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COMPLETE COLLECTION

OF

State Trials

AND

PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS

FROM THE

EARLIEST PERIOD TO THE PRESENT TIME.

VOL. III.

COMPRISING THE PERIOD

FROM THE THIRD YEAR OF THE REIGN OF KING CHARLES THE FIRST, A. D. 1627, TO THE SIXTEENTH YEAR OF THE SAID REIGN, A. D. 1640.

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127. Proceedings on the HABEAS CORPUS, brought by Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Hevening-ham, and Sir Edmund Hampden, at the King's-bench, in West-minster-hall: 3 CHARLES I. A. D. 1627: Together with the Proceedings in Parliament, relating to the LIBERTY OF THE SUBJECT: A. D. 1628 and 1629.

THE king having deprived himself of the prospect of all parliamentary Aids, by dissolving the parliament, and yet resolving to prosecute the war; it was necessary to project all possible ways and means of raising money; to which end letters were sent to the Lords Lieutenants of the counties, to return the names of the persons of ability, and what sums they could spare; and the Comptroller of the king's Household issued forth letters in the king's name, under the privy seal, to several persons returned for the Loan-money; some were assessed 20*l.* some 15, and others 10*l.* and Commissioners were appointed with private instructions how to behave themselves in this affair, and divers lords of the council were appointed to repair into their counties to advance the Loan*. Collectors were also appointed to pay into the exchequer the sums received, and to return the names of such as refused, or discovered a disposition to delay the payment of the sums imposed. This assessment of the general-Loan did not pass currently with the people, for divers persons refused to subscribe or lend at the rate proposed; the non-subscribers of high rank in all counties were bound over by recognizances to tender their appearance at the Council-board, and performed the same accordingly, and divers of them committed to prison: which caused great murmuring. But amongst those many gentlemen who were imprisoned throughout England, for refusing to lend upon the Commission of Loans, only five of them brought their Habeas Corpus, viz. sir Thomas Darnel, sir John Corbet, sir Walter Earl, sir John Heveningham, and sir Edmund Hampden.

ARGUMENTS UPON THE HABEAS CORPUS.

Sir THOMAS DARNEL his case, Mich. 3 Caroli. Banco Regis.

Sir Thomas Darnel, baronet, being imprisoned in the Fleet, by virtue of a warrant signed by the king's Attorney General, upon the 3rd of November, by serjeant Bramston, his assigned council, moved the justices of the King's Bench to grant him a Writ of Habeas Corpus *cum causa*; directed to the Warden of the Fleet, to shew that court the cause of his imprisonment, that thereupon they might determine whether his restraint were legal or illegal; and it was granted by the court returnable Thursday following the 8th of November.

* "Sir Randolf Crew shewing no zeal for the advancement of the Loan was then removed from his place of Lord Chief-Justice, and sir Nicholas Hyde succeeded in his room: a person who, for his parts and abilities, was thought worthy of that preferment; yet nevertheless came to the same with a prejudice, coming in the place of one so well-beloved and so suddenly removed." 1 Rushworth, 420.—Croke (Charles) p. 52. "Mem. upon Friday the 10th of Nov. sir Randolf Crew, Chief Justice of the King's Bench, was discharged of that place, by writ under the great seal, for some cause of displeasure conceived against him; but for what, was not generally known."

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On Thursday, sir Thomas Darnel expected that his Writ should be returned, but it was delayed; and it was moved that the return should be on Saturday, the 10th of November, which made sir Thomas the more remiss in suing out an Alias upon his Habeas Corpus.

On Saturday the Writ was not returned, and thereupon the king's Attorney General gave order for an alias upon the Habeas Corpus for sir Thomas Darnel, returnable upon Thursday morning the 15th of Nov.; by virtue of which Writ, the warden of the Fleet brings sir Thomas Darnel to the King's Bench, and returneth as followeth:

Executio istius Brevis pacet in quadam schedula annexat' huic brevi.

The return was this:

'Ego Henricus Liloe miles guardianus prisonæ 'domini regis de le Fleet serenissimo domino 'regi certifico quod dic'. Thomæ Darnel ba- 'ronet' detentus est in prisona prædict' sub 'custodia mea virtute cujusdam warranti duo- 'rum de privato consilio mihi directi, cujus 'tenor sequitur in his verbis, viz.

'Whereas heretofore the body of sir Thomas 'Darnel hath been committed to your custody, 'these are to require you still to continue him; 'and to let you know that he was and is com- 'mitted by the special command of his ma- 'jesty, &c.'

Et hæc est causa detentionis prædict' Thomæ Darnel.

Serj. Bramston. May it please your lordship, I did not expect this cause at this time, neither did I hear of it until I came now into the Hall; and therefore I shall now humbly shew you what my client hath informed me since my coming hither. I understand by him that he expected not his coming to this place to day; the Writ by which he was brought hither was not moved for by him, but was procured without his privity; and seeing his case is so, and that he perceives the cause of his coming, which before he knew not, his motion to your lordship is, that you would be pleased to let him have the copy of the return, and give him time to speak unto it, and that this Writ being not sent out by his procurement, may not be filed.

Attorney General *Heath.* My lords, it is true that this gentleman, sir Thomas Darnel, being imprisoned in the Fleet, did heretofore move your lordships for a Habeas Corpus, &c. and it was granted him: and his majesty being made acquainted therewith, was very willing that he and all his people might have equal justice; and when they desire that which seems to accord with the rules of the law, they should have it. But it fell out so, that on the day when the Writ should have been returned, the Warden of the Fleet did not return it, as it was his duty to have done; he did forbear to do it upon a commandment, because it was conceived, there being five at that time to appear, the Court would have been straitened for want of time: but I imagined that these gentlemen who did desire the Writ before, should have again been earnest to renew them, which it seems they did not. This Habeas Corpus was sent out by special command, because these gentlemen gave out in speeches, and in particular this gentleman, That they did wonder why they should be hindered from Trial, and what should be the reason their Writs were not returned: nay, his majesty did tell me, that they reported that the king did deny them the course of justice, and therefore he commanded me to renew the Writ, which I did, and think I may do it *ex officio.*

Sir Tho. Darnel. My lords, I knew not until now, but that I was committed by Mr. Attorney's Warrant only, and thereupon I did desire a Habeas Corpus at the bar, which you were pleased to grant me; but now I understand that my restraint is by another means, and therefore I shall crave leave to have some time to speak to it. And as for the words alledged against me, as if I had spoken them, I humbly pray they may be no disparagement to my cause, for I do patiently refer myself to your grave censures, as being accused of a fact whereof I am no ways guilty.

Hyde (L. C. Justice.) You give a temperate and fair answer; and now you may perceive the upright and sincere proceedings that have been in this business. You did no sooner petition to have counsel assigned you, but you had it granted to you, for indeed we cannot deny it; and I know not but that any counsel might have moved for you, without having been assigned for you, and yet have had no blame; for it is the king's pleasure his laws should take place and be executed, and therefore do we sit here. When you made a motion for a Habeas Corpus, that was likewise granted; whether the commitment be by the king or others, this Court is a place where the king doth sit in person, and we have power to examine it; and if it appears that any man hath injury or wrong by his imprisonment, we have power to deliver and discharge him; if otherwise, he is to be remanded by us to prison again. Now it seems you are not ready to speak to this return; if you desire a further day, we ought to grant it.

Sir T. Darnel. My lords, I humbly desire it.

L. C. J. I know no cause why it should be denied.

Serj. Bramston. My lords, we shall desire the Writ may not be filed, and that we may have a copy of the return.

Att. Gen. You cannot deny the filing of the Writ, if you desire to have a copy of the return.

L. C. J. Although you be remanded at this time to prison, because you are not ready to speak to the return, we can adjourn you to a new day upon the Writ, and so you may prepare yourself; but if you will not have this filed, there must go out a new Habeas Corpus, and thereupon must be another return.

Serj. Bramston. My lord, we desire some time, that we may be advised whether we may proceed or not.

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L. C. J. Will you submit yourself to the king?

Sir T. Darnel. My lord, I desire some time to advise of my proceedings: I have moved many men, and offered to retain them of my counsel; but they refuse me, and I can get none to be of counsel with me without your assistance.

L. C. J. You shall have what counsel assigned you will have or desire; for no offence will be taken against any man that shall advise you in your proceedings in law.

Att. Gen. I will pass my word, they that do advise you, shall have no offence taken against them for it; and I shall give consent to any way that you shall desire, either that it may be filed, or that it may not be filed; for if you desire justice, you shall have it, and the king will not deny it; but if it shall be conceived, as it is rumoured, that there was a denial of justice on the king's part, you must know that his majesty is very tender of that. And for the gentleman, now he is brought hither, I conceive, but yet I leave it to your lordship's judgment, that the writ must be filed, and you must either deliver him, or remand him, or else it will be an escape in the warden of the Fleet.

Sir T. Darnel. I would not have it thought that I should speak any thing against my prince, and for those words I do deny them; for upon my conscience they never came into my thought: perhaps you shall find that they have been spoken by some other, but not by any of us.

L. C. J. Sir, you have made a fair answer, and I doubt not but Mr. Attorney will make the like relation of it; you move for the not filing of the Writ; if you refuse to have it filed, whereby it should not be of record, you must have no copy of it; but if you will have it filed you shall have a copy of it, and further time to speak to it; chuse whether of them you will.

Serj. Bramston. We desire to have the return read once more.

And it was read as before.

Serj. Bramston. So as the writ may not be filed, we will desire no copy of the return.

L. C. J. Then the gentleman must return back again into the custody of the Warden of the Fleet; and therefore I ask you, whether you desire to come hither again upon this Writ, or will you have a new one?

Sir T. Darnel. I desire your lordship that I may have time to consider of it.

L. C. J. Then in God's name take your own time to think of it.

Mich. 3 Car. Regis, Nov. 22, 1627.

Sir John Corbet, bart. sir Walter Earl, sir John Heveningham, sir Edmund Hampden, knights, were brought to the bar.

Serj. Bramston. May it please your lordship to hear the return read, or shall I open it?

L. C. J. Let it be read.

Mr. Keeling reads the return, being the same as that of sir T. Darnel.

Serj. Bramston. May it please your lordship, I shall humbly move upon this return in the behalf of sir John Heveningham, with whom I am of counsel; it is his petition, that he may be bailed from his imprisonment: it was but in vain for me to move that to a court of law, which by law cannot be granted: and therefore in that regard, that upon this return it will be questioned, whether as this return is made, the gentleman may be bailed or not? I shall humbly offer up to your lordship the case, and some reasons out of mine understanding, arising out of the return itself, to satisfy your lordship that these prisoners may, and, as their case is, ought to be bailed by your lordship.

The exception that I take to this return, is as well to the matter and substance of the return, as to the manner and legal form thereof: the exception that I take to the matter, is in several respects.

That the return is too general, there is no sufficient cause shewn in special or in general of the commitment of this gentleman; and as it is insufficient for the cause, so also in the time of the first imprisonment: for howsoever here doth appear a time upon the second warrant from the lords of the council to detain him still in prison, yet by the return no time can appear when he was first imprisoned, though it be necessary it should be shewn; and if that time appear not, there is no cause your lordship should remand him; and consequently he is to be delivered.

Touching the matter of the return, which is the cause of his imprisonment, it is expressed to be 'per speciale mandatum domini regis:' this is too general and uncertain, for that it is not manifest what kind of command this was.

Touching the legal form of the return, it is not, as it ought to be, fully and positively the return of the keeper himself only, but it comes with a *significavit*, or *prout*, that he was committed 'per speciale mandatum domini regis,' as appeareth by warrant from the lords of the council, not of the king himself; and that is not good in legal form.

For the matter and substance of the return, it is not good, because there ought to be a cause of that imprisonment.

This Writ is the means, and the only means that the subject hath in this and such-like case to obtain his liberty; there are other Writs by which men are delivered from restraint, as that De Homine Replegiando, but extends not to this cause, for it is particularly excepted in the body of the Writ De Manucaptione, et de Cautione Admittenda, but they lie in other cases: but the Writ of Habeas Corpus is the only means the subject hath to obtain his liberty, and the end of this Writ is to return the cause of the imprisonment, that it may be examined in this court, whether the parties ought to be discharged or not: but that cannot be done upon this return: for the cause of the imprisonment of this gentleman at first is so far

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from appearing particularly by it, that there is no cause at all expressed in it.—This Writ requires that the cause of the imprisonment should be returned, and if the cause be not specially certified by it, yet should it at the least be shewn in general, that it may appear to the judges of the court; and it must be expressed so far, as that it may appear to be none of those causes for which by law of the kingdom the subject ought not to be imprisoned; and it ought to be expressed that it was by presentment or indictment, and not upon petition or suggestion made to the king and lords, which is against the statute made in the 25 E. 3, c. 4. 42 E. 3, c. 3.

By the statute 25 E. 3, c. 4. it is ordained and established, 'That no man from henceforth shall be taken by petition or suggestion made to the king or his council, but by indictment or course of law;' and accordingly it was enacted, 42 E. 3, c. 3. the title of which statute is, 'None shall be put to answer an accusation made to the king without presentment.' Then, my lord, it being so, although the cause should not need to be expressed in such manner as that it may appear to be none of these causes mentioned in the statute, or else the subject by this return loseth the benefit and advantage of these laws, which be their birth-right and inheritance; but in this return there is no cause at all appearing of the first commitment, and therefore it is plain, that there is no cause for your lordship to remand him; but there is cause you should deliver him, since the writ is to bring the body and the cause of the imprisonment before your lordship.

But it may be objected, that this writ of Habeas Corpus doth not demand the cause of the first commitment, but of the detaining only; and so the writ is satisfied by the return; for though it shew no cause of the first commitment, but of detaining only, yet it declareth a cause why the gentleman is detained in prison: this is no answer, nor can give any satisfaction; for the reason why the cause is to be returned, is for the subject's liberty, that if it shall appear a good and sufficient cause to your lordship, then to be remanded; if your lordship think and find it insufficient, he is to be enlarged.

This is the end of this writ, and this cannot appear to your lordship, unless the time of the first commitment be expressed in the return. I know that in some cases the time is not material, as when the cause of the commitment is (and that so especially) returned, as that the time is not material, it is enough to shew the cause without the time, as after a conviction or trial had by law; but when it is in this manner, that the time is the matter itself: for intend what cause you will of the commitment, yea though for the highest cause of treason, there is no doubt but that upon the return thereof the time of it must appear; for it being before trial and conviction had by law, it is but an accusation, and he that is only accused ought by law to be let to bail.

But I beseech your lordship to observe the consequence of this cause. If the law be, that upon this return this gentleman should be remanded, I will not dispute whether or no, a man may be imprisoned before he be convicted according to the law; but if this return shall be good, then his imprisonment shall not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually, and by law there can be no remedy for the subject: and therefore this return cannot stand with the laws of the realm, or that of Magna Charta; nor with the statute of 28 E. 3, c. 3. for if a man be not bailable upon this return, they cannot have the benefit of these two laws, which are the inheritance of the subject.—If your lordship shall think this to be a sufficient cause, then it goeth to a perpetual imprisonment of the subject: for in all those causes which may concern the king's subjects, and are applicable to all times and cases, we are not to reflect upon the present time and government, where justice and mercy floweth, but we are to look what may betide us in the time to come, hereafter.

It must be agreed on all sides, that the time of the first commitment doth not appear in this return; but by a latter warrant from the lords of the council, there is a time indeed expressed for the continuing of him in prison, and that appears; but if this shall be a good cause to remand these gentlemen to prison, they may lie there these seven years longer, and seven years after them, nay, all the days of their lives. And if they sue out a writ of Habeas Corpus, it is but making a new warrant, and they shall be remanded, and shall never have the advantage of the laws which are the best inheritance of every subject.—And in E. 6, fol. 36, the laws are called the great inheritance of every subject, and the inheritance of inheritances, without which inheritance we have no inheritance. These are the exceptions I desire to offer up to your lordship touching the Return, for the insufficiency of the cause returned, and the defect of the time of the first commitment, which should have been expressed.

I will not labour in objections till they be made against me, in regard the Statute of Westminster primo is so frequent in every man's mouth, that at the common law those men that were committed in four cases were not replevisable; viz. those that were taken for the death of a man, or the commandment of the king, or his justices for the forest. I shall speak something to it, though I intend not to spend much time about it, for it toucheth not this case we have in question.

For that is concerning a case of the common law, when men are taken by the king's writs, and not by word of mouth, and it shall be so expounded, as Mr. Stamford, fol. 73, yet it is nothing to this case, for if you will take the true meaning of that statute, it extends not at all to this writ of Habeas Corpus; for the words are plain 'they shall be replevisable by the 'common writ,' that is, by the writ 'De ho-

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'mainprise replegiando,' directed to the sheriff to deliver them, if they were bailable: but this case is above the sheriff, and he is not to be judge in it, whether the causes of the commitment be sufficient or not, as it appears in Fitz-Herbert, 'De homine replegiando,' and many other places, and not of the very words of the statute this is clear, for there be many other causes mentioned, as the death of a man, the commandment of the justice, &c. in which the statute: saith, men are not replevisable. But will a man conceive that the meaning is, that they shall not be bailed at all, but live in perpetual imprisonment? I think I shall not need to spend time, in that it is so plain; let me but make one instance.

A man is taken *de morte hominis;* he is not bailable by writ, saith this Statute; that is, by the common writ: there was a common writ for this case, and that was called *de odio et acia*, as appeareth, Bracton, Coron. 34. This is the writ intended by the statute, which is a common writ, and not a special writ; but, my lord, as this writ *de odio et acia* was before this statute, so it was afterwards taken away by the statute of 28 E. 3, c. 9. But before that statute, this writ did lie in the special case, as is shewn in Coke's 9th Report, the poulterer's Case; and the end of this writ was, that the subject might not be too long detained in prison, as till the justices of Eyre discharged them. So that the law intended not that a man should suffer perpetual imprisonment, for they were very careful that men should not be kept too long in prison, which is also a liberty of the subject; and, my lord, that this court hath bailed upon a suspicion of High-Treason, I will offer it to your lordship, when I shall shew you precedents in these cases of a commitment by the privy-council, or by the king himself: but before I offer these precedents unto your lordship, of which there be many, I shall by your lordship's favour speak a little to the next exception, and that is to the matter of the return which I find to be 'per speciale mandatum domini regis.' And what is that? It appears by this writ, there may be sundry commands by the king; we find a special command often in our books, as in the statute of Marl. cap. 8. they who were imprisoned *Rediss.*' shall not be delivered without the special command of our lord the king. And so in Bracton, *de Actionibus*, the last chapter, where it appears that the king's commandment for imprisonments is by special writ; so by writ again men are to be delivered, for in the case of *Rediss'* or *Post Rediss'*, if it shall be removed by a Certiorari, that is by a special writ to deliver parties. So that by this appears, that by the king's commandment to imprison, and to deliver in those cases, is understood this writ, and so it may be in this case which we have heard.

And this return here is a special Mandatum; it may be understood to be under some of the king's seals, 42 Ass. and ought to be delivered; and will you make a difference between the king's command under his seal, and his command by word of mouth? What difference there is, I leave it to your lordship's judgment: but if there be any, it is the more material that it should be expressed what manner of command it was, which doth not here appear; and therefore it may be the king's command by writ, or his command under his seal; or his command by word of mouth alone.

And if there is any of these commands of an higher nature than the other, doubtless, it is that by writ, or under seal, for they are of record, and in these the person may be bailed, and why not in this? As to the legal form, admitting there were substances in the return, yet there wants legal form; for the writ of Habeas Corpus is the commandment of the king to the keeper of the prisons, and thereupon they are to make return both of the body, and of the cause of the commitment, and that cause is to appear of them who are the immediate officers. And if he doth it by signification from another, that return is defective in law, and therefore this return cannot be good, for it must be from the officer himself; and if the cause returned by him be good, it binds the prisoners.

The warrant of the lords was but a direction for him; he might have made his return to have been expressly by the king's commandment, there was warrant for it, I shall not need to put you cases of it; for it is not enough that he returns that he was certified that the commitment was by the king's command, but he must of himself return this fact as it was done. And now, my lord, I shall offer to your lordship precedents of divers kinds, upon commitments by the special command of the king, and upon commitments both by the king and the lords together. And howsoever I conceive, which I submit to your lordship, that our case will not stand upon precedents, but upon the fundamental laws and statutes of this realm; and though the precedents look the one way or the other, they are to be brought back unto the laws by which the kingdom is governed. In the 1st of Hen. 8, Rot. Parl. 9, one Harrison was committed to the Marshalsea by the command of the king; and being removed by H. Corpus into the court, the cause returned was, that he was committed 'per mandatum 'domini regis,' and he was bailed.

In the 40 Eliz. Thomas Wenden was committed to the gatehouse by the commandment of the queen, and the lords of the council: and being removed by an H. Corpus, upon the general return he was bailed.—In 8 Jac., one Cæsar was committed by the king's commandment, and this being returned upon his H. Corpus, upon the examination of this case it doth appear that it was over-ruled, that the return should be amended, or else the prisoner should be delivered.

The precedents concerning the commitment by the Lords of the Council, are in effect the same with these where the commitment is, by the reason why the cause of the commitment should not be shewn, holds in both cases, and

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that is the necessity of suit; and therefore Mr. Stamford makes the command of the king, and that of the lords of the privy-council, to be both as one; and to this purpose, if they speak, he speaks; and if he speaks, they speak.

The precedents that we can shew you, how the subject hath been delivered upon commitment by the lords of the council, as in the times of Hen. 8, and in the times of queen Eliz., and queen Mary, are infinite; as in the 9th Eliz. Thomas Lawrence was committed to the Tower by the lords of the council, and bailed upon an H. Corpus.

In the 43 Eliz., Calvin's case. In the 3d Eliz., Vernon's case. These were committed for High Treason, and yet bailed; for in all these cases there must be a conviction in due time, or a deliverance by law.

There be divers other precedents that might be shewn to your lordship. In 12 Jac., Miles Renards. In 12 Jac., Rot. 155, Rd. Beckwith's case. In 4 Jac., sir Thomas Monson was committed for treason to the Tower of London, and afterwards was brought hither, and bailed; and since our case stands upon this return, and yet there is no sufficient cause in law expressed in the return of the detaining this gentleman; and since these precedents do warrant our proceedings; my humble suit to this court is, that the gentleman, sir John Heveningham, who hath petitioned his majesty, that he may have the benefit of the law, and his majesty hath signified it: it is his pleasure that justice according to the law should be administered at all times in general to all his subjects: and particularly to these gentlemen, which is their birth-right: my humble suit to your lordship is that these gentlemen may have the benefit of that law, and be delivered from their imprisonment.

Mr. Noye's Argument of Counsel with sir Walter Earl at that time.

May it please your lordship, I am of counsel with sir Walter Earl, one of the prisoners at the bar: the return of this writ is as those that have been before, they are much of one tenour, and as you have heard the tenour of that, so this gentleman coming hither by an H. Corpus, I will by your lordship's favour read the writ:

'Carolus, Dei gratia, &c. Johanni Liloe 'milit' Guardian' prison' nostræ de le Fleet 'salut', Præcipimus tibi quod corpus Walteri 'Earl milit' in prison' nostra sub custodia tua 'detent' ut dicit' una cum causa detentionis suæ 'quocunque nomine prædict' Walter' censeat 'in eadem Habeas Corpus, ad subjiciendum et 'recipiendum ea quæ curia nostra de eo adtunc 'et ibidem ordin' conting' in hac parte et hæc 'nullatenus omit' periculo incumbend' et habeas ibi hoc breve. Test' Hyde, apud West-'minster, quarto die Nov., anno 8.' 'Execu-'tio istius Brevis patet in quadam schedula 'huic brevi annexat.'

Respons. Johan' Liloe Guardian' Prison' de le Fleet.

'Ego Johannes Liloe Mil' Guardian' Prison' 'domini Regis de le Fleet, serenissimo domino 'regi, apud Westminster 8. Post receptionem 'hujus brevis quod in hac schedula est men-'tionat', Certifico quod Walter Earl miles, in 'eodem brevium nominat' detentus est in pri-'sona de le Fleet sub custodia mea prædict' 'per speciale mandatum domini regis mihi sig-'nificatum per Warrantum duorum et aliorum 'de Privato Concilio perhonorabilissimi dicti 'domini regis, cujus quidem tenor sequitur in 'hæc verba.'

Whereas sir Walter Earl, knight, was heretofore committed to your custody, these are to will and require you still to detain him, letting you know, that both his first commitment, and this direction for the continuance of him in prison, were and are by his majesty's special commandment. From Whitehall, 7 Novembris, 1627. Thomas Coventry, C. S., Henry Manchester, Thomas Suffolk, Bridgewater, Kelly, R. Dunelm', Thomas Edmunds, John Cook, Marlborough, Pembroke, Salisbury, Totness, Grandison, Guliel' Bath and Wells, Robert Nanton, Richard Weston, Humphry Mayes.

To the Guardian of the Fleet or his Deputy.

'Et hæc est causa detentionis prædict' Wal-'teri Earl sub custodia mea in prison prædict'. 'Attamen corpus ejusdem Walteri coram do-'mino rege ad diem et locum prædictum, post 'receptionem brevis prædict' parat' habeo 'prout istud breve in se exiget et requiret."

Respon' Johan' Liloe Milit' Guardian' Prison' de le Fleet.

My lord, the first Habeas Corpus bears date the 4th of Nov., then there is an Alias Habeas bears Teste after that, and the tenour thereof is a command to the warden of the Fleet, 'quod Habeas Corpus Walteri Earl, coram nobis 'ad subjiciendum et recipiendum ea quæ curia 'nostra de eo, &c. ordin' conting'.' And the Warden of the Fleet, he certifies as your lordship has heard. May it please your lordship, I desire as before was desired for the other gentlemen, that sir Walter Earl may be also bailed, if there be no other cause of his imprisonment: for if there were a cause certified, and that cause were not sufficient to detain him still in prison, your lordship would bail him; and if a man should be in a worse case, when there is no cause certified at all, that would be very hard.

The writ is, that he should bring the prisoner *coram nobis,* before the king, the end of that is 'ad subjiciendum et recipiendum;' now I conceive, that though there be a signification of the king's pleasure to have this gentleman imprisoned, yet when the king grants this writ to bring the prisoner hither, 'ad subjiciendum et 'recipiendum,' his pleasure likewise is, to have the prisoner let go, if by law he be not chargeable; or otherwise to detain him still in prison, if the case so require it.

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I will put your lordship in mind of a case, and it was Pasch. 9 Edw. 3, M. 3. I will cite by the Placita, because my book is not paged as other books are; it is in the case of a *Cessavit*. In that case there were two things considerable: the one that there was a signification of the king's pleasure past, and that determined with him: the other, that though there was a signification of the king's pleasure before, yet there comes after that a writ; and that was another signification of the king's pleasure, that the prisoner shall be brought hither *ad subjiciendum*, to submit himself to punishment, if he have deserved it; or *ad recipiendum*, to receive his enlargement, and be delivered, if there be no cause of his imprisonment.

And if upon an Habeas Corpus, a cause of commitment be certified, that cause is to be tried here before your lordship. But if no cause be shewn, then the proceedings must be 'ut curia nostra ad mar' contigerit,' the court must do that which stands with law and justice, and that is to deliver him.

My lord, I shall be bold to move one word more touching this Return: I conceive that every officer to a court of justice must make his return of his own act, or of the act of another, and not what he is certified of by another. But in this case the warden of the Fleet doth not certify himself, of himself, that this gentleman was commanded to him by the king, but that he was certified by the lords of the council, that it was the king's pleasure that he should detain him. But in our case the warden of the Fleet must certify the immediate cause, and not the cause of the cause, as he doth by this return; 'Detentus est sub custodia mea per 'speciale mandatum Domini Regis mihi signi-'ficatum per Warrantum duorum de Privato 'Concilio;' that is not the use in law, but he ought to return the primary cause, and not the subsequent cause: as in 32 Edw. 3. return, Rex vicecom' 87. in a writ De Homine Replegiando, against an abbot, the sheriff returns, that he hath sent to the bailiff of the abbot, and he answered him, that the party was the abbot's villain, and so he cannot deliver him; that it is held an insufficient return, and a new Alias was granted. But if the sheriff had returned, that the abbot did certify him so, it had been good; but he must not return what is certified him by another.

In one of the precedents that hath been noted, as that of Parker, 22 H. 8, there the guardian of the prison certifies, that Parker 'detentus est sub custodia mea per mandatum 'Domini Regis mihi nunciatum per Robertum 'Pecke;' now our case is by the nunciation of many, but in law 'Majus et minus non variant 'in speciem,' the certification of one and of many is of the same effect, although in moral understanding there may be a difference.

Trin. 2 E. 3, Rot. 46. in this court in 21 E. 3, in the printed Book there is a piece of it: the abbot of Bury brings a prohibition out of this court, the bishop of Norwich pleaded in bar of that, 'Quod mihi testificatum quod con-'tinetur in Archivis,' that he is excommunicated; there were two exceptions taken to this case in this precedent, and they are both in one case: the first was, that no cause appeareth, why he was excommunicated; there may be causes why he should be excommunicated, and then he should be barred, and there may be causes why the excommunication should not bar him: for it may be the excommunication was for bringing the action, which was the king's writ; and therefore because there was no cause of the excommunication returned, it was ruled that it was not good. The other reason is that upon the Roll, which is *mihi testificatum*.

Now every man, when he will make a certificate to the court, 'Proprium factum suum 'non alterius significare debet,' he must inform the court of the immediate act done, and not that such things are told him, or that such things are signified unto him; but that was not done in this case, and therefore it was held insufficient, and so in this case of ours I conceive the return is insufficient in the form. There is another cause, my lord, for which I conceive this return is not good.

But first I will be bold to inform your lordship, touching the statute of Magna Charta 29. 'Nullus liber homo capiatur vel imprisonetur, '&c. nec super eum mittimus nisi per legale 'judicium parium suorum, vel per legem terræ.' That in this statute these words *in carcerem* are omitted out of the printed books: for it should be 'nec eum in carcerem mittimus.' For these words 'per legem terræ;' what 'Lex 'terræ' should be, I will not take upon me to expound, otherwise than I find them to be expounded by acts of parliament; and this is, that they are understood to be the process of the law, sometimes by writ, sometimes by attachment of the person: but whether, 'speciale mandatum Domini Regis' be intended by that or no, I leave it to your lordship's exposition upon two Petitions of the commons, and Answer of the king, in 36 E. 3, No. 9, and No. 20.

In the first of them the commons complain that the Great Charter, the Charter of the Forest, and other statutes were broken, and they desire that for the good of himself and of his people, they might be kept and put in execution, and that they might not be infringed by making an arrest by special command, or otherwise: and the answer was, that the assent of the lords established and ordained, that the said charter and other statutes should be put in execution according to the petition, and that is without any disturbance by arrest by special command or otherwise; for it was granted, as it was petitioned.

In the same year, for they were very careful of this matter and it was necessary it should be so, for it was then an usual thing to take men by writs 'quibusdam de causis,' and many of these words caused many acts of parliament; and it may be some of these writs may be shewn: and I say in the same year they com-

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plained that men were imprisoned by special command, and without indictment or other legal course of law, and they desired that thing may not be done upon men by special command against the Great Charter.

The king makes answer, that he is well pleased therewith: that was the first answer; and for the future he hath added farther, if any manbe grieved, let him complain, and right shall be done unto him. This, my lord, is an explanation of the Great Charter, as also the statute of 37 Ed. 3, c. 18. is a commentary upon it, that men would not be committed upon suggestion made to the king, without due proofs of law again them, and so it is enacted twice in one year.

We find more printed books, as in Hen. 6, Mrus de fiacts, Fitz. 182. which is a strong case, under favour, in an action of trespass for cutting down trees. The defendant saith, That the place where the trees are cut, is parcel of the manor of B. whereof the king is seised in fee, and that the king did command him to cut them: and the opinion of the court was, that this was no good plea, without shewing the specialty of the command; and they said, if the king command me to arrest a man, and I arrest him, he shall have an action of false imprisonment against me, although it were done in the king's presence.

In 1 Joh. cap. 7, fol. 46, it is in print, and there we leave it.

Hussey, Chief Justice saith, that sir John Markham told king Edw. 4, that he could not arrest a man upon suspicion of felony or treason, as any of his subjects might; because if he should wrong a man by such arrest, the parties could have no remedy against him, if any man shall stand upon it. Here is a signification of the king's pleasure, not to have the cause of the commitment examined; he hath here another signification of his pleasure by writ, whereby the party is brought hither 'ad 'subjiciendum et recipiendum,' that he hath made your lordship judge of that, which should be objected against this gentleman, and either to punish him, or to deliver him; and if there be no cause shewn, it is to be intended that the party is to be delivered, and that it is the king's pleasure it should be so: and the writ is a sufficient warrant for the doing of it, there being no cause shewn of the imprisonment. And now, my lord, I will speak a word to the writ of *de homine replegiando*, and no other writ, for that was the common writ; and the four causes expressed in that statute, to wit, the death of a man, the command of the king, or his justice, or forest, were excepted in that writ before that statute made, as appears Bracton 133, so that the writ was at the common-law before that statute.

And it appears by our Books, that if a man be brought hither by an Habeas Corpus, though he were imprisoned *de morte hominis*, as in the 21 Edw. 4, 7. Winckfield was bailed here, this court bailed him, for he was brought hither 'ad subjiciendum et recipiendum,' and not to lie in prison God knows how long; and if the statute should be expounded otherwise, there were no bailing men outlawed, or breakers of prison, for they are not within this statute, and yet this court doth it at pleasure.

But plainly by the statute itself, it appears, that it meant only the common writ; for the preamble recites, that the sheriffs and others had taken and kept in prison persons detected of felony, and let out to plevin such as were not reprisable, to grieve the one party, and to the gain of the other; and forasmuch as before this time it was not determined what prisoners were reprisable, and what not, but only in certain cases were expressed, therefore it is ordained, &c.

Now this is no more than for direction to the keepers of the prisons, for it leaves the matter to the discretion of the judges, whether bailable or not; for when the statute hath declared who are repleviable, who are not, as men outlawed, those who have abjured the realm, breakers of prison, burners of houses, makers of false money, counterfeiting of the king's seal, and the like; it is then ordained, that if the sheriff, or any other, let any go at large by surety, that is not reprisable, whether he be sheriff, constable, or any other that hath the keeping of prisons, and thereof be attainted, he shall lose his office and fee for ever; so that it extends to the common gaolers and keepers of prisons, to direct them in what cases they shall let men to bail, and in what cases not: and that they shall not be judges whom to let to replevin, and whom to keep in prison; but it extends not to the judges, for if the makers of the statute had meant them in it, they should have put a pain or penalty upon them also.

So then I conclude, under your lordship's favour, that as this case is, there should have been a cause of the commitment expressed, for these gentlemen are brought hither by writ *ad subjiciendum*, if they be charged; and *ad recipiendum*, if they be not charged; and therefore in regard there is no charge against them, whereupon they should be detained in prison any longer, we desire that they may be bailed or discharged by your lordship.

Mr. SELDEN's Argument at the King's-bench bar the same day.

My Lords; I am of counsel with sir Edm. Hampden; his case is the same with the other two gentlemen: I cannot hope to say much, after that that hath been said; yet if it shall please your lordship, I shall remember you of so much as is befallen my lot. Sir Edmund Hampden is brought hither by a writ of Habeas Corpus, and the keeper of the Gatehouse hath returned upon the writ, that sir Edm. Hampden is detained in prison 'per speciale man-'datum domini regis, mihi significatum per 'warrantum duorum privati concilii dicti do-'mini regis.' And then he recites the warrant of the lords of the council, which is, that they do will and require him to detain this gentleman still in prison, letting him know that

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his first imprisonment, &c. May it please your lordship, I shall humbly move you that this gentleman may also be bailed; for under favour, my lord, there is no cause in the return, why he should be any farther imprisoned and restrained of his liberty.

My lord, I shall say something to the form of the writ; and of the return; but very little to them both, because there is a very little left for me to say.

My lord, to the form, I say it expresseth nothing of the first caption, and therefore it is insufficient; I will add one reason, as hath been said: the Habeas Corpus hath only these words, 'quod habeas corpus ejus una cum 'causa detentionis, et non captionis.' But, my lord, because in all imprisonments, there is a cause of caption and detention, the caption is to be answered as well as the detention. I have seen many writs of this nature, and on them the caption is returned, that they might see the time of the caption, and thereby know whether the party should be delivered or no, and that in regard of the length of his imprisonment.

The next exception I take to the form is, that there is much uncertainty in it, so that no man can tell when the writ came to the keeper of the prison, whether before the return or after; for it appears not when the king's command was for the commitment, or the signification of the council came to him. It is true, that it appears that the warrant was dated the 7th of November; but when it came to the keeper of the prison, that appears not at all: and therefore, as for want of mentioning the same time of the caption, so for not expressing the same time when this warrant came, I think the return is faulty in form, and void.

And for apparent contradiction also, the return is insufficient; for in that part of the return which is before the warrant, it is said, 'Quod detentus est per speciale mandatum do-'mini regis.' The warrant of the lords of the council, the very syllables of that warrant are, that the lords of the council do will and require him still to detain him, which is contrary to the first part of the return.—Besides, my lord, the lords themselves say, in another place and passage of the warrant, that the king commanded them to commit him, and so it is their commitment; so that upon the whole matter, there appears to be a clear contradiction in the return; and there being a contradiction in the return, it is void.

Now, my lord, I will speak a word or two to the matter of the return; and that is touching the imprisonment, 'per speciale mandatum 'domini regis,' by the lords of the council, without any cause expressed: and admitting of any, or either, or both of these to be the return; I think that by the constant and settled laws of this kingdom, without which we have nothing, no man can be justly imprisoned by either of them, without a cause of the commitment expressed in the return. My lord, in both the last arguments the statutes have been mentioned and fully expressed: yet I will add a little to that which hath been said.

The statute of Magna Charta, cap. 29, that statute if it were fully executed as it ought to be, every man would enjoy his liberty better than he doth. The law saith expressly, 'No 'freeman shall be imprisoned without due pro-'cess of the law;' out of the very body of this act of parliament, besides the explanation of other statutes, it appears, 'Nullus liber homo 'capiatur vel imprisonatur nisi per legem terræ.' My lord, I know these words 'legem terræ,' do leave the question where it was, if the interpretation of the statute were not. But I think under your lordship's favour, there it must be intended by due course of law, to be either by presentment or by indictment.

My lords, if the meaning of these words, 'per legem terræ,' were but, as we use to say, according to the laws, which leaves the matter very uncertain; and 'per speciale mandatum,' &c. be within the meaning of these words, 'according to the law;' then this act had done nothing. The act is, 'No freeman shall be im-'prisoned but by the law of the land.' If you will understand these words, 'per legem terræ,' in the first sense, this statute shall extend to villains as well as to freemen; for if I imprison another man's villain, the villain may have an action of false imprisonment. But the lords and the king, for then they both had villains, might imprison them; and the villain could have no remedy. But these words in the statute, 'per legem terræ,' were to the freeman, which ought not to be imprisoned, but by due process of law: and unless the interpretation shall be this, the freeman shall have no privilege above the villain.

So that I conceive, my lords, these words, 'per legem terræ,' must be here so interpreted, as in 42 Eliz. The bill is worth observing. It reciteth that divers persons without any writ or presentment were cast into prison, &c. that it might be enacted, that it should not be so done hereafter. The answer there is, that as this is an article of the Great Charter, this should be granted. So that it seems the statute is not taken to be an explanation of that of Magna Charta, but the very words of the statute of Magna Charta.

I will conclude with a little observation upon these words, 'nec super eum mittimus;' which words of themselves signify not so much, a man cannot find any fit sense for them. But, my lord, in the 7th king John, there was a Great Charter, by which this statute in the 9th H. 3, whereby we are now regulated, was framed, and there the words are, 'nec eum in carcerem 'mittimus.' We will not commit him to prison; that is, the king himself will not; and to justify this, there is a story of that time in Matthew Paris, and in that Book this Charter of king John is set down at large, which book is very authentic, and there it is entered: and in the 9th of Hen. 3, he saith, that the statute was renewed in the same words with the Charter of king John. And, my lord, he might

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know it better than others, for he was the king's Chronologer in those times: and therefore, my lord, since there be so many reasons, and so many precedents, and so many statutes, which declare, that no freeman whatsoever ought to be imprisoned but according to the laws of the land; and that the Liberty of the Subject is the highest inheritance that he hath; my humble request is, that according to the ancient laws and privileges of this realm, this gentleman, my client, may be bailed.

The ARGUMENT of MR. CALTHROP, at the King's-Bench bar, 22 Nov. Mich. 3 Car. regis.

SIR John Corbet being brought to the King's-Bench bar, with sir Edmund Hampden, sir Walter Earl, and sir John Heveningham, who were also brought thither by several writs of Habeas Corpus, with the same return; I being assigned by the court of King's-Bench, upon a petition delivered, to be of counsel with sir John Corbet, did move that sir John Corbet might be discharged of his imprisonment, and put in bail; for I did conceive that the return of this H. Corpus was insufficient, both in the matter of the return, and in the manner of the return, and so there ought not to be a longer detaining of sir John Corbet in prison. For as to the manner of the return, it is not laid down precisely, that sir John Corbet is detained in prison by the special commandment of the king, signified by the warrant of the lords of the council; the which is not a direct affirmation that he is detained by the special command of the king, but that the lords of the council, by their warrant, have signified unto him that he was committed and still detained by the special command of the king.

And howsoever the lords of the council had signified that he was detained by the commandment of the king, yet it may be he was not detained by the commandment of the king; for their signification of the same by warrant may be untrue, and the warrant of the lords of the council that is returned *in hæc verba*, importeth that the keeper of the Gatehouse rather took upon him to return, that it was signified unto him by the warrant of the lords of the council, that sir John Corbet was committed and detained by the special commandment of the king; because if the keeper had taken upon him to affirm it upon his return, then needed he not to have returned the warrant of the lords of the council: and the warrant itself sheweth that he had only his information from the lords of the council. For their warrant is to let the keeper know, that both the first commitment, and this direction for the continuing of him in prison, were and are by his majesty's special commandment; and I do not see, as this return is made, that an accord upon the case can lie upon the keeper of the Gatehouse, if sir John Corbet was not committed nor detained by the special commandment of the king, so long as the warrant of the lords of the council be returned as it was made, because he doth return the same as the significavit of the lords by their warrant. Register 65, the writ of Excommunicat' Capiend' goeth, 'Rex 'vicecom' Lincoln' S. significavit nob' venera-'bilis pater Henricus Lincolniensis episcopus 'per literas suas patentes quod R. suus paro-'chial' propter suam manifestam contumac' 'authoritate ipsius episc' ordin' excom' est, nec 'se vult per censuram ecclesiasticam justiciar' '&c. tibi præcipimus quod prædict' R. per cor-'pus suum secundum consuetud' Angliæ jus-'tic' &c.' And yet no man will say that there is an information of the king, that R. is excommunicated, but only that the bishop of Lincoln had signified unto him that R. was excommunicated. And in Fitz. Nat. Br. 663, and Register 65, it appears that the form of the writ of Excommunication *deliberand'* is, 'Rex vice-'com' London' salut'. Cum Thom' Jay allu-'tar' London' qui nuper ad denuntiat. venera-'bil' patris archicp' Eborum pro contumaciis 'suis ratione contractus in civitate nostra Ebo-'rum habit' ut dicebat. tanquam excom' et 'claves ecclesiæ contemnent' per corp' suum 'secundum consuetud' Angliæ per te justic' 'præcepimus, donec &c. esset satisfact' eid' 'archiepiscop. ad satisfaciendum Deo et sanctæ 'ecclesiæ, sufficientem exposuit cautionem, 'per quod eidem archiepiscopus offic. archi-'diac. London. mutuæ vicissitudin' obtentu 'scripsit ut ipsum absolvat ab excom' senten' 'memorata sicut idem archiepiscopus per lite-'ras suas patentes nob' significavit, tibi præci-'pimus quod præd' Thom. cum tibi constare 'poterit ipsum ab excom' prædict' per prædict' 'official' absolvi a prison' qua detinetur si ea 'occasione et non alia detineat' in eadem sine 'dilatione deliberari fac'.' And yet it cannot be said, that although the king recited in his writ that the archbishop had signified unto him that he had written unto the official of the archdeacon, that the king said, that the archbishop had written; for he doth not affirm so much precisely, but only referreth himself unto the certificate of the archbishop.

Plowden 122. Buckley and River's case, it is put, That if a man will bring an action of debt upon an obligation, and declare that it appears by the obligation that the defendant stood bound to the plaintiff in 20*l.* the which he hath not paid, this declaration is not good; insomuch as it is not alledged by matter in fact, that he was bound unto him in 20*l.* but the deed is alledged by recital only, 21 Ed. 4, 43.

Plowden Com. 126 & 143. Browning and Beeston's Case.

The Abbot of Waltham being appointed collector of a Disme granted unto the king, in discharge of himself, in the Exchequer, pleadeth, 'Quo inter recordat' Ter. Pasc. anno 15. 'domini Regis Edwardi 1 inter alia continetur 'quod R. 2.' had granted unto the predecessors of the said Abbot, that he nor any of his successors should be any collectors of any dismes to be granted afterwards, and it was adjudged that this plea was ill.

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For the saying 'It was contained among the Records,' it is no precise affirmation that the king had granted to his predecessors, that they should be discharged of the collecting any dismes, but it is only an allegation by way of recital, and not by precise affirmation, the plea may not be good.

2 & 3 Mar. Dyer 117. & 118. the plaintiff's reply in bar of all pleadeth, that John Abbot of W. was seized of his lands in right of his church, and so seized by the assent of the tenant by indenture, 14 H. 4, 'testat' quod præ-'dict' Abbat' et convent' demiserunt et tradi-'derunt' unto the plaintiff; and ruled, that this form of pleading was ill, insomuch as it was not alledged by precise affirmation, 'quod 'demiserunt, sed indentura testatur, quod de-'miserunt;' which is not sufficient, insomuch as it is only an allegation by way of recital, that the indenture doth witness, and the same indenture may witness so much, and yet not be a demise.

And if in pleading there must be direct affirmation of the matter alledged, then *à fortiori* in a return, which must be more precise than in pleading; and so by all the cases I have formerly touched, it appeareth that this return is no express affirmation of the keeper of the Gatehouse, that sir John Corbet is detained in prison by the special commandment of the king, but only an affirmation of the lords of the council, who had signified unto him that his detainment in prison, was by special command of the king.

The return, which ought to be certain, and punctual, and affirmative, and not by the way of information out of another man's mouth, may not be good, as appeareth by the several books of our law.

23 Ed. 3, Rex vic' 181. upon a *Homine replegiando*, against the Abbot of C. the sheriff returneth that he had sent to the bailiff of the abbot, that answered him, that he was the villein of the abbot, by which he might not make deliverance, and a *Sicut alias* was awarded, for his return was insufficient; insomuch that he had returned the answer of the bailiff of the abbot, where he ought to have returned the answer of the abbot himself out of his own mouth.

Trin. 22 E. 2, Rot. 46. parent' vill' et Burg. Evesque de Norwich, repl' 68. Nat. Br. Case 34. Fitz. Nat. Br. 65. & 34 E. 3, Excom' 29. the case appeareth to be such in a trespass; the defendant pleadeth the plaintiff is excommunicate, and sheweth forth the letter of the bishop of Lincoln, witnessing that for divers contumacies, &c. and because he had certified no *excommunic'* done by himself, but by another, the letter of excommunication was annulled, for the bishop ought to have certified his own act, and not the act of another.

Hillari 21 H. 8, Rot. 37, it appeareth by the return of an H. Corpus, that John Parker was committed to prison for security of the peace, and for suspicion of felony, as 'per mandatum 'domini regis nunciatum per Robertum Peck, 'de Clifford's-Inn;' and upon his return, John Parker was bailed: for the return 'Commiss. 'fuit per speciale mandatum domini regis, 'nunciatum per Robertum Peck,' was not good, insomuch that it was not a direct return that he was committed 'per mandatum domini 'regis.'

And for the first point, I conclude, that this return is insufficient in form, insomuch, that it doth not make a precise and direct return, that he was committed and detained by the special command of the king, but only as it was signified by the warrant of the lords of the council, which will not serve the turn. And upon the book of 9 H. 6, 44. the return of the cause of a man's imprisonment ought to be precise and direct upon the H. Corpus, insomuch as thereby to be able to judge of the cause, whether it be sufficient or not: for there may not any doubt be taken to the return, be it true or false, but the court is to accept the same as true; and if it be false, the party must take his remedy by action upon the case.

And as concerning the matter of the return, it will rest upon these parts: 1. Whether the return, that he is detained in prison by special commandment of our lord the king, be good or not, without shewing the nature of the commandment, or the cause whereupon the commitment is grounded in the return? 2. Whether the time of the first commitment by the commandment of the king, not appearing to the court, is sufficient to detain him in prison? 3. Whether the imprisonment of the subjects without cause shewed, but only by the commandment of the king, be warrantable by the laws and statutes of this realm?

As to the first part, I find by the books of our law, that commandments of the king are of several natures, by some of which the imprisonment of a man's body is utterly unlawful: and by others of them, although the imprisonment may be lawful, yet the continuance of him without bail or mainprise, will be utterly unlawful. —There is a verbal command of the king, which is by word of mouth of the king's only; and such commandment by the king, by the books of our law, will not be sufficient either to imprison a man, or to continue him in prison, 16. 6. 'Monstrans de faict si,' upon an action of trespass brought for cutting of trees, the defendant pleadeth that the place where he cut them is parcel of the manor of D. whereof the king is seized in fee, and the king commanded him to cut the trees: and the opinion of the court there is, that the plea in bar was ill, because he did not shew any special commandment of the king; and there it is agreed by the whole court, that if the king commandeth one to arrest another, and the party commanded did arrest the other, an action of trespass or false imprisonment is maintainable against the party that arrested him, although it were done in the presence of the king, 39 H. 6, 17. where one justifieth the seizure of the goods of a person that is outlawed by the commandment of the king, such a party being no officer, may

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not in an action brought against him have any aid of the king; for such a commandment given to one that is not an officer, will not any ways avail him, that is to justify himself by the return of that commandment.

37 H. 6, 10. If the king give me a thing, and I take the same by his commandment by word of mouth, it is not justified by law; nothing may pass without matter of record.

10 H. 7, 7. and 17, 18, it is agreed, that justices may command one to arrest another that is in their view or presence, but not one that is out of their view or presence. (1 Croke. Holliday V. Oxenbridge.)

And Keble 10 H. 7, 13, said, that where one is arrested by a parol command in their view or presence, it is fitting that a record may be made of it, insomuch, that without such a record there can hardly be a justification in another term.

2. There is a commandment of the king by his commission, which, according to Calvin's case in Coke's 7th Report, it is called by him, 'breve mandatum non remediabile;' and by virtue of such a commandment, the king may neither seize the goods of his subject, nor imprison his body, as it is resolved in 42 Ass. pl. 5, where it is agreed by all the justices, that a commission to take a man's goods, or imprison his body, without indictment or suit of the party, or other due process, is against the law.

3. There is a commandment of the king, which is grounded upon a suggestion made to the king or to his council; and if a man be committed to prison by such a suggestion, by commandment of the king, it is unlawful, and not warranted by the law of the realm.

The 25 of E. 3, cap. 4, De Provisionibus, where it is contained in the Great Charter of the franchises of England, that none shall be imprisoned or arrested of his freehold or of his franchises, nor of his free customs, but by the law of the land.—It is awarded, consented and established, that from henceforth none shall be taken by petition or suggestion made to our sovereign lord the king, or to his council, until it be by indictment or presentment of his good and lawful neighbours, where such deeds are done in due manner, or by process made by writ original at the common law; nor that none shall be arrested of his franchises, nor of his freehold, unless he be duly brought in, and answer, and forejudged of the same by way of law: and if any thing be done against the same, it shall be redressed and holden for nought.

37 E. 3, c. 10, although it be contained in the Great Charter, that no man be taken or imprisoned or put out of his freehold, without due process of the law; nevertheless, divers persons make false suggestions to the king himself, as well for malice as otherwise, whereby the king is often grieved, and divers of the realm put in great damages, contrary to the form of the same statute.

Wherefore it is ordained, that all they that make such suggestions, be sent with their suggestions to the Chancellor or Treasurer, and they and every of them find sureties to pursue their suggestions, and endure the same pain as the other should have had in case that his suggestion be found untrue: and that then process of the law be made against them, without being taken or imprisoned, against the form of the same charter, and other statutes.—So that it appears by these several statutes, that such commandments of the king as are grounded upon suggestion, either made to himself or to his council, for the imprisonment of a man, are against the law.

Fourthly, I find that there is a commandment of the king which is made under his hand, with his signet; for in 4 and 5 of Philip and Mary, Dyer 162, where the statute of 1 Ric. 2, c. 11, restraineth the Warden of the Fleet for letting any man at large that is in upon judgment at the suit of any man, except it be by writ or other commandment of the king; it was doubted, whether the queen by letter under her hand and privy-signet doth give commandment to the Warden of the Fleet to suffer a man that is there in execution to go about his business, or the affairs of the queen; whether this be a warrantable command or not within the statute: and the law hath always been conceived upon that book, that such a commandment is not warrantable by law. And if such a command will not serve the turn, to give unto a man his liberty, which the law favoureth, and had the countenance of an act of parliament for the doing of it; then I conceive it should be a more strong case, the king should not have power by his commandment to imprison a man without due process of the law, and restrain him of his liberty, when there had been so many acts of parliament made for the liberty of the subjects.

Fifthly, I do find that there is the commandment of the king, which is by his writ under the great seal, or the seal of the court out of which it issueth, Regist. f. 69, and 70. In the writ 'De cautione admittenda,' I find the words, 'mandatum regis' expounded to be 'breve 'regis,' for the writ goeth: 'Rex vic' salutem. 'Cum nuper ad requisitionem S. de Isle cano- 'nici Lincolne venerabilis patris H. Lincoln. 'Episcopi ipso in remotis agente vicarii gene- 'ral. per literas suas patentes nobis significan- 'tes Nicho. B. dict. Lincoln. dioc. propter 'manifestam contumaciam authoritate ipsius 'episcopi ordinar. excommunicat. esse nec si 'velle, &c. vobis præceperimus quod præfat. '&c. satisfactum ex parte ipsius N. qui virtute 'mandati nostri prædict. per vos capt. et in 'prison. nostra de Newgate detent. existit, &c. 'nos nolentes quod præfat. N. per breve nos- 'trum prædict. via præcludatur, &c. prosequi 'possit in forma juris maxim. &c. integer esse 'debeat, vobis præcipimus quod scire, &c. quod 'sit, &c. quare prædict. N. a prisona prædict. 'deliberari non debeat. Rex justiciar' suis de 'Banco salut. Cum nos nuper ad significa- 'tionem S. de Isle, &c. usque ibi excommuni- 'cat. extitisse, nec se velle, &c. esset satisfac- 'tum ex parte ipsius N. virtute mandati nostri 'præd. cap et in prisona nostra de Newgate

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'tunc detenti, &c. et nolentes eo prætextu 'præfato N. per breve nostrum præd. via præ-'cludat. quo minus appellat. suæ negotium, &c. 'processerat. et appellant. statut. &c. per breve 'nostrum præceperimus præfat. vic. quod scire 'facerent, &c. vobis signific. et consult. et cir-'cumspect. in placitis per breve prædict coram 'vobis pendentibus procedere valeatis secun-'dum legem et consuetudinem regni nostri.'

Stat. 72, 5 E. 3, c. 8. 1 E. 3, c. 9, saith, that every Capias in a personal action is a commandment of the king, for it is 'Præcipimus 'tibi quod capias,' &c. and yet the defendant, as there it is said, is replevisable by the common law. 7 R. 20, a. Calvin's Case, saith, That there are two kind of writs, viz. 'brevia manda-'toria et remedialia, et brevia mandatoria et 'non remedialia.' Brevia mandatoria et remedialia, are writs of right, formed on, &c. debts, trespasses, and shortly all writs real and personal, whereby the party wronged is to recover somewhat, and to be remedied for that wrong which is done unto him.

Sixthly, I do find by our books of law, and by the Register, that this special 'mandatum 'domini regis,' is expounded to be this writ, and that the law taketh no notice of any other 'spe-'ciale mandatum,' than by this writ. The which being so, when the return is made, that he is imprisoned and detained in prison by the special commandment of the king, how can the court adjudge upon this return, that sir John Corbet ought to be kept in prison, and not to be bailed; when the nature of the special commandment is not set forth in the return, whereby it may appear unto the court that he is not bailable? In Bracton, c. 12, 112, you shall see a writ reciting, 'Præcipimus tibi quod 'non implacites nec implacitari permittas ta-'lem de libero tenemento suo tali villa, sint 'speciali præcepto nostro vel capitalis justiciar' 'nostri.'

And the reason of it there is given, 'Quia 'nemo de libero tenemento sine brevi sive li-'bello conventionali nisi gratis voluerit respon-'debit.' So as the exception of special commandment by the very book, appeareth to be 'breve sive libellus conventionalis.' Regist. 271, the Writ of Mainucaption goeth in this manner: 'Rex vic. salut cum nuper assigna-'verimus dilectos et fideles nostros A. B. et C. 'D. ad inquisitiones de forstallariis. et trans-'gressionibus contra formam statuti dudum 'apud Winton. editi in com. tuo faciend. et ad 'illos quos inde culpabiles invenirent. capiend. 'et in prisona nostra salvo custod. faciend. do-'nec aliud inde præcipissemus quod C. D. et 'E. pro hujusmodi forstallamentis et transgres-'sionibus unde coram præfat. A. B. et C. D. 'indict. fuerint, capt. et in prisona de L. detent. 'exist. à qua deliberari non possunt, sine man-'dato nostro speciali, nos volentes eisdem C. 'D. et E. gratiam in hac parte facere specialem, 'tibi præcipimus quod si prædict. C. D. et E. 'occasione prædict. et non alia in prisona præ-'dict. detineantur, et pro transgressionibus illis 'secundum legem et consuetudinem regni nos-'tri Angliæ replegiabiles existunt, &c. tunc im-'pos' C. D. et E. a prisona prædict. si ea occa-'sione. et non alia detineantur in eadem, inte-'rim deliberari facias per manucapt. supradict. 'et habeas tibi tunc coram præfat. justiciar. 'nomina manucapt. illorum et hoc breve.'

And the exposition of this 'speciale manda-'tum domini regis,' mentioned in the Writ, is expounded to be 'breve domini regis,' and thereupon is this writ directed unto the sheriff for the delivery of them.—And so much for the first branch of the first part: I conclude, that the special command of the king, without shewing the nature of the commandment of the king, is too general, and therefore insufficient; for he ought to have returned the nature of the commandment of the king, whereby the court might have adjudged upon it, whether it were such a commandment that the imprisonment of sir John Corbet be lawful or not; and whether it were such a commandment of the king, that although the imprisonment were lawful at first, yet he might be bailed by law.

And as for the general return of 'speciale 'mandatum domini regis,' without shewing the cause of the imprisonment either special or general, I hold, that for that cause also the return is insufficient.

First, in regard of the Habeas Corpus, which is the commandment of the king only, made the 15th of November.

According to the teste of the Writ, commanding the keeper of the Gate-house to have the body of sir John Corbet, 'una cum causa de-'tentionis, et ad subjiciendum et recipiendum 'ea quæ curia nostra de eo ad tunc ibid. ordi-'nar. contingat';' so as the commandment of the writ being to shew the cause of his detaining in prison, the keeper of the Gate-house doth not give a full answer unto the writ, unless the cause of the detainment in prison be returned; and the court doth not know how to give their judgment upon him, either for his imprisonment, or for his discharge, according to the purport of the writ, when there is not a cause returned. And forasmuch as upon an Excommengement certified, it hath been adjudged oftentimes that certificates were insufficient, where the cause of the commitment hath not been certified; that the court might adjudge whether the ecclesiastical judges, who pronounced the excommunication, had power over the original cause, according to the book of 14 Hen. 4, 14, 8. Rep. 68. Trollop's case, and 20 Edw. 3, Excommengement 9.

So upon an Habeas Corpus in this court, where a man hath been committed by the Chancellor of England, by the Council of England, Marches of Wales, Warden of the Stannaries, High-Commission, Admiralty, Dutchy, Court of Request, Commission of Sewers or Bankrupts; it hath several times been adjudged that the return was insufficient, where the particular cause of imprisonment hath not been shewn, to the intent that it might appear, that those that committed him had jurisdiction over the cause, otherwise he ought to be dis-

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charged by the law: and I spare to recite particular causes in every kind of these, because there are so many precedents of them in several ages of every king of this realm: and it is an infallible maxim of the law, That as the court of the King's-Bench, and Judges, ought not to deny an Habeas Corpus unto any prisoner that shall demand the same, by whomsoever he be committed; so ought the cause of his imprisonment to be shewn upon the return, so that the court may adjudge of the cause, whether the cause of the imprisonment be lawful or not. And because I will not trouble the court with so many precedents, but such as shall suit with the cause in question, I will only produce and vouch such precedents, where the party was committed either by the commandment of the king, or otherwise by the commandment of the privy-council, which Stamford. fol. 72. termeth the mouth of the king; such acts as are done by the privy-council, being as acts done by the king himself.—And in all these causes you shall find that there is a cause returned as well as 'a speciale mandatum domini regis, &c.' or 'mandatum privati concilii domini regis,' whereby the court may adjudge of the cause, and bail them if they shall see cause.

In the 8th Hen. 7, upon return of an Habeas Corpus awarded for the body of one Roger Sherry, it appeareth that he was committed by the mayor of Windsor for suspicion of felony, and 'ad sectam ipsus regis pro quibusdam felo-'niis et transgressionibus ac per mandatum 'domini regis;' 21 H. 7. upon the return of an Habeas Corpus sent for the body of Hugh Pain, it appeared that he was committed to prison, 'per mandatum dominorum privati 'consilii domini regis pro suspicione feloniæ.'

1 Hen. 8, Rot. 9, upon the return of an Habeas Corpus sent for the body of one Tho. Harrison and others, it appears that they were committed to the earl of Shrewsbury, being marshal of the houshold, 'per mandatum do-'mini regis, et pro suspicione feloniæ, et pro 'homicidio facto super mare.'—3 et 4 Philip. et Mariæ, upon a return of an Habeas Corpus, sent for the body of one Peter Man, it appeareth that he was committed 'pro suspicione 'feloniæ, ac per mandatum domini regis et 'reginæ.'—4 et 5 Philip et Mariæ, upon the return of an Habeas Corpus sent for the body of one Thomas Newport, it appeared that he was committed to the Tower, 'pro suspicione 'contrafact' monetæ per privatum concilium 'domini regis et reginæ.'—33 Eliz. upon the return of an Habeas Corpus for the body of one Laurence Brown, it appeared that he was committed, 'per mandatum privati concilii domina 'reginæ pro diversis causis ipsam reginam tan-'gent' ac etiam pro suspicione proditionis.'

So as by all these precedents it appeareth where the return is either, 'per mandatum do-'mini regis,' or 'per mandatum dominorum 'privati concilii domini regis,' there is also a cause over and besides the *mandatum* returned. As to that which may be objected, that 'per mandatum domini regis,' or 'privati con-'cilii domini regis,' is a good return of his imprisonment, I answer,

1. That there is a cause: for it is not to be presumed that the king or council would commit one to prison without some offence; and therefore this *mandatum* being occasioned by the offence or fault, must be the cause, and not the command of the king or council, which is occasioned by the cause.

2. It appears that the jurisdiction of the privy-council is a limited jurisdiction, for they have no power in all causes, their power being restrained in certain causes by several acts of parliament, as it appeareth by the Stat. of 20 E. 3, c. 11. 25 E. 3, c. 1. Stat. 4. (vide 4 Instit. p. 53.) the private petition in parliament permitted in the 1 R. 2, where the commons petition that the privy-council might not make any ordinance against the common law, customs or statutes of the realm; the 4 H. 4. cap. 3. 13 H. 4, 7. 31 H. 6. And their jurisdiction being a limited jurisdiction, the cause and grounds of their commitment ought to appear, whereby it may appear if the lords of the council did commit him for such a cause as was within their jurisdiction: for if they did command me to be committed to prison for a cause whereof they had not jurisdiction, the court ought to discharge me of this imprisonment. And howsoever the king is 'Vicarius Dei in terra,' yet Bracton, cap. 8, fol. 107, saith, 'quod nihil 'aliud potest rex in terris cum sit minister Dei 'et vicarius, quam solum quod de jure potest, 'nec obstat, quod dicitur quod principi placet, 'legis habet vigorem, quia sequitur in fine legis 'cum lege regia quæ de ejus imperio lata est; 'id est, non quicquid de voluntate regis temere 'præsumptum est, sed animo condendi jura, 'sed quod consilio magistratuum suorum rege 'author, præstant, et habita super hoc delibera-'tione et tract. rect. fuer. definit. potestat. 'itaque sua juris est, et non injuriæ.' The which being so, then also it ought to appear upon what cause the king committeth one to prison; whereby the judges which are indifferent between the king and his subjects, may judge whether his commitment be against the laws and statutes of this realm, or not.

3. It is to be observed, that the king's command by his writ of Habeas Corpus, is since the commandment of the king for his commitment; and this being the latter commandment, ought to be obeyed: wherefore that commanding a return of the body 'cum causa deten-tionis,' there must be a return of some other cause than 'per mandatum domini regis,' the same commandment being before the return of the writ.

Pasch. 9 E. 3, pl. 30, fol. 56, upon a writ of Cessavit brought in the county of Northumberland, the Defendants plead, That by reason of the county being destroyed by wars with the Scots, king Ed. 2 gave command that no writ of Cessavit should be brought during the wars with Scotland, and that the king had sent his writ to surcease the plea, and he averreth that the wars with Scotland did continue.

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Hearle that giveth the rule saith, That we have command by the king that now is, to hold this plea, wherefore we will not surcease for any writ of the king that is dead. And so upon all these reasons and precedents formerly alledged, I conclude, that the return that sir John Corbet was committed and detained in prison, 'per speciale mandatum domini regis,' without shewing the nature of the commandment, by which the court may judge whether the commandment be of such a nature as he ought to be detained in prison, and that without shewing the cause upon which the commandment of the king is grounded, is not good. As to the second part, which is, Whether the time of the commitment by the return of the writ, not appearing unto the court, the court ought to detain him in prison, or no? I conceive that he ought not to be continued in prison, admitting that the first commitment by the command of the king were lawful; yet when he hath continued in prison by such reasonable time, as may be thought fit for that offence for which he is committed, he ought to be brought to answer, and not to continue still in prison without being brought to answer.—For it appears by the books of our laws, that liberty is a thing so favoured by the law, that the law will not suffer the continuance of a man in prison for any longer time than of necessity it must; and therefore the law will neither suffer the party, sheriffs or judges to continue a man in prison by their power and their pleasure, but doth speed the delivery of a man out of prison, with as reasonable expedition as may be.

And upon this reason it is resolved, in 1 & 2 El. Dyer 175. & 8 Ed. 4, 13, That howsoever the law alloweth that there may be a term between the teste of an original writ and the return of the same, where there is only a summons, and no imprisonment of the body; yet it will not allow that there shall be a term between the teste of a writ of Capias, and the return of the same, where the body of a man is to be imprisoned: insomuch that it will give no way, that the party shall have any power to continue the body of a man imprisoned any longer time than needs must, 39 E. 3, 7. 10 H. 7, 11. 6 E. 4, 69. 11 E. 4, 9. 48 E. 3, 1. 17 E. 3, 1. & 2 Hen. 7.

Keilway's Reports do all agree, that if a Capias shall be awarded against a man for the apprehending of his body, and the sheriff will return the Capias that is awarded against the party, a 'non est inventus,' or that 'languidus est in prisona,' yet the law will allow the party against whom it is awarded, for the avoiding of his corporal penance and duress of imprisonment, to appear gratis, and for to answer.—For the law will not allow the sheriff by his false return to keep one in prison longer than needs must, 38 Ass. pl. 23. Brooks imprisonment 100 saith, That it was determined in parliament that a man is not to be detained in prison, after he hath made tender of his fine for his imprisonment; therefore I desire your lordship that sir John Corbet may not be longer kept in durance, but be discharged according to the law.

L. C. Justice. Mr. Attorney, you have heard many learned Arguments; if you be provided to answer presently, we will hear you; but if you will have a longer day, for that you are not provided to argue, you may, we will give it you.

Doderidge. If you will, you may see the precedents; it may be you have not seen some of them, and we must see them too.

Att. Gen. (Heath.) May it please your lordship, the gentlemen that be of counsel with the knights at the bar, they have said much, and spoken very long for their clients, and to good purpose and pertinently. It is a cause that carrieth with it a great deal of weight, both towards the king and his subjects also, and I am not so hasty to put myself upon the main point of this cause, when it is almost time for your lordship to rise.

My lord, the gentlemen have severally spoken, and given and insisted upon several reasons, and they have cited many precedents. I could say something of them at this present, and that some of them have been mistaken; and therefore I beseech your lordship, that I may have time to answer, that I may not wrong the cause of the king's part, or slight the cause on the subject's part.

But that which I desire to say now is, that these gentlemen have all of them gone in one form, to divide the cause into two parts: The first, the Form of the return. The second, the Matter of the return. For the form, methinks we may put an end to that now; if your lordship please, that we may have no return to that another day, but I may apply myself unto the matter of the return.

To the Form of the return they have taken divers exceptions, but they especially insisted upon two main heads: First, That the Return is not good, because it is not an absolute return. I confess the ground is well laid, and the major is good, that if this return be not positively the return of the Warden of the Fleet himself, but the relation of another, it is no good return, therefore I need spend no time in that, the ground being well laid. But under your lordship's favour, the minor proposition I deny, we differ only in that; for I say that this return is certain, and that it is not the words of any man else, but the express words of the warden himself, and that this is added *ex abundanti* to give satisfaction to the court, that he had order to make the return: therefore I desire your lordship to cast your eyes upon the substance of the return, and distinguish it into parts. The words are, 'Detentus est in pri-'sona sub custodia mea per speciale mandatum 'domini regis, mihi significatum per Warran-'tum duorum privati concilii dicti domini 'regis, &c.' If he had turned these words, and said, 'Detent' est prout mihi significat' per 'Warrantum duorum privati concilii per spe-'ciale mandatum domini regis,' then it might

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be taken to be the words of the lords of the council: but the first words being positive, 'Detentus est per speciale mandatum domini 'regis,' that is sufficient, and the rest is surplusage, and he doth not say, 'prout mihi signi-'ficat',' but 'mihi significat' only;' which is absolute, and the resolution thereof resteth more in your lordship's expounding of the words, than in putting any case upon them.

The second exception is taken to the Form of the return, for that there is not the cause of the imprisonment returned, but of the detaining alone. My lord, I say no more at present to that, but this: no man is bound to answer more than that which is the contents of the writ. But the writ it may be to know specially the cause of the detaining, or what the cause of the caption is only, and if the officer make answer to that which is required of him in the writ, it is sufficient. It may be, there be precedents both ways, I am sure there are for detentions, and there is no cause why the officer shall shew the time of his commitment: but if the prisoner shall desire it, your lordship may grant him a writ, to shew the cause both of his caption and detention also.

Thirdly, They say that this return is uncertain, and that it is the Warrant of the lords of the council, and not of the king, by which he is committed. For that, my lords, I say, that if it had all been left out, and he had only said, 'Detentus fuit per speciale mandatum 'domini regis,' it had been sufficient: but when he doth more, it is superfluous, and not necessary, for it appeared before by whom he was committed; and when he returns the warrant of the lords of the council, it is not their words that commit him: but they being the representative body of the king, they do express what the king's command is, but they signify nothing of their own; and therefore I desire your lordship to deliver your opinion in that point of the return, whether it be positive or no.

This cause, as it greatly concerns the Subjects, so it much concerns the king too. I am sorry there should be any occasion to bring these things in question; but since it is now here, I hope I shall give satisfaction to your lordship, and to the parties too, and I desire that I may have till Monday for it.

L. C. Justice. I think it is not best for us to declare our opinions by piece-meals, but upon all the case together, and as you are a stranger to the return, so are we; and there be many precedents and acts of parliament not printed, which we must see.

Doderidge. This is the greatest cause that ever I knew in this court; our judgments that we give between party and party, between the king and the meanest subject, ought to be maturely advised on, for so are the entries of our judgments, 'Quod matura deliberatione 'habita,' It was judged, &c. And we must see the precedents and acts of parliament that we hear mentioned.

Justice *Jones.* Mr. Attorney, if it be so that the law of Magna Charta and other statutes be now in force, and the gentlemen be not delivered by this court, how shall they be delivered? Apply yourself to shew us any other way to deliver them.

Doderidge. Yea, or else they shall have a perpetual imprisonment.

Per Curiam. Monday was appointed for the Attorney's argument, and in the interim the Counsel for the gentlemen were by order appointed to attend the Judges with all the precedents and unprinted statutes which they mentioned, and that they should let the Attorney see them also.—And the gentlemen being asked if they desired to come again, answered they did, and a Rule was entered for it.

Monday, 26 November, 1627. Tertio Michaelis, 38 Caroli Regis, in Banco Regis.

Sir John Corbet, sir Walter Earl, sir John Heveningham, sir Edmund Hampden, knights, were brought to the bar.

Attorney-General (Heath). May it please your lordship, these gentlemen, sir John Corbet, sir Walter Earl, sir John Heveningham, and sir Edmund Hampden, upon their motion to this Court to have their Habeas Corpus, and that themselves, and the cause of their detaining them in their several prisons, might be brought before your lordship, had it granted to them.—My lord, at the first motion of it, the knowledge thereof coming, and that they had such a desire, his majesty was very willing to grant unto them, as to all his subjects, this common case of justice; and though it be a case which concerns himself in a high degree, yet he hath been so gracious and so just, as not to refuse to leave the examination and determination thereof to the laws of this kingdom. —My lord, it is very true that this is a very great cause, and hath raised a great expectation, and for the manner of it, more than was necessary; but, my lord, I am afraid these gentlemen whom it concerns, have rather advised their counsel, than their counsel them: but I shall take the case as now I find it, and as the gentlemen's counsel, on the other side, have led me the way to it.—The exceptions that have been taken by the counsel on the other side, to the return made by the warden of the Fleet, and the rest of the guardians of several prisons, have been two. For renewing of your lordship's memory, we will read one of the Returns, they are all alike.

Then the Return was read for sir John Heveningham, by Mr. Keeling.

Attorney-General. May it please your lordship, against this return the counsel of the gentlemen have taken some exceptions, and have divided their objections into two main points, the one the Form, the other the Matter. To the Form they have objected four several things: 1. That the return is not positive, but referred to the signification made by another, as the lords of the council. 2. That the keepers of the prisons have not returned the cause of the commitment, but the cause of the

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cause, which is not good. 3. That the return is imperfect, for that it shews only the cause of the detaining in prison, and not the cause of the first commitment.—And lastly, That the return is contradictory in itself, for that in the first part thereof there is a certification that the detaining of these gentlemen in prison, is 'per 'speciale mandatum domini regis;' and when the Warrant of the lords of the council is shewed, it appears that the commitment is by the command of the king, signified by the lords of the council: and by your lordships favour, I will give a several answer to every of these several objections. And for the first, that the return is not positive and affirmative, but depends upon and hath relation to some other, and therefore it is not good; I do agree that the ground is true, that if the return be not positive, it is not good: we differ only in the minor, that the return is not positive and affirmative; for I agree that these Book-cases, that have been put, are good law: as 27 Ass. pl. 65, that if the sheriff return that he had sent to the bailiff of the hundred, and he gives him that answer, that is no good return; for the sheriff ought to make the return as of his own act, without naming of the bailiff of the hundred in his return: for if he return, 'Quod 'man. 'avi ballivo itineranti qui habet retorn' 'omnium brevium et executionem eorund' per 'cartam domini regis qui mihi dedit nullum 'responsum;' this is not good, if he were not bailiff of a franchise or signiory, for so is 21 H. 7, fol. 4.

There hath been cited to maintain these objections, 20 Ed. 3. The record I have perused, and there I find that the Bishop said, that it is found in *archivis*, in the record, &c. that he was excommunicated; but it was found to be in *archivis*, &c. and that is no positive return that it is so. I will oppugn what hath been said by the Counsel on the other side; it must be granted that if the return here be not positive, it is imperfect, and in 5 H. 7, 28, it is said, that an imperfect return is no return at all, it is all one; but if the return was so, that was not much material, for then it were but temporary, and it might be amended: but, my lord, they have mistaken the minor proposition, for they have taken it as granted that there is an imperfect return from the lords of the council. My lord, I shall intreat you to cast your eyes upon the return, and you shall find the first words positive and affirmative: the words are, 'Quod detentus est sub custodia mea per 'speciale mandatum domini regis:' the other words, 'mihi significatum,' follow after, but are not part of the affirmation made before it. But if they will have it as they seem to understand it, then they must turn the words thus: 'Quod testificatum,' or 'significatum est mihi 'per dominos privati concilii quod detentus est 'per speciale mandatum domini regis;' and then indeed it had not been their own proper return, but the signification of another, the lords of the council: the turning of the sentence will resolve this point; the thing itself must speak for itself. I conceive by your lordship's favour, that it is plain and clear, here is a positive return, that the detaining is by the commandment of the king: and the rest of the return is rather for satisfaction to myself and the Court, than otherwise any part of the return.

The second Objection hath dependance upon this, as that he hath returned the cause of the cause, and not the cause itself, wherein, under your lordship's favour, they are utterly mistaken; for the return is affirmative, 'Ego Jo- 'hannes Liloe testifico,' &c.' I know that among the logicians there are two causes, there is *causa causans*, and *causa causata*: the *causa causans* here in this case is not the warrant from the lords of the council, for that is *causa causata*: but the primary and original cause, which is *causa causans*, is 'speciale mandatum domi- 'ni regis;' the other is but the council's signification or testification, or warrant for him that made the return.

To the third Objection, that the return is imperfect, because it shews only the cause of the detaining in prison, and not the cause of the first commitment: My lords, for that I shall not insist much upon it, for that I did say the last day, which I must say again, it is sufficient for an officer of the law to answer that point of the Writ which is in command.—Will your lordship please to hear the Writ read, and then to see, whether the wardens of the prisons have not made answer to so much as was in command?

Then the Writ was read by Mr. Keeling.

Attorney-General. My lord, the Writ itself clears the objection; for it is to have the party mentioned in it, and the cause of his detention, returned into this court; and therefore the answer to that is sufficient. Only, my lord, the warden of the Fleet, and the rest of the keepers of the prisons, had dealt prudently in their proceedings, if they had only said, that they were detained 'per speciale mandatum domini 'regis,' and it had been good, and they might have omitted the rest: but because, if they should make a false return, they were liable to the actions of the party, they did discreetly to have the certification of the lords of the council, in suspicion that if this return was not true, they were liable to the actions of these gentlemen.—In 9 H. 6, 40, 44, it is said, That whatsoever the cause be that is returned, it must be accepted by the court; they must not doubt of the truth of the Return, and the officer that shall return it is liable to an action if the return is false; and therefore the guardians of the prisons did wisely, because they knew this was a case of great expectation, to shew from whom they had their warrant, and so to see whether the cause be true or not.

The last Objection to the Return is, that it is contradictory in itself, as that the first part of it is, that they are detained in prison 'per 'speciale mandatum domini regis;' but in this relation of it, it shews that they are detained

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by the command of the lords of the council; for the words of their Warrant are, to require you still to detain him, &c.—But, my lord, if they will be pleased to see the whole Warrant together, they shall find that the lords of the council speak not their own words or command in that warrant, but they say that you are to take notice of it, as the words and command of the king; for, my lord, the lords of the council are the servants to the king, they signify his majesty's pleasure to your lordship, and they say it is his majesty's pleasure you should know that the first commitment, and this present detaining him in prison, are by his majesty's special commandment.—And this, my lord, is all that I will say for the sufficiency of the Form of the return, to prove that it is sufficient.

Touching the matter of the return, the main point thereof, it is but a single question, and I hope, my lord, of no great difficulty; and that is, whether they be replevisable, or not replevisable? It appears that the commitment is not in a legal and ordinary way, but that it is 'per speciale mandatum domini regis;' which implies, not only the fact done, but so extraordinarily done, that it is notorious to be his majesty's immediate act and will it should be so; whether in this case they should be bailable or not in this court, which I acknowledge to be the highest court of judicature for such a case as is in question.

The counsel on the other side desire, that they may be bailed, and have concluded that they may not be remanded; their grounds of argument, though they were many that did speak, I have in my Collection divided into five points:

The first was, Reasons that they must be so, arising from the inconveniences that would fall to the subjects, if it should not be so in the main points of their liberty. The second was, they shewed divers authorities out of their law-books, which they endeavoured to apply. The third was, The Petition of the Commons answered by several kings in parliament. The fourth was, Acts of Parliament in print. The last was, Precedents of divers times; which they alledged to prove, that men committed by the king's commandment, and by the commandment of the lords of the privy-council, (which I conceive to be all one, for the body of the privy-council represents the king himself) that upon such commitment in such causes men had been bailed.

In the course of my arguments I will follow their method, first, to answer their Reasons, and then those Books which they have cited, which I conceive to be pertinent to this question, and then the Petition and Answer made in parliament, and then their Acts of Parliament, next their Precedents; and lastly, I will give your lordship some reasons of my own, which I hope shall sufficiently satisfy your lordship and all others, but the parties themselves, for I except them.

My lord, the great and mighty Reason that they insisted upon, was the inconveniences that might come to the subjects in their liberties, if this return should be good; and this reason they inferred out of records and books of the common law, which gives the liberty of the subjects; I do acknowledge that the Liberty of the Subject is just, and that it is the inheritance of the subject, but yet it is their inheritance *secundum legem terræ.*

My lords, they put many Cases likewise to enforce it, 1 and 2 Eliz. Dyer, fo. 175, that the continuance of a Capias shall be from term to term, without a term betwixt, because otherwise the party defendant may be kept too long in prison; and 38 Ass. pl. 22, Broke tit. Imprisonment 100, that imprisonment is but to detain the party till he have made fine to the king, and therefore the king cannot justly detain him in prison after the fine tendered; and 16 H. 6, monstrans de faict 182, if the king command me to arrest a man, and thereupon I do arrest him, he may have an action of false imprisonment, or of trespass against me, though it be done in the king's presence: and 1 H. 7. 4, the discourse of Hussey, where he saith, that sir John Markham delivered unto king Edward the 4th, that he should not arrest upon treason or felony any of his subjects, because he could not wrong his subjects by such arrest, for they could not have remedy against him.

These, my lord, are the Causes that they insisted upon for this purpose. To the two first, I shall give but one answer; which is, That the restraint in these two cases, and most of the other cases before cited, appears to be in the ordinary course of judicature fit for Westminster-hall, and not for the king's council-table. A writ of Capias was the first original of it, and therefore not to be applied to the cause of ours.

And for the other two cases, the law presumeth that the active part of them is not so proper for the majesty of a king, whoever doth these things by his subordinate officers; but that the subject should not be committed by the king, was never heard of, for the king may commit any man at his pleasure; but that is not our case: but whether when the king hath committed one, he must render a cause of that commitment, that it may appear whether the party be bailable or not, or else the party must be delivered.

The book 9 E. 3, fol. 16, pl. 30, cited of a Cessavit, the king having by proclamation commanded, that in the county of Northumberland no Cessavit should be brought, &c. during the war; the tenant pleaded this command, and it was denied him, and he, notwithstanding that, was commanded to plead; but the reason thereof was, because the commandment thereof was given by E. 2, who being dead, the commandment was determined.

The Book of Edw. 3, 4 fol. 16, is indeed, where the commandment was given by the same king, and that was likewise denied him; for the king cannot command your lordship, or any other court of justice, to proceed otherwise

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than according to the laws of this kingdom; for it is part of your lordship's oath, to judge according to the law of the kingdom. But, my lord, there is a great difference between those legal commands, and that *absoluta potestas* that a sovereign hath, by which a king commands; but when I call it *absoluta potestas*, I do not mean that it is such a power as that a king may do what he pleaseth, for he hath rules to govern himself by, as well as your lordships, who are but inferior unto judges under him. The difference is, the king is the head of the same fountain of justice, which your lordship administers to all his subjects; all justice is derived from him, and what he doth, he doth not as a private person, but as the head of the common wealth, as *judicarius regni*, yea, the very essence of justice under God upon earth is in him; and shall not we generally, not as subjects only, but as lawyers, who govern themselves by the rules of the law, submit to his commands, but make inquiries whether they be lawful, and say that the king doth not this or that in course of justice?

If your lordship sitting here shall proceed according to justice, who calleth your actions in question, except there are some errors in the proceeding; and then you are subject to a writ of error.—But who shall call in question the actions or the justice of the king, who is not to give any account for them? as in this our case, that he commits a subject, and shews no cause for it.

The king commits and often shews no cause, for it is sometimes generally, 'Per speciale 'mandatum domini regis,' sometimes 'Pro 'certis causis ipsum dominum regem moventi-'bus:' but if the king do this, shall it not be good? It is all one when the commitment is 'Per speciale mandatum domini regis,' and when it is 'Pro certis causis ipsum dominum 'regem moventibus;' and it is the same if the commitment be 'Certis de causis ipsum domi-'num regem tangentibus.'

And, my lord, unless the Return to you doth open the secrets of the commitment, your lordship cannot judge whether the party ought by law to be remanded, or delivered: and therefore if the king allow and give warrant to those that make the return, that they shall express the cause of the commitment, as many times he doth, either for suspicion of felony, or making money, or the like; we shall shew your lordship that in these causes this court in its jurisdiction were proper to try these criminal causes, and your lordship doth proceed in them although the commitment be 'per speciale man-'datum domini regis,' which hath not a secret in it in these causes, for with the warrant he sendeth your lordship the cause of the committing; and when these warrants are made and brought into this court, your lordship may proceed: but if there be no cause expressed, this court hath always used to remand them; for it hath been used, and it is to be intended a matter of state, and that it is not ripe nor timely for it to appear.

My lord, the main fundamental grounds of argument upon this case begins with Magna Charta, from thence have grown statutes for explanation thereof, several Petitions of parliament, and Precedents for expedition; I shall give answers to them all.

For Magna Charta, in the 29th chapter, hath these words; 'No freeman shall be taken or 'imprisoned, or disseised, of his freehold liber-'ties, nor free customs, nor be outlawed, or 'exiled, nor any other way destroyed, nor we 'will not pass upon him nor condemn him, but 'by lawful judgment of his peers, or by the 'law of the realm.'—My lord, this statute hath been many times confirmed; the lord Coke numbered up the number to be about twenty; and we are to conclude on this, it is the foundation of our Liberties.

No freeman can be imprisoned but by 'legale judicium parium suorum, aut per legem 'terræ.' But will they have it understood that no man should be committed, but first he shall be indicted or presented? I think that no learned man will offer that; for certainly there is no justice of peace in a county, nor constable within a town, but he doth otherwise, and might commit before an Indictment can be drawn or a presentment can be made: what then is meant by these words, 'Per legem 'terræ?' If any man shall say, this doth not warrant that the king may for reasons moving him commit a man, and not be answerable for it, neither to the party, nor (under your lordship's favour) unto any court of justice, but to the High Court of Heaven; I do deny it, and will prove it by our Statutes.

My lord, it was urged by the counsel on the other side, that our printed Magna Charta, which saith 'nec super eum mittimus,' is mistaken; and that in divers Manuscripts it is expressly set down to be, 'nec eum in carcerem 'mittimus.' I cannot judge of the Manuscripts that I have not seen; but, my lord, I have one here by me, which was written many years ago, and the words in print are word for word as that which is here written.

Then they say, that Matthew Paris sets it down so in his History: My lord, we do not govern ourselves by Chronicle, but to answer that of Matthew Paris, he reports a thing done in king John's time, but it was then but thought on, and it was enacted in the time of Henry 3; and there be many things said to be done in Matthew Paris which were not, and many things omitted by him which were done. This Charter was but in election in the time of king John, and then it might be, 'nec eum in car-'cerem mittimus;' but it was not enacted till the time of Henry 3, and then that was omitted, and the Charter granted as now we have it.—But if they do see no more than I in this Clause, I know not why we should contend about these words, seeing the first part of this Statute saith, 'Nemo imprisonetur,' why then may not I say as well, 'nec eum in carcerem 'mittimus?' I see no difference in the words, and therefore, my lord, I shall not insist any

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longer upon the literal exposition of the words of Magna Charta, but I will resort to the rest of it, which is exprest in the subsequent statute and in common practice.

The Counsel on the other side said, that the statute of 28 E. 3, c. 3. expresseth and giveth life to this Charter; I shall desire to have that Statute read.

Keeling, Clerk. Item. 'Whereas it is contained in the Great Charter,' &c. (Vide all these Statutes in Littleton's Argument in Parliament *postea.*)

Attorney General. My lord, the reading of this statute will give answer to it; for it is apparent by the words thereof, none shall be taken by Petition, &c. and that the court be extended to the first arrest, but they are to be understood that none shall be condemned, but he shall be brought to answer, and be tried. And if it be expounded otherwise, it will be contrary to that practice which was then in use.—But it is utterly forbidden by this Statute, that any man should be condemned upon suggestions or petitions made to the king or council, without due trial by law.—The next Statute they cited was 25 E. 3. cap. 4. My lord, I desire that that may be read.

Keeling, Clerk. Item, 'That no man, of 'what estate or condition soever he be, shall 'be put out of land or tenement, nor taken, 'nor imprisoned, nor disinherited, nor put to 'death, without being brought to answer by 'due process of law.'

Attorney General. My lord, this Statute is intended to be a final prosecution: for if a man shall be imprisoned without due process, and never be brought to answer, that is unjust, and forbidden by this statute; but when a man is taken in causes that are unknown to us, (who walk below stairs) we are not privy to the circumstances which may cause the trial to be delayed; and peradventure it is not time to bring the matter to trial, because it is not yet come to maturity, and therefore this is not within the meaning of the statute.—Another Statute that they mention is in the same year, and it is page 9. ch. 9. I desire it may be read.

Keeling, Clerk. Item, 'Because the People of the realm, &c.' (Vide Littleton's Argument *postea.*)

Attorney General. My lord, it is very clear that this Statute had no manner of thought of this cause in question; but whereas sheriffs did procure commissions to be awarded to themselves for their private gain, to the prejudice of the subject, the statute condemneth those commissions, but it maketh nothing to this question which we have now in hand. The next Statute which they cited, was 37 Ed. 3, cap. 18. I beseech it may be read.

Keeling, Clerk. 'Item, Though it be contained in the Great Charter,' &c. (Vide as aforesaid.)

Attorney General. My lord, this Statute seems to be a commentary and light to the other Statutes, the scope whereof is against private suggestions made to the king or his council, and not in a legal way, and therefore it condemns them; and this is more fully expressed in the Statute of 38 Edw. 3, cap. 9. which they likewise mentioned: By which statute direction is given what security, those persons which make such suggestions are to give, that they should prosecute their suggestions, and what punishment they shall undergo, if their suggestions be found false.

Keeling, Clerk. 'Item, As to the article 'made at the last parliament,' &c. (Vide as before said.)

Attorney General. My lord, this and the last Statute seem to conduce both to one purpose, that they that in their accusations went not in a legal way to bring the party to his answer, it was directed by this statute, that they should go a legal way.—The last act of parliament in print, the counsel on the other side produced, was the Statute of 1 R. 2, cap. 12. which I desire may be read.

Keeling, Clerk. 'Item, Whereas divers 'people at the suit of parties were committed 'the Fleet,' &c. (Vide as before.)

Attorney General. My lord, it appeareth that the scope of this Statute is against the Wardens of the Fleet, for some miscarriages in them; but there is one thing in this Statute which I shall desire your lordship to observe; and that is, for those misdemeanors he shall forfeit his office, except it be by writ from the king, or his commandment; so that it was no new doctrine in those times, that the king might then give such commandment for committing. The scope of this Statute had two hands; 1. That the warden should forfeit his office; and, 2. That he should recompense the party.

In the 4th and 5th of Phil. et Mar. Dyer 162. it was resolved, That if the Warden shall deliver a man out of prison without command, he forfeiteth his office, and damage unto the party; but if he have the command of the king, that shall excuse the forfeiture of his office: but he must bring the party hither, and here these gentlemen are now, for that commandment of the king is no exception for him not to observe.—If he receives a writ from this court, to shew the court from whence he receives his warrant, it may excuse the forfeiture of his office, but notwithstanding he is subject to the action of the party.

But I desire your lordship to observe that part of the Statute, which the other party would not make use of, which is, that the king may command by writ or otherwise; these were all the printed statutes cited by the counsel on the other side. But because I would not misinterpret these statutes, I thought it equal to desire your lordship that they might be read. Besides the printed Statutes, they mentioned Petitions by the commons, and the Answers to them of several kings in parliament. The first is, Rot. pl. 6 Ed. 3, numero 1 et 20: besides these two, there is one other of 28 Ed. 3, n. 18.

My lord, of these three Petitions and their

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Answers, the two first were mentioned by the counsel on the other side; and that in 28 Ed. 3, 28, I have produced, all of them even to one purpose. The commons then petitioned the king, that all the Statutes made in exposition of Magna Charta, and of the Forest, may be kept and observed: the king makes Answer, that it shall be done. And in one of the Answers it is said, If any man be grieved he may complain. But what is all this to the point in question? Could there be any other Answer to give life to these requests? The king he is petitioned that some are injured; he answers, That if they complain, they shall be relieved.

And now, my lord, we are where we were, to find out the true meaning of Magna Charta, for there is the foundation of our case; all this that hath been said concerneth other things, and is nothing to the thing in question. There is not a word either of the commitment of the king, or commandment of the council, in all the Statutes and Records.

And now, my lord, I am at an end of those Statutes, and come to that that was alledged and mentioned to be in 3 H. 6, 46. and if I could have found it, I would have brought it, but I could not find it; therefore if they have it, I desire that they will shew it, but I think they have it not, and therefore I will let that go.

My lord, I come to that which I insisted upon, the question as it was at first, not whether the king or the lords of the council can commit a man, and shew no cause wherefore they do commit him; but whether the ordinary courts of justice have power to bail him or no; for that I will insist upon the Statute of Westm. 1. which I desire your lordship may be read, and then I will apply. (vide Westm. primo.)—My lord, this Statute, if I misunderstand it not, is a full expression to the purpose of Magna Charta; the scope whereof is to direct us in what cases men imprisoned were to be bailed. It was especially for direction to the sheriffs and others; but to say courts of justice are excluded from this statute, I conceive it cannot be. It recites, That whereas heretofore it was not resolved in what cases men were replevisable, and in what cases not, but only in these four cases; for the death of a man, or by the commandment of the king, or of his justices, or of the forest.—My lord, I say that this statute expresseth not the law was made by this statute, that in these cases men were not replevisable; but it expresseth that the law was clear in these cases; in these four cases it was clearly resolved before.

I pray you, my lord, observe the time of the making of this Statute; that of Magna Charta was made in the time of Henry 3, and this of Westminster in the time of Edw. 1, so that it was made in the time of the same.—And, my lord, if they had understood the statute of Magna Charta in another sense, would they not have expressed it so in this statute? Was it not fitter for them than for us, they being nearer the first making of Magna Charta than we are? But certainly the Statute of Magna Charta was expounded at the time, as I have shewed before; if not, without all doubt at the time of making of Westm. primo.

The parliament would not have been so careful to provide for things of lesser moment and omit this of so great consequence, if there had been any question of it. In all times and ages, Magna Charta hath been confirmed, but they shew not any one law that doth except against this positive law of Westminster the first, or any acts of parliament; nay more, in any printed Books, that in this case men should be replevisable.

My lord, if you know nothing printed or unprinted, if any will desire to alter a course that always hath been held, you will seek for Precedents, for the constant use and course is the best exposition of the law; it is not enough for me to say, This it is, unless I make it good.

First then, I say, they on the other side cannot cite one Book, Statute, or other thing, to prove, that they that have been committed 'per speciale mandatum domini regis,' are bailable. But, my lord, I find some to the contrary, that they are not bailable, and I will cite some of them, and read of others; for I would not in a case of that expectation, that it should be thought that any thing should be misinterpreted.

In the 33 Hen. 6, f. 28, Robert Poyning's Case, he was committed 'pro diversis causis 'ipsum dominum regem tangent' &c. this alters not the case, for it was as good as no cause, for it was the Warrant 'domini regis,' and there is no question upon this: but, my lord, I know this is not the point in question.

The next thing I shall shew unto your lordship, is Pasch. 21 Edw. 1, Rot. cla. 2, and this, my lord, was near the time of making of the statute of Westm. 1, and this precedent is to this purpose: The sheriff of Leicestershire and Warwickshire (for then there was but one sheriff to both those shires) did receive commandment by letters from the king, That whereas the earl of Warwick had commanded divers persons to the custody of the said sheriff, the king sent a letter to the said sheriff, commanding, that to those who were committed to his custody by the earl of Warwick, he should shew no grace to them; that is, they should not be bailed.—The sheriff, notwithstanding this command, lets some of those prisoners to bail; whereupon he was complained of in parliament, that he had done against the king's commandment, and he was condemned for it.

This was in parliament; I wonder this should be done in parliament, and that it was not said there, that this commitment, being done by the king's commandment, was not good; no, he was condemned in parliament, for it was one that did break the statute of Westm. prim.

My lord, the use that I make of this Record is this: It recites, that the earl of Warwick committed divers, it might be that he did commit them by direction from the king; but the record mentioneth not so much, but it shews, that the king by letters commanded the sheriff,

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that he should shew those persons no grace, and yet he did; he was examined upon this, and by parliament committed.

The next matter I will offer to your lordship's judgment for the true exposition of the law in this case, is the Book we call The Register, an authority respected, it is the foundation of all our writs at the common law; I bring not the book. In this book there is one writ saith thus, 'Rex, &c. Quod repiar' fac' A. nisi fuerit per 'speciale mandatum domini regis.'

Justice *Doderidge*. In what writ is that, 'De homine replegiando?'

Attorn. Gen. Yes, in the writ 'De homine 'replegiando;' and there is another writ directed to the constable of Dover, in the very same words; by which it appears that they that are imprisoned by the king's command, 'non sunt 'replegiabiles.' Mr. Fitzherbert, a grave judge, and is in authority with us, perusing these writs, expressed it in these words plainly: "There are some cases wherein a man cannot have this writ, although he be taken and detained in prison; as if he be taken by the death of a man, or if he be taken by the commandment of the king's justices;" and mentions not Chief Justice: which I believe is to be intended not of the chief of the court of judicature, but of the chief justice of England, for there was such a one in those days. Thus, my lord, you see the opinion of Mr. Fitzherbert in this case.

The next thing, that I will shew your lordship, is the opinion of Mr. Stamford, in his Pleas of the Crown, fol. 72, where he sets down the Statute of Westminster primo, and then he adds, That by this it appears, that in four cases at the common law a man is not replevisable; in those that were taken for the death of a man, or by the commandment of the king, or of his justices, or of the forest: and there he saith, That the commandment of the king is to be intended, either the commandment of his mouth or of his council, which is incorporated to him, and speak with the mouth of the king.—My lord, I shall desire no better commentaries upon a law, than these reverend grave Judges, who have put Books of Law in print, and such Books as none, I believe, will say their judgments are weak.

The next thing I shall offer unto your lordship, is this, That I cannot shew with so great authority as I have done the rest, because I have not the thing itself by me; but I will put it to your lordship's memory, I presume you may well remember it; it is the resolution of all the Judges, which was given in the 34th of queen Elizabeth, it fell out upon an unhappy occasion, which was thus: the Judges they complain that Sheriffs and other officers could not execute the process of the law as they ought, for that the parties on whom such process shall be executed were sent away by some of the queen's Council, that they could not be found: the Judges hereupon petitioned the Lord Chancellor, that he would be a suitor to her majesty that nothing be done hereafter. And thereupon the Judges were desired to shew in what cases men that were committed were not bailable, whether upon the commitment of the queen or any other. —The Judges make answer, That if a man shall be committed by the queen, by her command, or by the privy council, he is not bailable: if your lordship ask me what authority I have for this, I can only say, I have it out of the Book of the lord Anderson, written with his own hand.

My lord, I pray you give me leave to observe the time when this was done; it was in a time, and we may truly call it a good time, in the time of good queen Elizabeth, and yet we see there was then cause of complaint: and therefore I would not have men think that we are now grown so bad (as the opinion is we are), for we see that then in those times there was cause of complaint, and it may be more than is now.—This, my lord, was the resolution of all the Judges and Barons of the Exchequer, and not by some great one.

Now I will apply myself to that, which has been enforced by the counsel on the other side, which was the reason that the subject hath interest in this case.

My lord, I do acknowledge it, but I must say that the sovereign hath great interest in it too. And sure I am, that the first stone of sovereignty was no sooner laid, but this power was given to the sovereign: if you ask me whether it be unlimited; my lord, I say it is not the question now in hand: but the common law, which hath long flourished under the government of our king and his progenitors kings of this realm, hath ever had that reverend respect of their sovereign, as that it hath concluded the king can do no wrong: and as it is in the lord Berkley's Case in Plowden's Com. 246, b. it is part of the king's prerogative that he can do no wrong.—In the 4th of Edw. 4, fol. 25, the king cannot be a disseisor; and so it is also in the lord Berkley's Case in 32 Hen. 8, Dyer, fol. 8.

The king cannot usurp upon a patron, for the common law hath that reverend respect to him, as that it cannot conceive he will do any injury.—But the king commits a subject, and expresseth no cause of the commitment: What then? Shall it be thought that there is no cause why he should be committed? Nay, my lord, the course of all times hath been, to say there is no cause expressed, and therefore the matter is not ripe, and thereupon the courts of judicature have ever rested satisfied therewith, they would not search into it.

My lords, there be 'Arcana Dei, et Arcana 'Imperii;' and they that search too far into them, and make themselves busier with them than their places do require, they will make themselves, &c. I will say no more; but I shall be able to shew that there shall as much prejudice come to the kingdom, if God direct not the heart of the king, which is in the hand of God, as the rivers of waters; I say, there may as much hazard come to the commonwealth in many other things, with which the king is trusted, as in this particular there can accrue to the subject.

If a treason be committed, as it was not

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long ago, not far removed from our memories; since there was a treason, and the actors thereof fled, some to the court of Rome, some to Brussels, when it was to be put in execution; the treason being discovered, one is apprehended upon suspicion of it, and is put into the Tower, and there he lieth, and thinketh the time very long; and I cannot blame him.

It may be he is innocent, and thereupon he brings a Habeas Corpus, and by virtue of that writ he is brought hither; and will your lordship think it fit or convenient to bail him, when the accusation against him must come from beyond the sea? I think you will rather so respect the proceedings of the state, as that you will believe these things are done with a cause, than inquire further of them.—Peradventure some great misdemeanor may be committed, and some of the parties make away, so as Proclamation cannot overtake them, and some are taken, is it fit that they that are in prison should be tried before the principal be taken?

I will give you an instance, that lately was put into my mind; there be some prisoners in the Tower at this present, which were put in thither when they were very young: if they should bring an Habeas Corpus, they were imprisoned for State-matters, will your lordship deliver them? No, in that the state doth not think it fit to send them back into their own countries, you will esteem so reverendly of the state for committing children, that you will believe that there is great reason of state so to do, or else they would not do it: many inconveniences may follow, if it should be otherwise. It may be, divers men do suffer wrongfully in prison, but therefore shall all prisoners be delivered? That were a great mischief.

No doubt but the king's power is absolutely over his coins; if then he shall command his coin shall be turned to brass or leather, I confess it were inconvenient; but if the king would do it, the answer that I can make is, that he would not undo the kingdom: but can your lordship hinder it, as being an inconvenience, if he would do it? The Cinque-Ports are free for traffick for all his subjects; but the king in his cabinet understands there is danger of war to come upon this kingdom, thereupon he shuts the ports, that no man can go out; shall the merchant say this is injustice in the king? And as in this, so in many other particulars this may appear, but I will not go too high: and therefore we are too wise, nay we are too foolish, in undertaking to examine matters of state, to which we are not born. Now, my lord, I come to our book-cases, by which it appears what our king may do, and nothing can be said against it, but he will not do it; the king may pardon all traitors and felons, and if he should do it, may not the subjects say, If the king do this, the bad will overcome the good? But shall any say, The king cannot do this? No, we may only say, He will not do this.

The king may exempt men from the office of Sheriff, is not this inconvenient? And may it not be said, he may exempt ten in a shire, and then the burden of the country shall rest upon the meaner sort of people? can any man say more to this, than that he will not do it?—Inheritances are to be decided upon trial, the king may exempt private men from being of a Jury; but if he exempt all men, who shall try our causes? for it is to be presumed, that he will not do it.

But to our case: By the statute of Magna Charta, no man shall be put out of his Freehold, &c. But if the king will do it, must not the party that is so put out go to the king by petition? But you will say, It is a petition of right; and it may be these gentlemen's is so; admit it be, yet when such a petition comes to the king, must it not be answered with these words, *Soit droit fait al parte?* And when the king will give that warrant for it, then they must have it done, and not before.

And this may answer a perpetual imprisonment, and God forbid that this should be so; and now, my lord, I will trouble you no longer, but I will go to precedents. Precedents I know prevail much, and rule in many cases; and if the precedents they cite were not misinterpreted, I should think they had said a great deal.

But, my lord, I will answer their precedents with precedents; nay, I will shew your lordship that the precedents which they have cited are no precedents for them.—And, my lord, it is a dangerous thing for men in matters of weight to avouch precedents with confidence, when they make nothing for them: for, my lord, precedents are now become almost proclamations, for they already run up and down the town; and yet they know but part of them, and not all, and I think if they knew all, men would be more modest.

But, my lord, I will now come to these Precedents, where I may say they have not dealt freely with me, for they have shewed me many precedents more than they mentioned here, and it may be they have done the like unto your lordship. They alledged but 8 precedents before your lordship, but they have brought 16 unto me: for these eight mentioned here, I will take them in order as they were cited, and answer.

The first precedent they cited was in H. 8, Rot. 9, of one Harrison: we have the Record here to shew your lordship, that he was committed for suspicion of Felony, which was expressed in the warrant; and then, my lord, this is clear, if the king, or the lords of the council, will express any thing within your lordship's jurisdiction, there is good ground for your proceedings; but when there is nothing expressed, whether you will judge what the cause of the warrant is, I will leave to your lordship's judgment; but it appears this was the cause, and that he was delivered.

The next precedent was 22 H. 8, Rot. 57, and it was Parker's case: and it is true that his commitment appeared to be 'per speciale 'mandatum domini regis,' but it was also pro-

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posed to be 'pro pace et suspicione feloniæ;' and the signification of the command was given by Mr. Peck of Clifford's-Inn: but there the warrant shews the cause of the commitment was for the peace and suspicion of felony, and therefore he was bailed.

The next was in 40 Eliz. Wendon's case; but, my lord, that commitment was out of the Star-Chamber by an ordinary course; then they cited 8 Jac. Thomas Cæsar's case; he indeed was committed by 'speciale mandatum 'domini regis,' and brought his Habeas Corpus, but the Roll saith 'remittitur:' and is that a warrant for them to say that he was delivered?

Then sir Tho. Vernon's case was cited; and, my lord, when we looked into the Records, we found that he was committed for suspicion of treason; and he was tried for it and discharged.

The next precedent was sir Tho. Monson's case; I wonder that they did cite that, for he was committed by the lords of the council indeed; but the ground of it was suspicion of the death of sir Tho. Overbury, and he was discharged again by the lords of the council. Certainly if they had known this, they would not have named this as a precedent.

The next was Reynor's case; he, my lord, was one of the Gun-Powder-Treason, and yet there was a warrant to discharge him too. And therefore what these precedents are, I shall submit to your lordship: I must confess, when they are cited together, they make a great noise; but when they are examined severally, they prove nothing.

My lord, there is one more precedent that was cited here before your lordship, and I hope that one shall be as none. It was mentioned to be Laurence Brown's Case, 30 Eliz. I know not what it is, but it is like to be of the same value as the rest; 'Pro certis causis eos moven-'tibus, &c.'

And thus, my lord, I have gone through those precedents that were alledged here before your lordship; and now I will come to those precedents that were brought to me, and not mentioned here.

The first was John Browning's case, in 21 H. 8. My lord, these precedents came not to me before Saturday last, about candle-lighting; and yesterday was no time fitting to search out precedents, and how could I then search for this?

The next was William Roger's case, of the same time. But the cause is expressed to be for suspicion of felony, which is a cause within the jurisdiction of this court.

Newport's case was the like, in 4 et 5 Phil. et Mar. and so was Thomas Laurence's case, 9 Eliz. and Edw. Harcourt's case, 5 Eliz. which was for suspicion of felony. R. Beckwith and not Bartwith, as was cited, for they have mistaken both names and matters, was committed 'per speciale mandatum domini regis;' and the Record saith he was bailed. But it was by reason of a letter from the lords of the council.

The cause of Peter Man's commitment in the 4 and 5 of Philip and Mary, appears to be for suspicion of felony and robbery.

For Reynor's case, it is the same with Beckwith, and were both for one thing.

In the 8 Hen. 7 one Roger Cherry was committed 'per mandatum domini regis,' and it was for a criminal case; and he was afterwards indicted and acquitted and delivered. And there is another precedent thereof, that saith, he was afterwards arraigned, condemned, and hanged; we have the Record of it.

And now, my lord, I will shew some precedents on the other side, where men have been committed by the commandment of the king, and by the commandment of the council, and have been delivered again by their directions: and of this kind there be two in the Tower, that as they were committed by warrant, so by warrants again for their bailing they were delivered; the offences were against the forest, and for murder.

In 4 E. 3, M. 4, Edmund de Newport in Essex was indicted for an offence committed by him in the Forest. And M. 7. John Fox was likewise indicted for an offence by him done in the Forest: and there be two warrants to bail them.

M. 20. John Cobb was the like, and there was a letter from the king, 'Quod ponatur in 'ballium usque ad proximam assisam.' These were offences within Westminster primo, and there be several warrants to bail them.

The clerk of this court hath many records, by which it appeareth, that many have been committed by the command of the king and of the queen, and of the council, and brought their Habeas Corpus; and the success was, that many of them were committed to the same prisons, and divers were committed to the marshal of this court: the reason was, for that many of them were to appear here, their causes being triable here; and it would have been a great trouble to send them back so far to prison as into the countries, and therefore they were delivered to the marshal of the king's houshold: again, many had their trials in this court, and some suffered, and some were delivered by special command, as they were committed by special command. —The number of these of this nature are infinite that have been in our times; we have found some forty precedents of men committed out of the Chancery, and by the high-commission, for contempts, and some by the barons of the exchequer, and some in London, that have been brought hither by Habeas Corpus.

Of this I shall observe, that in the 11 Jac. there was a private constitution in London, made between the white bakers, that they might live one by another, and the one not to invade the other's liberties; and for contempt against this ordinance, some were committed to prison; as Thomas Heaning, and Littlepage: they had a Habeas Corpus, and the cause was shewn to be by reason of the said constitution, and thereupon the prisoners were sent back to London, to abide the order of the mayor. For, my lord, this court hath been ever careful not

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to examine the Decrees of the Chancery, or Court of Requests, but have only looked whether the cause returned be within the jurisdiction of this court; nor have they called in question the by-laws and constitutions of London, but they send them back to the court of justice that committeth them.—And hath this court been so careful of these inferiour courts to this which is the chief? and when the king, who is the head of justice, shall commit a man, shall not they be as careful to do the like justice to him? But when the king saith to them, The commitment was by my warrant and commandment, will you question this, and whether this commitment be good or no? I hope you will not.

And now, my lord, touching some Precedents which have been taken out of their own shewing, I shall make it appear, that as they have been committed by the king or council, so they had warrants also to discharge them: and they, my lord, are two ancient records; the first is 7 H. 7, Rot. 6. the other, Rot. 73. The first was Thomas Brown, he was committed to the Marshalsea, 'per mandatum domini regis, et 'aliis certis de causis:' and afterwards the records say, 'Dominus rex quoad chase relax-'avit mandatum suum,' and he was bailed and the rest lay by it.

My lord, I will conclude; I could be infinite in this case in precedents, but enough is enough, your lordship knoweth the weight of precedents; it is not enough to shew this was done, but also to shew the reason why it was done. I will trouble your lordship no longer, but if any man shall doubt whether that or any part thereof be truly recited which hath been said touching the Records or Statutes, I can say no more, but that the Statutes have been read, and the Records are ready sorted out to be seen by your lordship.

I shall conclude (what I shall say) in this case, to answer the fear rather than the just ground of them that say, this may be a cause of great danger, with the words of Bracton, who spake not to flatter the present age; lib. 1. cap. 3, in the end, speaking of a writ for wrong done by the king to the Subject touching land, he hath these words: 'Si judicium 'a rege testatur (cum breve non currat contra 'ipsum) locus erat supplicationi quod factum 'suum corrigat et emendet, quod quidem si 'non fecerit, satis sufficit ei ad pœnam quod 'dominum expectet ultorem, nemo quidem de 'factis suis præsumat disputare, multo fortius 'contra factum suum venire.'—My lord, I English it not, for I apply it not, any man may make use of it as he pleaseth; and so I conclude both for the point of exception, and matter of the return, which I refer to your lordship's judgment, whether all in the return but these words, 'per speciale mandatum domini 'regis,' be not superfluous. And for the matter, whether these gentlemen be bailable or not bailable, I have shewed your lordship, that by the practice of all ages they are not bailable, but have been remanded back.

And therefore I pray your lordship, that these gentlemen may be remitted, and left to go the right way for their delivery, which is by a petition to the king. Whether it be a Petition of right or of grace, I know not; it must be, I am sure, to the king, from whom I do personally understand that these gentlemen did never yet present any petition to him that came to his knowledge.

L. C. Justice. Mr. Attorney, thus much we must say to you, you have taken a great deal of pains, you having had so short a time to consider of this case; it is a case of very great weight and expectation, and we do not intend that you shall expect long for our resolution, for that these gentlemen are in prison, and desire no doubt to know where they must trust; I hope we shall resolve according to the reason of former times, and according to our consciences: but this I must tell you, as I did those that argued, you must bring in your Precedents; for though we have seen some of them, yet some of them we have not seen, therefore we desire that your servants or yourselves do attend, and bring unto us after dinner those precedents you have mentioned on the king's part, for we intend to meet this afternoon, and you shall have our Opinions to-morrow: and I must tell you on the other side, that this cause being of such weight, counsel should be wary how they speak any thing to inveigle the court.—Touching such precedents as you urged in some of them, we know there is something urged which makes not for you, so you have omitted some material things to be shewn; I speak it to this purpose, not to prejudice the cause, or to deliver my opinion, which becomes me not, but to shew, that counsellors should be careful: and this I dare say, there is matter in some of the precedents themselves that leads to another case, if they were entirely cited.—The Term grows away, you shall not be long in expectation, we will meet this afternoon, and give you our Opinions to-morrow morning.

Mr. *Noye.* We desire that Mr. Attorney may bring the precedents of 34 Eliz. with him.

Mr. *Attorney.* I will shew you any thing; but, my lord, I shall be bold to claim the privilege of my place, as the king's counsel; when the king's Attorney has spoken, there ought to be no arguments after that; but if you ask to see any thing, you shall have it.

L. C. Justice. It is that we aim at, that truth and right may appear, and not to satisfy the one or the other part; but it is not desired to make use of it by way of reply, but for satisfaction only.

Serj. *Bramston.* My lord, for the precedents I cited, I did think they should have been brought and read in the court, that your lordship might see them.

L. C. Justice. You shall need no apology, the Records and Precedents shall be brought to the court, and read openly, for the court will not wrong you, and you shall see the difference between them, and your relation of them; nor you must not wrong us with your written verities.

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On Thursday the 28th of November, Michaelis, 3 Caroli Regis, Chief-Justice Hyde, Justice Doderidge, Justice Jones, and Justice Whitlock on the bench: Sir John Corbet, sir Walter Earl, sir John Heveningham, and sir Edmund Hampden at the bar.

L. C. Justice. I am sure you here expect the resolution of the whole Court, as accordingly yesterday we told you you should have. This is a case of very great weight and great expectation, and it had been fit we should have used more solemn arguments of it than now for the shortness of the time we can do; for you have been long in prison, and it is fit you should know whereunto you should trust: I am sure you expect justice from hence, and God forbid we should sit here but to do justice to all men according to our best skill and knowledge, for it is our oaths and duties so to do, and I am sure there is nothing else expected of us. We are sworn to maintain all Prerogatives of the king, that is one branch of our oath; and we are likewise sworn to administer justice equally to all people.

We cannot, I tell you, deliver in solemn Arguments, and give the Judgments of every one of us touching this case, as the weight thereof requireth; but we have met together, and we have duly and seriously considered of it, and of all that which has been spoken of on either side, and we are grown to a Resolution, and my brothers have enjoined me to deliver to you the resolution of the whole court; and therefore, though it be delivered by my mouth, it is the resolution of us all: I hope I shall not mistake any thing of their intention in my delivery; but if I do, they sit here by me, and I shall not take it ill if they right me. Therefore I must tell you, there hath been many points learnedly argued at the bar, which we shall not touch, or give our resolution upon, but bend ourselves to the point in judgment here.

These three Statutes, as for example, the Statute of Magna Charta, 25 E. 3, and 36 E. 3, and the Statute of Wesminster primo, and divers other statutes that have been alledged, and particularly disputed of, we all acknowledge and resolve, that they are good laws, and that they be in force: but the interpretation of them at this time belongs not to us, for we are driven to another point; and though the meaning of them belongs to the one way or the other, yet our judgment must be the same; for that which is now to be judged by us is this, Whether one that is committed by the king's authority, and no cause declared of his commitment, according as here it is upon this return, whether we ought to deliver him by bail, or to remand him back again? Wherein you must know this which your counsel will tell you, we can take notice only of this return; and when the case appears to come to us no otherwise than by the return, we are not bound to examine the truth of the return, but the sufficiency of it, for there is a great difference between the sufficiency and the truth.

We cannot judge upon rumours nor reports, but upon that which is before us on record; and therefore the Return is examinable by us, whether it be sufficient, or not.

The Exceptions which have been taken to this Return were two: the one for the Form, the other for the Substance.

For the Form, whether it be formally returned or no, for it is not returned, as it is said, positively and absolutely, that they were committed by the king, but as it appears by a warrant from the lords of the council, and then there seems to be a contradiction in the return.—For first it saith, they were committed by the king's command, and afterwards it alledgeth it to be by a warrant of the lords of the council, and so it is repugnant.

Now we conceive that this is a positive and an absolute Return, and so the reason is, that he first returns that they are detained by the special command of the king, and if he had ceased there it had been positive; now there follows, that this was signified to them by the lords of the council. This is returned, to ascertain the court that he returned the cause truly, and to shew us that we should not doubt the verity of this return; and not to shew to us that he hath no knowledge of the cause but by the signification of the lords of the council: according to that Case of the bishop of Norwich, touching the Excommunication, he must testify his own knowledge, and not 'continetur 'in archivis:' so a Sheriff must not return 'quod mandavi ball', &c. and he gives this answer, unless it be a bailiff of a liberty that hath return of writs.

And so here if the Warden of the Fleet had returned, that the lords of the council had signified unto him that his prisoner was detained by the king's commandment, that had been sufficient: but when he returns positively at the first, that it is done by the king's direction, he shews afterwards that which should make it appear that he deals not falsely; which might have been omitted, but being mentioned that that is the scope of it, and not otherwise, the return is good and positive.

Now then to the other Objections, because he speaks nothing of the caption why they were taken, you know it is the usual return of all officers to answer the point in question; there is not one word in the Writ that demands the cause why they were taken, but why they are detained: so that the point in the writ is sufficiently answered; for though sometimes it is necessary that the cause of the caption should be certified, yet sometimes it is superfluous: but in our case the cause of the detention is sufficiently answered, which is the demand of the writ, and therefore we resolve that the form of this return is good. The next thing is the main point in law, whether the substance or matter of the return be good or no, wherein the substance is this, he doth certify that they are detained in prison by the special command of the king; and whether this be good in law or no, that is the question.

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To this purpose, if you remember this point, I say you did not cite any Book or Case in print, but many precedents, which, I confess, are so strong as any Book-cases, for Book-cases, I confess, are taken and selected out of the Records and Resolutions of Judges, and that is it which is in our books, though they be not so obvious for every eye, but are found out by pains and diligent search, and being produced, are of the same and equal authority with our Book-cases; but this must be when Records are brought faithfully and entirely, so that the court may judge of them.

Now the Precedents, you urged them to be so many, and so fully to the point, that we may thereby see that it is good to hear what can be said on both sides, and for to hear all, and view the Records themselves; and therefore we required you to bring the Records to us, and you did so, and you brought us more than you mentioned here; and we have perused them all, that thereby we might see whether the court be faithfully dealt withal or no; for though counsellors may urge a book for their own advantage, yet it is the duty of the court to see and distinguish of their allegations as the truth may appear.

This I told you yesterday, when I told you your Precedents warranted not so much as you urged them for; for if you remember, you urged some precedents to be, that where men were committed by the king, or by the lords of the council, and no cause expressed why they were committed, they were delivered.—This is in effect our case, if the precedents affirm that when a man is committed by the king's command, and no just cause is shewn, that upon such a general return the party shall *ipso facto* be delivered; for if the return be not amended, then he shall be discharged.—For although men come with prepared minds, yet the preparation of every man's heart ought to submit to the truth, and by the precedents, you shall see if it be so as you have alleged; but this I dare affirm, that no one of the Records that you have cited, doth inforce what you have concluded out of them, no not one; and therefore as you have cited Records and Precedents, Precedents shall judge this case.

I will shew you how they differ from the Records: you have concluded, when the king hath committed one, and expresseth not the cause, the court hath delivered the party; but you shall see the contrary concluded in every case that you have put: where the cause of the commitment hath been expressed, there the party hath been delivered by the court, if the case so required; but where there hath been no cause expressed, they have ever been remanded; or if they have been delivered, they have been delivered by the king's direction, or by the lords of the council: if this fall now in proof, you see you have gathered fair conclusions out of the Records; and that you may see that this is so, I have brought the Records with me of your own propounding, and I will go through them from point to point, and then judge yourselves of the case.

It is not material whether I call for them in that order as you produced them or no, and therefore I will take them as they are, first or last in the king's reign. They are in number many, in the time of H. 7, H. 8, Mary, Eliz. and king James's time.

I will shew you sir Thomas Monson's Case in 14 Jac. which was in all our memories.

I will begin with Hill. 8 H. 7, R. Cherry's Case; you vouched it to this purpose, That Cherry being committed by the mayor of Windsor, was brought hither by a Habeas Corpus, and the mayor returns that he was committed 'per mandatum domini regis,' and that thereupon he was delivered; but you shall find by the Record, that he was committed by the mayor at the suit of the king for felony, for which he was afterwards indicted, brought to trial, and then discharged. (Vide this Record in Mr. Selden's Argument in the parliament, 3 & 4 Car. Regis, and so all the rest *postea.*)

The next was 19 H. 7, Urswick's Case; and you say he was brought hither by the Warden of the Fleet, who, as you said, returned that he was committed 'per mandatum domini regis,' and you said he was discharged, but he was bailed upon the Lord's Letter, and brought hither to record his return, for he was bound to appear here, and then he was discharged; but that was the cause of his bringing hither. (Vide the Records as aforesaid.)

The next was Hugh Pain's Case, in 21 H. 7, and that you urged thus: You say that he was brought hither by a H. Corpus by the Warden of the Fleet, who returned that he was committed by the king's council, and he was bailed: now, we find that he was committed by them for suspicion of felony; and that cause was declared, and he was bailed: so that you see there was a cause expressed. (Vide the Records aforesaid.)

The next is 2 H. 8, Thomas Beckley, and Robert Harrison's Case; these you said were brought in hither by George, earl of Shrewsbury, and Thomas earl of Surry; and the return was, that they were committed by the command of H. 7, and that they were bailed; but you shall find that they were committed for suspicion of felony; and that Harrison was committed by H. 7, but it was for Homicide upon the sea, and so the cause is expressed, and afterwards he was bailed. The next was in 22 H. 8, John Parker's Case: you urged it to this purpose, That he was brought hither by a H. Corpus by the sheriffs of London, and they you said returned, that he was committed 'per speciale mandatum domini regis nuncia-'tum,' &c. by Robert Peck, &c. The cause why you urged this was two-fold; 1. That he was committed by the king's command, and yet he was bailed: 2dly, That he was committed 'per mandatum domini regis nuncial',' per such a one: but you shall find by the Record that he was committed for the security of the peace, and for suspicion of felony, and that was the cause for which he was bailed, for he is bailable by law when such a cause appears. (Vide the Record as aforesaid).

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Go on to the next, and that is Peter Man's Case, in the 3 and 4 Phil. and Mary; you urged that to this purpose, you say, that he was brought by the Keeper of the Gate-house, and you say, that he returned, that he was committed by the command of the king and queen's council, and thereupon he was bailed; but you shall find that he was committed for suspicion of felony and robbery, and thereupon he was bailed.

The next is in the 4 and 5 Phil. et Mar. Edward Newport's Case; you said that the Constable of the Tower brought him hither, and returned that he was committed by the council of the king and queen, and that he was bailed: but you see by the Records, that he was committed for suspicion of coining, which is bailable only in this court, and therefore it was removed hither. Yet this I must tell you, that it is true, in one Record it appears not but as you have cited it; but you may see how it is supplied by another record, and the cause, and he was delivered by a proclamation. (Vide both Records in Mr. Selden's Argument).

Doderidge. He could not be delivered by proclamation, unless it was for a criminal cause.

L. C. J. (Hyde). Observe another thing in the Book, he is brought hither by the special command of the council: so that although it appears not in the record, yet if the king or lords mean to have him tried for his life, he is brought hither. Then you cited Robert Constable's case, 9 Eliz. and you said he was brought hither by the Lieutenant of the Tower, who returned that he was committed by the lords of the council, and thereupon he was bailed; but you shall find that he came hither to plead his pardon, and he was pardoned. (Vide the Record as aforesaid).

Thomas Lawrence's Case in 9 Eliz. is the same with Constable's, for it appears that he was brought hither to plead his pardon, and he was pardoned, and that was the cause he was brought hither.

The next was in the 21 Eliz. John Browning's Case; it is true he was committed by the lords of the council, and he was brought by a H. Corpus to the chamber of sir Christ. Wray, chief justice, and he was there bailed.

The next was 33 Eliz. Wm. Rogers; and he, you said, was brought hither by the Keeper of the Gate-house, who returned, that he was committed to him by the lords of the council, yet there was a cause expressed, and that was for suspicion of coining of money.

The next was in 39 Eliz. Laurence Broome; you say that he was brought hither by the keeper of the Gate-house, who returned, that he was committed for divers causes, moving the lords of the council, and thereupon he was delivered; but the Record is, that the return also was for suspicion of treason; and although the suspicion of treason appears not in one Record, yet there is another for it. Here you see the cause of his commitment, and that he was bailed, but it was by the king's command, *usque Oct. Michaelis.* (Vide the Record).—I blame not you that are of counsel with these gentlemen for urging this Record, for this cause is not expressed in your Record, but that he was committed by the command of the council only; but he was committed for suspicion of felony with sir Thomas Smith. (Vide the Record).

The next is in 40 Eliz. Edward Harcourt's case, and Thomas Wenden's case; I bring them together, because they are both in one year. In the 40 of Eliz. Harcourt, you say, was committed to the Gate-house by the lords of the council; and the return was, that he was committed by them, 'Certis de causis ipsos 'moventibus ignotis,' and he was bailed.—Here is another in the same time committed to the same prison by the lords in the Star-chamber, it was Thomas Wenden's case; and he, you say, was committed by them, 'certis de 'causis,' (as the other was) and that he was bailed; but you shall find in the margin of the Roll, 'Traditur in bail' ex assensu concilii do-'minæ reginæ;' and that was the relation of the queen's Attorney, so that you see how the precedent fits you.

The next are two more commitments to the Gate-house, Beckwith and Reyner; they, you said, were committed to the Gate-house, brought their H. Corpus, and the Keeper of the Gate-house returned, that they were committed by virtue of a warrant from the abp. of Canterbury, Henry earl of Northampton, lord warden of the Cinque Ports, and others of the privy-council; requiring the said Keeper to receive the said Beckwith and Reyner into his charge, until they should have further order from them in that behalf; and you say they were bailed. (Vide the Record in Mr. Selden aforesaid) —Now you shall see the direction to bail him; he was bailed by the direction from the lords of the council, as appears by their letter. (Vide as aforesaid).

Now we come to Cæsar's Case, in 8 Jacobi; you urged that to this purpose: you say he was committed to the Marshalsea, who upon a H. Corpus returned, that he was committed 'per 'speciale mandatum domini regis,' and you say, because the return was so general, the rule of the court was, that it should be amended, or else he should be discharged. I will open to you what the reason of that rule was, for that notice was taken, that the Keeper of the prison had used a false return, and had usurped the name of the king; I know not how, but the commitment was not by the king's command; and that was the cause that he had a day given him to amend his return, but his body was remanded to prison, as you shall see by the Record. (Vide the Record, &c.).

The last precedent that you used, was that of sir Tho. Monson; and that was so notorious, and so late, that I marvel that was offered at all, it made me jealous of all the rest, that was so notorious; and now I have omitted none you brought me. (Vide the Record.)—By this Record you may see that he was committed by divers lords of the council; and it

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was for the suspicion of the death of sir Tho. Overbury; and it is notoriously known, that he was brought hither to plead his pardon.

I will not tell you that you read all these precedents, for you read none, but urged them here before us; but we required you to bring them to us, and they were brought to us, Mr. Corbet brought them all but one, and that Mr. Noye brought, it was in the 22 H. 8, Parker's Case; and one Mr. Holborn, a man whose face I never saw before, nor is he now in mine eye, did yesterday bring us one precedent to this purpose; and it was sir John Brocket's Case in 1 Jac. he was committed to the Gatehouse, and upon a Habeas Corpus, the Keeper returned that 'Commiss' fuit per warrantum 'dominorum de privat' concilio, cujus tenor 'sequitur in hæc verba,' viz. 'To the Keeper 'of the Gatehouse,' &c. (Vide Mr. Selden's precedents; but see upon what ground he was bailed, it was a special command of the lords of the council. Vide the Record).

These are all the Records and Precedents that you ministered unto us in your Argument, and that were delivered unto us, for I have dealt faithfully with you; and now you have seen them in the cases, I would have any man judge of the conclusion which you made the last day, that when a man is committed, and the case not known, but it is certified to be by the king's special commandment, and the Habeas Corpus is procured by yourselves and speeded by the king, that we can discharge or bail them.

Then the Precedents are all against you every one of them, and what shall guide our judgments, since there is nothing alledged in this case but precedents? That if no cause of the commitment be expressed, it is to be presumed to be for matter of state, which we cannot take notice of; you see we find none, no not one, that hath been delivered by bail in the like cases, but by the hand of the king or his direction.

If we should cease here, you see you have shewn nothing to satisfy us, and we know that you that be of their counsel, will satisfy your clients therein. But you shall see that we have taken a little pains in this case, and we will shew you some Precedents on the other side; and I believe there be 500 of this nature, that may be cited to this purpose. I shall go retrogade, and go backwards in citing the years of the precedents that I shall mention.

I will begin with 7 H. 8, Edward Page, he was brought hither by the Steward of the Marshalsea, who returned that he was committed 'per mandatum domini regis,' and he was remitted, so that he was not delivered upon this general return, but he was remanded.

The next was 12 H. 7, there you shall see a precedent where one was committed, his name was Thomas Yew, he was committed for felony, and also 'per mandatum domini regis,' and the king's Attorney came hither and released the king's command, and thereupon he was bailed.

Mr. Noye. It is all one with Parker's case.

L. C. J. No; for here were two causes of the commitment, Hobart was then the king's Attorney, and he signified in open court that he was discharged by the king's command, and 'Postea traditur in ball' pro suspicione feloniæ.'

The next was Humphrey Broch, 9 H. 7, Rot. 14. you shall find it much to that purpose as the other was before; he was imprisoned for an outlawry, and by the commandment of the king also, and after that the release of the king's commandment was certified to the chief-justice, he was thereupon discharged. (Vide the Record).

The next is 7 H. 7, Thomas Brown, John Rawlings, Robert Sherman and others, were committed 'per mandatum domini regis,' and for felony, outlawry, and other causes, as appears by the Records, and after the king releaseth his commandment, and that the outlawry should be reversed, and for the felony he was bailed. (Vide the Record).

So that you may see the offences mentioned in the Warrant for the commitment were triable here, and when the king releases his commandment they were bailed for the rest, but they that were committed by the commandment of the king were released by the king.

In 7 H. 7, the cases of Wm. Bartholomew, Henry Carre, William Chase, and others, is to the same effect, by all which you may see, that when the king releaseth his commandment, they were bailed for the rest, and as they were committed by the king's commandment, so they were released by the king's command.

Now here I shall trouble you with no more Precedents, and you see your own what conclusion they produce. And as to those strong precedents alledged on the other side, we are not wiser than they that went before us; and the common custom of the law is, the Common Law of the land, and that hath been the continual common custom of the law, to which we are to submit, for we come not to change the law, but to submit to it.

We have looked upon that precedent that was mentioned by Mr. Attorney; the resolution of all the Judges of England, in 34 Eliz. We have considered of the time, and I think there were not before, nor have been since, more upright Judges than they were, Wray was one, and Anderson another: in Easter term this was certified under the hands of all the Judges of England, and Barons of the Exchequer, in a duplicate, whereof the one was delivered to the Lord-Chancellor, and the other to the Lord-Treasurer, to be delivered to the queen. We have compared our copies, not taking them the one from the other, but bringing them; we have long had them by us together, and they all agree word for word; and that which Mr. Attorney said, he had out of Judge Anderson's Book, and it is to this purpose, to omit other things, that if a man be committed by the commandment of the king, he is not to be delivered by a Habeas Corpus in this court, for we know not the cause of the

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commitment. (Vide the latter end of the first part of Mr. Selden's argument, as aforesaid).

But the question now is, Whether we may deliver this gentleman or not? You see what hath been the practice in all the kings times heretofore, and your own Records; and this resolution of all the Judges teacheth us, and what can we do but walk in the steps of our forefathers? If you ask me which way you should be delivered, we shall tell you, we must not counsel you.

Mr. Attorney hath told you that the king hath done it, and we trust him in great matters, and he is bound by law, and he bids us proceed by law, as we are sworn to do, and so is the king; and we make no doubt but the king, if you seek to him, he knowing the cause why you are imprisoned, he will have mercy; but we leave that. If in justice we ought to deliver you, we would do it; but upon these grounds, and these Records, and the Precedents and Resolutions, we cannot deliver you, but you must be remanded. Now if I have mistaken any thing, I desire to be righted by my brethren, I have endeavoured to give the Resolutions of us all.*

PROCEEDINGS IN PARLIAMENT
RELATING TO THE
LIBERTY OF THE SUBJECT.

The Gentlemen continued in custody till the 29th of January following, when his majesty in council ordered all of them to be released; and writs being issued about this time for electing members of parliament, to meet March the 17th, 1627-8, those gentlemen who suffered for the Loan, were elected in many places. On the 17th of March the house met, and sir John Finch was chosen Speaker. On the 20th, the house settled their Committees; and the 22d was spent in opening the Grievances, as Billeting of Soldiers, Loans by Benevolence and Privy-Seal, and the imprisoning certain Gentlemen who refused to lend upon that Account, who afterwards bringing their Habeas Corpus, were notwithstanding remanded to prison; nor did the house incline to supply his majesty till these Grievances were redressed. To which purpose,

Sir *Francis Seymour* spoke thus:

This is the great council of the kingdom, and here (if not here alone) his majesty may see as in a true glass the state of the kingdom; we are called hither by his majesty's writs to give him faithful counsel, such as may stand with his honour; but this we must do without flattery: we are sent hither by the commons to discharge that trust reposed in us, by delivering up their just Grievances, and this we must do without fear: let us not therefore be like Cambyses's judges, who being demanded of their king whether it were not lawful for him to do what in itself was unlawful? They, rather to please the king, than to discharge their own consciences, answered, That the Persian kings might do what they listed. This base flattery tends to mischief, being fitter for reproof than imitation; and as flattery, so fear taketh away the judgment: let us not then be possessed with fear or flattery, of corruptions the basest. For my own part, I shall shun both these, and speak my conscience with as much duty to his majesty as any man, but not neglecting the public, in which his majesty and the commonwealth have an interest: but how can we shew our affections, whilst we retain our fears? or how can we think of giving of subsidies, till we know, whether we have any thing to give or no? For if his majesty be persuaded by any to take from his subjects what he will, and where it pleaseth him; I would gladly know what we have to give! It is true, it is ill with those subjects that shall give laws to their princes, and as ill with those princes which shall use force with those laws; that this hath been done, appeareth by the billeting of Soldiers, a thing no way advantageous to his majesty's service, but a burden to the commonwealth; this also appeareth by the last *Levy of Money against an Act of Parliament*. Again, Mr. Speaker, what greater proof can there be of this, than *the imprisonment of divers Gentlemen for the Loan*, who if they had done the contrary for fear, their fault had been as great as theirs that were the projectors in it; and to countenance these proceedings, hath it not been preached (or rather prated) in our pulpits, that all we have is the king's *Jure Divino*, say these time-servers; they forsake their own function, and turn ignorant statesmen: we see how willing they will be to change a good conscience for a bishopric; and Mr. Speaker, we see how easy it is for a prince, how just and good soever, to be abused, in regard he must see with other men's eyes, and hear with other men's ears. Let us not flatter his majesty, it is too apparent

* Mr. Whitlock in his Memorials of the English Affairs, p. 8, (edit. 1732), says, "Five of the imprisoned gentlemen, by Habeas Corpus were brought to the King's-bench; and (by their counsel assigned) took exceptions to the Return, "For that it had not the cause of their Commitment, but of their detainer in prison, 'per speciale mandatum regis,' which is no particular cause; and the law being most tender of the subjects liberty," Noye, Selden, Bramston, Calthorpe, and others, who were of counsel for the prisoners, prayed they might be released and discharged.—Heath, the King's Attorney, at another day argued in maintenance of the Return. Hyde, Chief-Justice, declared the opinion of the court, "That the Return was positive and absolute, by the king's special command, and the signification of it by the lords of the council is only to inform the court: and that the Habeas Corpus is not to return the cause of the imprisonment, but of the detention in prison; that the matter of this Return is sufficient, and the court is not to examine the truth of the Return, but must take it as it is. So the Prisoners were remanded."

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to all the world, the king and people suffer more now than ever; his majesty in his affairs abroad, and his people in their estates at home: but will you know the reason of all this? Let us look back to the actions of former princes, and we shall find that those princes have been in greatest want and extremity that exacted most of their subjects, and most unfortunate in the choice of their ministers, and to have failed most in their undertakings; happy is that prince that hath those that are faithful of his council. That which his majesty wanted in the management of his affairs concerning France and Spain, I am clear, was his want of faithful council to advise: the reason is plain, a prince is strongest by faithful and wise council; I would I could truly say, such have been employed abroad. I will confess, and still shall from my heart, he is no good subject, nor well affected to his majesty and the state, that will not willingly and freely lay down his life, when the end may be the service of his majesty, and the good of the common-weal. But on the contrary, when against a parliament-law, the Subject shall have taken from him his goods against his will, and his Liberty against the laws of the land; shall it be accounted want of duty in us to stand upon our privileges, hereditary to us, and confirmed by so many acts of parliament?—In doing this we shall but tread the steps of our forefathers, who ever preferred the public interest before their own right, nay, before their own lives; nor can it be any wrong to his majesty to stand upon them, so as thereby we may be the better enabled to do his majesty service. But it will be a wrong to us and our posterity, and our consciences, if we willingly forego that which belongs unto us by the law of God, and of the land, and this we shall do well to present to his majesty; we have no cause to doubt of his majesty's gracious acceptation.

Sir Thomas Wentworth.

This debate carries a double aspect towards the sovereign and the subject; though both be innocent, both are injured and both to be cured. Surely, in the greatest humility I speak it, these illegal ways are punishment and marks of indignation, *the raising of Loans* strengthened by commission, with unheard-of instructions and oaths; the billeting of soldiers by the lieutenants, and deputy-lieutenants, have been as if they could have persuaded christian princes, yea worlds, that the right of empires had been to take away by strong hands, and they have endeavoured, as far as possible for them, to do it. This hath not been done by the king (under the pleasing shade of whose crown I hope we shall ever gather the fruits of justice), but by projectors, who have extended the prerogative of the king beyond the just symmetry, which maketh the sweet harmony of the whole: they have brought the crown into greater want than ever, by anticipating the revenues; and can the shepherd be thus smitten, and the sheep not scattered? They have introduced a Privy-Council, ravishing at once the spheres of all ancient government, *imprisoning us without either bail or bond;* they have taken from us, what? What shall I say indeed, what have they left us? All means of supplying the king, and ingratiating ourselves with him, taking up the root of all property, which if it be not seasonably set again into the ground by his majesty's own hands, we shall have, instead of beauty, baldness. To the making of those whole, I shall apply myself, and propound a remedy to all these diseases. By one and the same thing have king and people been hurt, and by the same must they be cured; to vindicate, what, new things? No, our ancient vital liberties, by re-inforcing the ancient laws made by our ancestors, by setting forth such a character of them, as no licentious spirit shall dare to enter upon them. And shall we think this is a way to break a parliament? No, our desires are modest and just, I speak truly, both for the interest of the king and people; if we enjoy not these, it will be impossible for us to relieve him.—Therefore let us never fear they shall not be accepted by his goodness; wherefore I shall shortly descend to my motions, consisting of four parts; two of which have relation to our persons, two to the propriety of goods. For our Persons: first, the freedom of them from imprisonment: secondly, from employment abroad, contrary to the ancient customs. For our goods, that no Levies be made, but by parliament; secondly, no billetting of Soldiers. It is most necessary that these be resolved, that the subject may be secured in both.

Sir Benjamin Rudyard.

This is the crisis of parliaments; we shall know by this if parliaments live or die, the king will be valued by the success of us, the counsels of this house will have operations in all, it is fit we be wise; his majesty begins to us with affection, proclaiming, that he will rely upon his people's love. Preservation is natural, we are not now on the *bene esse*, but on the *esse;* be sure England is ours, and then prune it. Is it no small matter that we have provoked two most potent kings? We have united them, and have betrayed ourselves more than our enemies could. Men and brethren, what shall we do? Is there no balm in Gilead? If the king draw one way, and the parliament another, we must all sink. I respect no particular, I am not so wise to contemn what is determined by the major part; one day tells another, and one parliament instructs another. I desire this house to avoid all contestations, the bearers of kings are great, it is comely that kings have the better of their subjects. Give the king leave to come off; I believe his majesty expects but the occasion. It is lawful, and our duty to advise his majesty, but the way is to take a right course to attain the right end; which I think may be thus: by trusting the king, and to breed a trust in him: by giving him a large supply according to his wants, by prostrating our grievances humbly at his feet,

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from thence they will have the best way to his heart, that is done in duty to his majesty. And to say all at once, let us all labour to get the king on our side, and this may be no hard matter, considering the near subsistence between the king and people.

Sir Edward Coke.

'Dum tempus habemus, bonum operemur.' I am absolutely for giving a Supply to his majesty; yet with some caution. To tell you of foreign dangers and inbred evils, I will not do it; the State is inclining to a consumption, yet not incurable: I fear not foreign enemies, God send us peace at home: for this disease I will propound remedies, I will seek nothing out of mine own head, but from my heart, and out of acts of parliament. I am not able to fly at all Grievances, *but only at Loans.* Let us not flatter ourselves; who will give Subsidies, if the king may impose what he will? and if, after parliament, the king may inhance what he pleaseth? I know the king will not do it, I know he is a religious king, free from personal vices; but he deals with other men's hands, and sees with other men's eyes. Will any give a Subsidy that will be taxed after parliament at pleasure? The king cannot tax any by way of Loans: I differ from them, who would have this of Loans go amongst Grievances, but I would have it go alone.—I will begin with a noble Record, it chears me to think of it, 25 E. 3; it is worthy to be written in letters of gold; *Loans against the will of the Subject, are against Reason, and the Franchises of the Land,* and they desire restitution: what a word is that *Franchise?* The lord may tax his villein high or low, but it is against the franchises of the land, for freemen to be taxed but by their consent in parliament. *Franchise* is a French word, and in Latin it is *Libertas.* In Magna Charta it is provided that, 'Nullus 'liber homo capiatur vel imprisonetur aut dis-'seisietur de libero tenemento, suo, &c. nisi 'per legale judicium parium suorum vel per 'legem terræ;' which Charter hath been confirmed by good kings above thirty times.

When these gentlemen had spoken, sir John Cook, Secretary of State, took up the matter for the king, and concluded for redress of Grievances, so that Supplies take the precedency; and said:

Mr. Secretary Cook.

I had rather you would hear any than me; I will not answer what hath been already spoken; my intent is not to stir, but to quiet; not to provoke, but to appease: my desire is, that every one resort to his own heart to reunite the king and his state, and to take away the scandal from us; every one speaks from the abundance of his heart: I do conclude out of every one's conclusion, to give to the king, to redress grievances; all the difference is about the manner. We all are inhabitants in one house, the Common-wealth, let every one in somewhat amend his house, somewhat is amiss: but if all the house be on fire, will we then think of mending what is amiss? will you not rather quench the fire? the danger all apprehend. The way that is propounded, I seek not to decline. Illegal courses have been taken, it must be confessed, the redress must be by laws and punishment: but withal, add the law of necessity; necessity hath no law, you must abilitate the state to do, what you do by petition require. It is wished we begin with Grievances; I deny not that we prepare them, but shall we offer them first? Will not this seem a condition with his majesty? Do we not deal with a wise king, jealous of his honour? All subsidies cannot advantage his majesty so much, as that his subjects do agree to supply him; this will amaze the enemy more than ten Subsidies: begin therefore with the king, and not with ourselves.

Sir Robert Phillips.

This day's debate makes me call to mind the custom of the Romans who had a solemn Feast once a year for their slaves, at which time they had liberty, without exception, to speak what they would, whereby to ease their afflicted minds; which being finished, they severally returned to their former servitude. This may, with some resemblance and distinction, well set forth our present state; where now, after the revolution of some time, and grievous sufferings of many violent oppressions, we have, as those slaves had, a day of liberty of speech; but shall not, I trust, be herein slaves, for we are free, we are not bondmen, but subjects: these, after their feasts, were slaves again; but it is our hope to return freemen. I am glad to see this morning's work, to see such a sense of the Grievances under which we groan. I see a concurrence of grief from all parts, to see the Subject wronged, and a fit way to see the Subject righted: I expected to see a division, but I see an honourable conjunction, and I take it a good omen. It was wished by one, that there were a forgetfulness of all; let him not prosper that wisheth it not. No, there is no such ways to perfect remedy, as to forget injuries; but not so to forget, as not to recover them. It was usual in Rome to bury all injuries on purpose to recover them. It was said by a gentleman, that ever speaks freely, 'We 'must so govern ourselves, as if this parliament 'must be the crisis of all parliaments, and this 'is the last.' I hope well, and there will be no cause for the king, our head, to except against us, or we against him. The dangers abroad are presented to us; he is no Englishman that is not apprehensive of them.

We have provoked two potent kings (the one too near, who are too strongly joined together; the dangers are not chimerical, but real, I acknowledge it, but it must be done in proportion of our dangers at home: I more fear the violation of public Rights at home, than a foreign enemy. Must it be our duties and direction to defend foreign dangers, and establish security against them, and shall we not look at that which shall make us able and willing thereun-

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to? We shall not omit to confide and trust his majesty, otherwise our counsels will be with fears, and that becomes not Englishmen. The unaccustomed violences, I have nothing but a good meaning, trench into all we have. To the four Particulars already mentioned, wherein we suffer, one more may be added, lest God forbear to hear me in the day of my trouble; our Religion is made vendible by Commissions: alas! now a toleration is granted (little less), and men for pecuniary annual rates dispensed withal; whereby Papists, without fear of law, practise idolatry, and scoff at parliaments, at laws, and all. It is well known, the people of this state are under no other subjection, than what they did voluntarily consent unto, by the original contract between king and people; and as there are many prerogatives and privileges conferred on the king, so there are left to the Subject many necessary Liberties and Privileges, as appears by the common laws and acts of parliament, notwithstanding what these two Sycophants, Sibthorp and Manwaring, have prated in the pulpit to the contrary. Was there ever yet king of England that directly violated the Subjects Liberty and Property, but their actions were ever complained of in parliament, and no sooner complained of than redressed? 21 E. 3, there went out a Commission to raise money in a strange manner; the succeeding parliament prayed redress, and, till H. 8, we never heard of the said Commissions again.—Another way was by Loan, a worm that cankered the law, the parliament did redress it, and that money was paid again. The next little engine was Benevolence; what the force of that was, look into the statute of R. 3, which damned that particular way, and all other indirect ways.

Since the Right of the Subject is thus bulwarked by the law of the kingdom, and princes upon complaint have redressed them, I am confident we shall have the like cause of joy from his majesty.

I will here make a little digression: the county, Somersetshire, I serve for, were pleased to command me to seek the removal from them of the greatest burthen that ever people suffered. It was excellently said, Commissionary Lieutenants do deprive us of all liberty; if ever the like was seen of the lieutenancy that now is, I will never be believed more: they tell the people they must pay so much upon warrant from a Deputy-Lieutenant, or be bound to the good behaviour, and sent up to the Lords of the Council; it is the strangest engine to rend the liberty of the subject that ever was: there is now a Decemviri in every county, and amongst that Decemviri, there is some Claudius Appius that seek their own revenges. We complain of Loans and Impositions, but when Deputy-Lieutenants may send Warrants to imprison our persons at pleasure, if we pay not what they sent for, it concerns us to preserve the country in freedom, and to consider of this kind of people. There is now Necessity brought in for an argument; all know that Necessity is an armed man, and that Necessity is an evil Counsellor, I would we had never known that counsel; we are almost grown like the Turks, who send their Janizaries, who place the halbert at the door, and there he is master of the house. We have Soldiers billetted, and Warrants to collect money, which if they do not, the soldiers must come and rifle. The Romans sending one into Spain, found no greater complaint, than the discontent that did arise, from soldiers placed amongst them. I would you would look into Fortescue, where he puts the prince in mind, what misery he saw, where soldiers were put upon the people: but, saith he, no man is forced to take Soldiers but Inns, and they are to be paid by them. I desire we resort to his majesty for redress, and to reduce all into bounds.

The other way of Grievance is a Judgment in a legal course of proceeding; we have had three Judgments of late times, all exceeding one another in prejudice of the subject: the first was, that which was judged in all formality, the Postnati, Scots, case, * which people I honour; for we find many of them love us more than we do ourselves: I do not complain of it, but only mention it.

The other Judgment was for Impositions, † which was given in the Exchequer, and this house twice afterwards damned that Judgment: how remiss our eyes are upon that I grieve to see.

There is a Judgment, if I may so call it, a fatal Judgment against the Liberty of the Subject, Mich. 3 Car. in sir John Heveningham's Case, argued at the bar, and pronounced but by one alone. I can live although another without title be put to live with me; nay, I can live, although I pay Excises and Impositions for more than I do: but to have my Liberty, which is the soul of my life, taken from me by power, and to be pent up in a gaol without remedy by law, and this to be so adjudged to perish in gaol; O improvident ancestors! O unwise forefathers! to be so curious in providing for the quiet possession of our lands and liberties of parliament, and to neglect our persons and bodies, and to let them die in prison, and that *durante bene placito*, remediless. If this be law, what do we talk of our Liberties? Why do we trouble ourselves with the dispute of Law, Franchises, Propriety of Goods? It is the *summa totalis* of all miseries; I will not say it was erroneous, but I hope we shall speak our minds, when that Judgment comes here to be debated. What may a man call this? if not Liberty. Having passed in some confusion in the fashion of my delivery, I conclude: we will consider two particulars, his Majesty, and his People. His Majesty calls to us, and craves our assistance to revive again his honour, and the honour of the nation: the People send us, as we hope, with that direction, that we shall return to them with that olive branch, that assurance of being free from those calamities, under

* See vol. ii, p. 559. † Ibid. p. 371.

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which they can hardly breathe. Our sins have brought on us those miseries, let us all bring our portion to make up the wall: we come with loyal hearts; his majesty shall find, that it is we that are his faithful counsellors; let all sycophants be far removed from his majesty, since we cannot help his majesty without opening our Grievances; let us discharge our duties therein: yet while we seek Liberty, we will not forget subjection. All things a state can be capable of, either blessings or punishments, depend on this meeting: if any think the king may be supplied, and the commonwealth preserved without redress of Grievances, he is deceived. The kings of England were never more glorious than when they trusted their subjects; let us make all haste to do the errand for which we came; let the house consider to prepare our Grievances fit for his majesty's view, not to make a law to give us new liberties, but declaratory, with respective penalties; so that those which violate them, if they would be vile, they should fear infamy with men; and then we shall think of such a Supply as never prince received, and with our money we shall give him our hearts, and give him a new people raised from the dead: then I hope this parliament will be entitled, 'The Parliament of 'Wonders,' and God's Judgments diverted, and these beams of goodness shall give us life, and we shall go home to our own countries, and leave our posterities as free as our ancestors left us.

But this day, as also the two next day's Debate, produced no Resolutions.

Monday, 24 March. Secretary *Cook* renewed the motion of Supplies for his majesty, yet so, that Grievances be likewise taken into consideration. Then he made a motion, "That the same Committee may hear Propositions of general heads of Supply, and afterwards go to other businesses of the day for Grievances." Others preferred the consideration of Grievances, as a particular root that invaded the main Liberty of the Subject. It is the law (said they), that glorious fundamental Right, whereby we have power to give; we desire but that his majesty may see us have that right therein, which, next to God, we all desire; and then we doubt not, but we shall give his majesty all supply we can. The time was, when it was usual to desire favours for sowing of discords, as Gondomar did for Raleigh's head. But the debates of this day came to no Resolution.

The day following, being the 25th, Mr. Secretary Cook tendered the house certain Propositions from the king, touching Supply; and told them, That his majesty, finding time precious, expects that they should begin speedily, lest they spend that time in deliberation, which should be spent in action: that he esteems the Grievances of the house his own, and stands not on precedents in point of honour. Therefore, to satisfy his majesty, let the same Committee take his majesty's Propositions into consideration, and let both concur, whether to sit on one in the forenoon, or the other in the afternoon, it is all one to his majesty.—Hereupon the house turned themselves into a Committee, and commanded Edward Littleton, esq. unto the chair, and ordered the Committee to take into consideration the Liberty of the Subject, in his Person, and in his Goods: and also to take into consideration his majesty's Supply. In this Debate the Grievances were reduced to six heads, as to our Persons.

1. Attendance at the Council-board. 2. Imprisonment. 3. Confinement. 4. Designation for foreign Employment. 5. Martial Law. 6. Undue Proceedings in matter of Judicature.

The first matter debated, was the Subject's Liberty in his Person: the particular instance was in the case of sir John Heveningham, and those other gentlemen who were imprisoned about Loan-money, and thereupon had brought their Habeas Corpus, had their Case argued, and were nevertheles remanded to prison, and a Judgment, as it was then said, was entered.

Then *Sir Edward Coke* spoke as follows.

It is true, that the king's Prerogative is a part of the law of this kingdom, and a supreme part, for the prerogative is highly tendered and respected of the law; yet it hath bounds set unto it by the laws of England. But some worthy members of this house have spoken of foreign states, which I conceive to be a foreign speech, and not able to weaken the side I shall maintain.

That Mr. Attorney (sir Robert Heath) may have something to answer unto, I will speak, without taking another day, to the body of the cause, yet keeping something in store for another time. I have not my *Vade mecum* here, yet I will endeavour to recite my authorities truly: I shall begin with an old authority, for 'Errorem ad sua principia referre, est refel-'lere.'

The ground of this error was the Statute of West. 1, cap. 15, which saith, 'That those are 'not repleviable, who are committed for the 'death of a man, or by the commandment 'of the king, or his justices, or for the forest', (for so it was cited:) and Stamford 72, expounded hereof, the 'commandment of the 'king' to be the commandment of the king's mouth, or of his council: but it is clear that by *præceptum* is understood the commandment of the Justices of the King's bench, and Common-Pleas: and this is 'contemporanea expositio, 'quæ est fortissima in lege.'

To this purpose vide Westm. 1. cap. 9, the Book of 2 R. 2. item, cap. 20, *de malefactoribus in parc*, the Book of 8 H. 4, 5, item, 25, 26, 29, c. *ejusdem statuti*, whereby it may appear that the commandment here spoken of to be the commandment of the king, is his commandment by the Judges, 'Præceptum Do-'mini Regis in Curia, non in Camera.' So it is likewise taken 1 R. 2, cap. 12, in a Statute made in the next king's reign, and expressly in

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Dyer, fol. 162. §. 50. et fol. 192. §. 24. Shall I further prove it by matter of Record? 'Fac 'hoc et vives:' it is 18 E. 3, Rot. 33 coram Rege, John Bilston's Case: who being committed and detained in prison by the commandment of the king, was discharged by Habeas Corpus, 'eo quod breve domini regis non fuit 'sufficiens causa.'

All the acts of parliament in title of Accusation are direct to the point, and also the 16 H. 6, Brooke and Littleton, 2, 8, monstrans de fait 182, per Cur. The king cannot command a man to be arrested in his presence: the king can arrest no man, because there is no remedy against him, 1 H. 7, 4, likewise *prædict. stat.* c. 18, the king's pleasure is not binding without the assent of the realm.

I never read any opinion against what I have said, but that of Stamford, mistaken (as you see) in the ground: yet I say not that a man may not be committed without precise shewing the cause in particular; for it is sufficient if the cause in general be shewed, as for Treason, &c. 1 E. 2, *stat. de fran gend. prison. nullus habeat judicium*, &c. there the cause of imprisonment must be known, else the statute will be of little force; the words thereof do plainly demonstrate the intent of the statute to be accordingly. I will conclude with the highest authority, that is, 25 chap. of the Acts of the Apostles, the last verse, where St. Paul saith, 'It is against reason to send 'a man to prison without shewing a cause.'—Thus, Mr. Attorney, according to the rules of physic, I have given you a preparative, which doth precede a purge. I have much more in store.*

Mr. Cresswell.

I stand up to speak somewhat concerning the point of the subjects grievances by imprisonment of their persons without any declaration of the cause, contrary unto, and in derogation of, the fundamental laws and liberties of this kingdom. I think I am one of the Puisnes of our profession, which are of the members of this house; but howsoever sure I am in that respect of my own inabilities, I am the Puisne of all the whole house; therefore, according to the usual course of students in our profession, I (as the Puisne) speak first in time, because I can speak least in matter.

In pursuance of which course I shall rather put the case than argue it: and therefore I shall humbly desire first of all, of this honourable house in general, that the goodness of the cause may receive no prejudice by the weakness of my argument; and next of all, of my masters here of the same profession in particular, that they by their learned judgments will supply the great defects I shall discover by declaring of my unlearned opinion.

Before I speak of the question, give me leave, as an entrance thereunto, to speak first of the occasion. You shall know, Justice is the life and the heart's blood of the commonwealth; and if the commonwealth bleed in the master-vein, all the balm in Gilead is but in vain to preserve this our body of policy from ruin and destruction. Justice is both 'columna et corona 'reipublicæ,' she is both the column and the pillar, the crown and the glory of the commonwealth. This is made good in Scripture by the judgment of Solomon, the wisest king that ever reigned on earth. For 1, she is the pillar; for he saith, that by Justice the throne shall be established: 2, she is the crown; for he saith, that by Justice a nation is exalted.—Our laws, which are the rules of this Justice, they are the *ne plus ultra* to both the king and the subject; and as they are the Hercules' pillar, so are they the pillar to every Hercules, to every prince, which he must not pass. Give me leave to resemble her to Nebuchadnezzar's tree: for she is so great, that she doth shade not only the palace of the king, and the house of the nobles, but doth also shelter the cottage of the poorest beggar.

Wherefore, if either now the blasts of indignation, or the unresistable violator of laws, necessity, hath so bruised any of the branches of this tree, that either our persons, or goods, or possessions have not the same shelter as before; yet let us not therefore neglect the root of this great tree, but rather with all our possible endeavour and unfeigned duty, both apply fresh and fertile mould unto it, and also water it even with our own tears, that so these bruised branches may be recovered, and the whole tree again prosper and flourish. For this I have learned from an ancient Father of the Church, that though 'preces regum sunt armatæ,' yet 'arma subditorum' are but only 'preces et la-'chrymæ.'

I know well that 'cor regis inscrutabile;' and that kings, although they are but men before God, yet are they Gods before men. And therefore to my gracious and dread sovereign, (whose virtues are true qualities ingenerate both in his judgment and nature) let my arm be cut off, nay, let my soul not live that day, that I shall

* "I rise not to make an argument in this point, the greatest that ever was in this place, or elsewhere. This liberty, which all men, as well lawyers as others, believe, as I hope, hath been violated, though not without complaint: but except in this late course, I am confident, was never adjudged before. The Habeas Corpus was brought, the cause was returned by command of the king, intimated by the lords of the council; Argument was made; seven acts of parliament were mentioned, and all were passed over, and only commended; and upon that a Declaration of Judgment was given, and so adjudged; 'That upon any commitment by the 'king or the council, no enlargement can be.' I ever observed, in any great cause, solemn arguments used to be made. We see his majesty and his council are both interested in this. I do desire that some of the king's counsel may speak what they can to satisfy us of this great power." MSS. Pymmii apud virum honoratum Thomam Hales baronettum. See Selden's Life in his Works, vol. 1, p. 12.

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dare to lift up my arm to touch that forbidden fruit, those flowers of his princely crown and diadem.

But yet in our Eden, in this garden of the commonwealth, as there are the *flowers of the sun*, which are so glorious that they are to be handled only by royal majesty; so are there also some daisies and wholesome herbs, which every common hand that lives and labours in this garden may pick and gather up, and take comfort and repose in them. Amongst all which this *oculus dici*, this *bona libertas* is one, and the chief one.

Thus much in all humbleness I presume to speak for the occasion. I will now descend to the question: wherein I hold, (with all dutiful submission to better judgments) that these acts of power in imprisoning and confining of his majesty's subjects in such manner, without any declaration of the cause, are against the fundamental laws and liberties of this kingdom.

And for these reasons thus briefly drawn, I conclude,

1. The first, from the great favour which the law doth give unto, and the great care which it hath ever taken of the liberty and safety of this kingdom. I should not need to take the question in pieces, nor handle it in parts dividedly, but as one entire; because I hold no other difference between Imprisonment and Confinement than only this, that one hath a less and straiter, the other a greater and larger prison. And this word Confinement not being to be found in any one case of our law, if therefore it is become the language of state, it is too difficult for me to define.

To proceed therefore in maintenance of my first reason; I find our law doth so much favour the Subject's Liberty of his person, that the body of a man was not liable to be arrested or imprisoned for any other cause at the common-law, but for force, and things done against the pence. For the common-law (being the preserver of the land) so abhorreth force, that those that commit it she accounts her capital enemies, and therefore did subject their bodies to imprisonment. But by the statute of Marlebridge, Cap. 24, which was made 35 H. 3, who was the eighth king from the Conquest, because bailiffs would not render accounts to their lords, it was enacted, that their bodies should be attached: And afterwards by the Statute 23 Ed. 3, 17. who was the eleventh king after the Conquest, because men made no conscience to pay their debts; it was enacted, that their bodies should likewise be attached: But before those statutes no man's body was subject to be taken or imprisoned otherwise than as aforesaid. Whereby it is evident, how much the common-law favoured the Liberty of the Subject, and protected his body from imprisonment.

I will inforce the reason further by a rule in law, and some cases in law upon that rule. The rule is this, That 'Corporalis injuria non re-'cipit æstimationem è futuro;' So as if the question be not for a wrong done to the person, the law will not compel him to sustain it, and afterwards accept a remedy; for the law holds no damage a sufficient recompence for a wrong which is corporal.

The cases in law to prove this, shall be these. If one menace me in my goods, or that he will burn the evidence of my land which he hath in his custody, unless I make unto him a bond: there I cannot avoid the bond, by pleading of this menace. But if he restrains my person, or threatens me with battery, or with burning my house, which is a protection for my person, or with burning an instrument of manumission, which is an evidence of my enfranchisement; upon these menaces or dares, I shall avoid the bond by plea.

So if a trespasser drives my beast over another man's ground, and I pursue to rescue it, there I am a trespasser to him on whose ground I am. But if a man assault my person, and I for my safety fly over into another man's ground, there I am no trespasser to him, for, 'Quod quis in tuitione sui corporis fecerit, 'jure id fecisse existimatur.'

Nay, which is more, the Common-law did favour the Liberty not only of Freemen, but even of the persons of bondmen, and villeins, who have no propriety either in lands or goods, as freemen have; and therefore by the law, the lord could not maim his villein; nay, if the lord commanded another to beat his villein, and he did it, the villein should have his action of battery against him for it.—If the lord made a lease for years to his villein, if he did plead with his villein, if he tendered his villein to be champion for him in a writ of right; any of those acts, and many other, which I omit, were in law enfranchisements, and made these villeins freemen. Nay, in a suit brought against one, if he by attorney will plead that he is a villein, the law is so careful of freedom, that it disallows this plea by attorney, but he must do it *propria persona*, because it binds his posterity and blood to the villein's also. And thus much in the general for my first reason.

2. My next reason is drawn by an argument *à majori ad minus;* I frame it thus: If the king have no absolute power over our lands or goods, then *à fortiori* not over our persons, to imprison them without declaring the cause, for our persons are much more worth than either lands, or goods; which is proved by what I have said already, and Christ himself makes it clear, where he saith, 'An non est corpus supra 'vestimentum?' Is not the body of more worth than the raiment? Where the Canonists say, that *vestimentum* comprehendeth all outward things which are not in the same degree with that which is corporal. And our law maketh it also plain; for if a villein purchaseth frank-land, this makes it villein-land according to the nature of his person; but it holds not *è converso*, frank-land shall not free the person. Now that the king hath no absolute power either over our lands or goods, I will only at this time but put a case or two: for without proof of the premises, my conclusion would not follow.

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First for Land: The king cannot by his letters-patent make the son of an alien heir to his father, nor to any other, for he cannot disinherit the right heir, saith the book, nor do no prejudice to the lord of his escheat. The king by his prerogative shall pay no toll for things bought in fairs and markets; but a custom for paying toll to go over the soil and freeholds of another shall bind the king, for this toucheth the inheritance of the subject; and therefore the king shall not have so much as a way over his lands without paying; and if not a way, then certainly not the land itself.

Next for goods; If a man hath a jewel in gage for ten pound, &c. and is attainted for treason, the king shall not have this jewel, if he pays not the ten pound. So if cattle be distreined, and the owner of them afterwards be attainted, yet the king shall not have them until he have satisfied that for which they were distreined. And if in these cases, where the owners of the goods are such capital offenders, the king cannot have them; much less shall he have them when the owner is innocent, and no offender.

Nay, I may well say that almost every leaf and page of all the volumes of our Common-Law prove this right of propriety, this distinction of *meum* and *tuum*, as well between king and subject, as one subject and another: and therefore my conclusion follows, That if the prerogative extend not neither to lands nor to goods, then *à fortiori* not to the person, which is more worth than either lands or goods, as I said. And yet I agree, that by the very law of nature, service of the person of the subject is due to his sovereign; but this must be in such things which are not against the law of nature: but to have the body imprisoned without any cause declared, and so to become in bondage, I am sure is contrary unto, and against the law of nature, and therefore not to be inforced by the sovereign upon his subjects.

3. My next reason is drawn *ab inutili et incommodo*. For the Statute *de frangentibus prisonam*, made 1 E. 2. is, 'quod nullus qui prisonam fregerit, subeat judicium vitæ vel membrorum pro fractione prisonæ tantum, nisi causa pro qua captus imprisonetur tale judicium requirat.' Whence this conclusion is clearly gathered, That if a man be committed to prison without declaring what cause, and then if either malefactor do break the prison, or the gaoler suffer him to escape, albeit the prisoner so escaping had committed *crimen læsæ majestatis*, yet neither the gaoler nor any other that procured his escape, by the law suffer any corporal punishment for setting him at large; which, if admitted, might prove in consequence a matter of great danger to the commonwealth.

4. My next reason is drawn *ab regis honore*, from that great honour the law doth attribute unto sovereign majesty; and therefore the rule of law is, that 'solum rex hoc non potest facere, quod non potest injuste agere.' And therefore if a subject hath the donation, and the king the presentation to a church, whereunto the king presents without the subject's nomination, here the *quare impedit* lies against the incumbent, and the king is in law no disturber.

And Hussey, Chief-Justice, in 1 H. 7, fol. 4. saith, That sir John Markham told king Edw. 4. he could not arrest a man either for treason or felony, as a subject might, because that if the king did wrong, the party could not have his action against him.

What is the reason that an action of false imprisonment lies against the Sheriff, if he doth not return the king's writ, by which he hath taken the body of the subject, but this, because the writ doth *breviter enarrare causam captionis*, (which if it doth not, it shall abate, and is void in law) and being returned, the party when he appears may know what to answer, and the court upon what to judge? And if the king's writ under his great seal cannot imprison the subject, unless it contains the cause, shall then the king's warrant otherwise do it without containing the cause; that his judges upon return thereof may likewise judge of the same, either to remain, or judge the party imprisoned?

I should argue this point more closely upon the statute of Magna Charta 29. 'Quod nullus 'liber homo imprisonetur;' the Statute of West. 1. cap. 15. for letting persons to bail; and the Judgments lately given in the King's-Bench: but the latter of these Statutes having been by that honourable gentleman sir Edward Coke (to whom the professors of the law both in this and all succeeding ages, are, and will be much bound) already expounded unto us, and that also fortified by those many cotemporary expositions and judgments by him learnedly cited; and there being many learned lawyers here, whose time I will not waste, who were present; and some of them perhaps of counsel in the late cause adjudged in the King's-Bench, where you (to whose person I now speak) do well know I was absent, being then of counsel in a cause in another court, and my practice being in the country, far remote from the Treasure of Antiquity, and Records conducing to the clearing of this point; therefore the narrowness of my understanding commends unto me sober ignorance, rather than presumptuous knowledge, and also commands me no further to trouble your patience.

But I will conclude with that which I find reported by sir John Davis, who was the king's Serjeant, and so, by the duty of his place, would no doubt maintain to his uttermost the prerogatives of the king his royal master; and yet it was by him thus said in those Reports of his upon the case of Tanistry Customs, p. 29, That the kings of England always have had a monarchy-royal, and not a monarchy-seignoral: where, under the first (saith he,) "the subjects are freemen, and have propriety in their goods, and free-hold, and inheritance in their lands; but under the latter they are as villeins and slaves, and have propriety in nothing. And therefore (saith he) when a royal monarch makes a new conquest, yet if he receives any

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of his nation's ancient inhabitants into his protection, they and their heirs after them shall enjoy their lands and liberties according to the law." And there he voucheth this Precedent and Judgment following, given before William the Conqueror himself, viz. "That one Sherborn a Saxon, at the time of the Conquest being owner of a castle and lands in Norfolk, the conqueror gave the same to one Warren a Norman; and Sherborn dying, the heir claiming the same by descent according to the law, it was before the conqueror himself adjudged for the heir, and that the gift thereof by the Conqueror was void."

If then it were thus in the Conqueror's time, and by his own sentence and judgment, and hath so continued in all the successions of our kings ever since, what doubt need we have, but that his most excellent majesty, upon our humble Petition prostrated at his feet, (which, as was well said, is the best passage to his heart) will vouchsafe unto us our ancient liberties and birth-rights, with a thorough reformation of this and other just grievances? And so I humbly crave pardon of this honourable house, that I have made a short lesson long.

Upon this and other arguments made in this Case of the Habeas Corpus, the house referred the whole business to a Committee, to examine all the proceedings: concerning which, Mr. Selden afterwards made report to the house, that Mr. Waterhouse, a Clerk in the Crown-Office, being examined before the Committee, did confess, that by direction from sir Robert Heath, the king's Attorney-General, he did write the draught of a Judgment in the Case before-mentioned, which was delivered to Mr. Attorney. And Mr. Keeling being examined before the Committee did confess, that after Mich. term last, the Attorney-General wished him to make a special entry of the Habeas Corpus: to which he answered, he knew no special entry in those cases, but only a *Remittitur*: but said to Mr. Attorney, that if he pleased to draw one, and the court after assented to it, he would then enter it. The Attorney did accordingly make a draught, and the copy thereof Mr. Keeling produced to the committee. And further said, that he carried this draught to the Judges, but they would not assent to a special entry: nevertheless, the Attorney-General divers times sent to him, and told him there was no remedy, but he must enter it. Yet a week before the parliament met, the Attorney-General called for the draught again, which accordingly he gave unto him, and never heard of it more.

Sir *Robert Philips*, upon this report, gave his opinion, "That this intended Judgment in the Habeas Corpus, was a draught made by some man that desired to strike us from all our Liberties: but the Judges justly refused it. But if the Judges did intend it, we sit not here (said he) to answer the trust we are sent for, if we present not this matter to his majesty. Let this business be further searched into, and see how this Judgment lies against us, and what the Judges do say concerning the same."

March 27. The house proceeded in further Debate of the Liberty of the Subject. When Mr. *Hackwell* resumed the debate of the matter concerning the Habeas Corpus.

Mr. Hackwell.

The late Judgment, said he, which lies in bar, is only an award, and no Judgment; and in the L. C. Justice's argument, there was no word spoken, That the king might commit or detain without cause. For the king to commit a man, is *indignum rege*: mercy and honour flow immediately from the king, judgment and justice are his too, but they flow from his ministers; the sword is carried before him, but the sceptre is in his hands. These are true emblems of a good king. The law admits not the king's power of detaining in prison at pleasure. In ancient times prisons were but 'pro 'custodia, carceres non ad pœnam, sed ad 'custodiam.' Admit the king may commit a man, yet to detain him as long as he pleaseth is dangerous, and then a man shall be punished before his offence: Imprisonment is a maceration of the body, and horror to the mind; it is *vita pejor morte*.

Then the house commanded that Case in the Lord Chief Justice Anderson's Book, all of his own hand-writing, to be openly read. The words of the Report were these:

"Divers persons fueront committes a several temps a several prisons, sur pleasure sans bon cause parte de queux estiant amesnes en Banck le Roy. Et parte en se Commune Banck fueront accordant a la ley de la terre mise a large et discharge de le imprisonment, pur que aucuns grants fueront ostendus et procure un commandment a les Judges que ils ne fera issent apres. Ceo nient meens les Judges ne surcease mes per advise enter eux ils fesoient certain Articles le tenour de queux ensue, et deliver eux al seigneurs Chauncelor et Treasurer et eux subscribe avec toute lour maines, les Articles sont come ensuont."

"We her majesty's justices of both benches, and barons of the Exchequer, desire your lordships, that by some good means some order may be taken, that her highness's subjects may not be committed or detained in prison by commandment of any nobleman or counsellor against the laws of the realm; either else help us to have access to her majesty, to the end to become suitors to her for the same; for divers have been imprisoned for suing ordinary actions and suits at the Common Law, until they have been constrained to leave the same against their wills, and put the same to order, albeit judgment and execution have been had therein, to their great losses and griefs; for the aid of which persons, her majesty's writs have sundry times been directed to sundry persons, having the custody of such persons unlawfully imprisoned, upon which Writs, no good or lawful cause of imprisonment hath been returned or

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certified. Whereupon, according to the laws, they have been discharged of their imprisonment; some of which persons so delivered, have been again committed to prison in secret places, and not to any common or ordinary prison, or lawful officer or sheriff, or other lawfully authorized, to have or keep a gaol; so that upon complaint made for their delivery, the queen's courts cannot tell to whom to direct her majesty's writs; and by this means justice cannot be done. And moreover, divers officers and serjeants of London have been many times committed to prison for lawful executing of her majesty's writs, sued forth of her majesty's courts at Westminster; and thereby her majesty's subjects and officers are so terrified, that they dare not sue or execute her majesty's laws, her writs and commandments: divers others have been sent for by pursivants, and brought to London from their dwellings, and by unlawful imprisonment have been constrained, not only to withdraw their lawful suits, but have also been compelled to pay the pursivants, so bringing such persons, great sums of money. All which upon complaint the judges are bound by office and oath to relieve and help, by and according to her majesty's laws. And when it pleaseth your lordships to will divers of us to set down in what cases a prisoner, sent to custody by her majesty or her council, are to be detained in prison, and not to be delivered by her majesty's Court or Judges; we think, that if any person be committed by her majesty's command, from her person, or by order from the Council-board; and if any one or two of her council commit one for High-Treason, such persons so in the cases before committed, may not be delivered by any of her courts, without due trial by the law, and judgment of acquittal had: nevertheless the Judges may award the queen's writ to bring the bodies of such prisoners before them; and if upon return thereof, the causes of their commitment be certified to the judges as it ought to be: then the judges in the cases before, ought not to deliver him; but to remand him to the place from whence he came, which cannot be conveniently done, unless notice of the cause in general, or else in special, be given to the keeper or gaoler that shall have the custody of such prisoner." All the Judges and Barons did subscribe their names to these Articles, *Ter. Pasche* 34 *Eliz.* and delivered one to the Lord-Chancellor, and another to the Lord Treasurer: after which time there did follow more quietness than before, in the cause before-mentioned.

After the reading of this Report,

Sir *Edward Coke* said, That of my own knowledge this Book was written with my lord Anderson's own hand, it is no flying report of a young student. I was solicitor then, and treasurer Burleigh was as much against commitment as any of this kingdom; it was the White Staves, that made this stir. Let us draw towards a conclusion: the question is, Whether a Freeman can be imprisoned by the king, without setting down the cause? I leave it as bare as Æsop's crow, they that argue against it, 'Humores moti et non remoti corpus de-'struunt.' It is a maxim, the common law has admeasured the king's prerogative, that in no case it can prejudice the inheritance of the subjects; had the law given the prerogative to that which is taken, it would have set some time to it, else mark what would follow. I shall have an estate of inheritance for life, or for years in my land, or propriety in my goods, and I shall be a tenant at will for my liberty; I shall have propriety in my own house, and not liberty in my person, 'Perspicue vera non 'sunt probanda.' The king hath distributed his judicial power to courts of justice, and to ministers of justice; it is too low for so great a monarch as the king is, to commit men to prison; and it is against law, that men should be committed, and no cause showed. I would not speak this, but that I hope my gracious king will hear of it: yet it is not I, Edward Coke, that speaks it, but the Records that speaks it; we have a national appropriate Law to this nation, 'divisis ab orbe Britannis.'

Mr. Selden.

I was sent hither, and trusted with the lives and liberties of them that sent me. Since I came, I took here an oath to defend the king's prerogatives and rights. I profess, though once I was of council, and then I spoke for my fee, for the gentlemen in their Habeas Corpus; yet now I speak according to my knowledge and conscience.

The question is, Whether any subject or freeman, that is committed to prison, and the cause not shewn in the Warrant, he ought to be bailed or delivered? I think, confidently, it belongs to every subject that is not a villein that he ought to be bailed, or delivered.

I shall speak in this course. 1. I will shew the Reasons. 2. Acts of Parliament. 3. Precedents. 4. Answer Objections.

I. Reasons drawn from three heads:

1. From Remedies provided by the common law against imprisonment. For that precious thing of Liberty there are divers remedies, by which it appears, if no known cause be of further detainment, he is to be delivered. I will not mention the action of false imprisonment, but the writ *de odio et atia* which is not taken away, for that it is in Magna Charta. That writ was sent to know, if the party imprisoned were committed for any cause of malice and hatred, and this was to be enquired of in jury. For the writ *de homine replegiando*, if one be imprisoned under the sheriff, he must be delivered, if he be not detained for a cause for which he is not replevisable. For the Habeas Corpus, the Keeper is to bring the body 'ad 'subjiciendum et recipiendum.' If there be no cause, how can the Court consider of the cause? For appeal, by the old law in the time of H. 1, one imprisoned might have his appeal, as appears by Bracton, c. 25. *lib. de corona. Fleta*, c. 42.

2. The second reason is from the considera-

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tion of Freemen and Villeins. All admit we are *liberi homines*; but do but consider the difference of Villeins and Freemen, and I know no difference in their persons, but only the one cannot be imprisoned, as the other may. Whoever can say I can imprison him, I will say he is my villein. It is the sole distinction of Freemen, that they cannot be imprisoned at pleasure. In old time none but Jews and Villeins could be imprisoned, and confined. The Jews were as demesne villeins of the king; he could send to them to lend money, and if they did not, he imprisoned them.

3. From matter of Punishment. When any thing is declared by any new statute to be an offence, it goes, That he shall be fined and imprisoned. To what end were this in any act of parliament, if imprisonment was at the king's will?

II. For Acts of Parliament, Magna Charta, c. 19. In that act when it was first made, it was 'nec eum in carcere mittimus,' 17 Job. that statute was made, and then it had those words. The course then was to send down all acts of parliament and charters to the abbeys to be enrolled. Matthew Paris, 345. & 342. recites that charter of 17 John.

They object in Magna Charta, there is 'lex 'terræ,' and by the law one may be imprisoned. 'Lex terræ' is the process of law, for the law imprisons no man at all, but it is meant the process of law, 5 E. 3. Upon some occasion it was enacted, That none be attached contrary to the Great Charter and the law of the land. 25 E. 3, divers were committed to the Tower, and no man knew wherefore, whereupon was 25 E. 3, made, 28 E. 3, c. 3, 36 E. 3, n. 9. is against imprisonment, 'per speciale mandatum.'

III. For Precedents, 18 E. 3, rot. 33 H. 1, H. 8, rot. 9, 12 Jac. rot. 153.

IV. Objections against it. First, Against the reason; a man may be committed for a point of state that may not be known: I understand not matters of state; I expected not the objection in a Court of Justice; and it may be a word for any king to try the courage of his judges, and to suppose there is a cause of state, when perhaps there is no cause appears to them. It is as if they sent him back to prison, they knew not wherefore; which cannot be in a court of justice, where they are sworn to do justice.

Secondly, As to the Acts of Parliament, the Judges gave no answer, but only commended them; but the Attorney answered them with one blow to strike them all; that they are to be considered for common and ordinary causes, that happen in Westminster-hall only. But do but consider Magna Charta, which reflects upon the king; 'nec super eum ibimus.' By the law, if I bring an Appeal of Murder against a nobleman, which is my suit, he shall not be tried by his peers; but if he be indicted for that murder, which is the king's suit, he shall; which shews, that that which is in Magna Charta is meant of the king, though it be not in the third person.

Third Objection is against the Statute of Westminster 1. c. 15. But the king's command is the command of the king by his justices; and also the word, 'Replevisable,' never signifies bailable; bailable, is in a Court of Record, by the king's justices: but replevisable, is by the sheriff. The statute is to the sheriff, and it shews the particular causes, and concludes that the sheriff shall lose his bailiwick. The sheriff could never replevy one for murder, or matters of the forest: but in the King's-bench for murder, or matters of the forest, they may, 3. assis. 19, 21 E. 4, 25. 22 H. 6, 48. Newton. If any man be taken by our command, or by the command of the king, if the sheriff take the party, he must come to us, we will grant a Supersedeas.

Fourthly, They object against the precedents cited; they are all of this kind, they were imprisoned 'per mandatum domini regis,' or 'concilii,' without cause, or the cause is expressed. When the cause is expressed, and is within the cognizance of the court, there they bailed them; but when it is for felony or treason, it may be done beyond the seas, and then the court has no cognizance of them. When no cause is set, yet bailment is alledged; then they answer divers were so bailed, but the cause appears by Paper-Books; but I never saw these Books to be Records, and Judges of Record made their Judgment in Records, and the cause only appears by Record.

For the Resolution cited 34 Eliz. all precedents were read, acts of parliament indeed were passed over, and yet that was not read. As we have that liberty here, so I dare say, no prince in Christendom doth assume this power to imprison any without any cause. I find no steps or *vestigium* of any such power.*

Saturday, March 29, 1628. Mr. *Solicitor* spake as followeth:

My care when I spake last was to give satis-

* "Die Veneris, Mar. 28. I rise to make a motion. Yesterday a learned Argument was made by Mr. Solicitor, and 21 Edw. 1, was cited by him, which makes clearly for the Subject, also for that *salus populi*. I am sure that 'libertas populi est salus populi.' And Festus himself that sent Paul to Agrippa was a lawyer of the empire; and to send a prisoner without signifying the crimes laid against him, seemed unreasonable to Festus to do. By the law of the empire none were to be committed above thirty days, and the gaoler is under a penalty to certify the cause of the prisoner's commitment: and if the gaoler be slack, he is to be fined. When they speak here of the Judgment given in the King's Bench, they say the Precedents were mis-recited. Let a Sub-committee search into those Judgments and Precedents. I heard here a *quousque*, and there is nothing but a *remittitur*. The course of the officer is to enter *quousque*, &c. and that is till they be delivered by law, and is all the Judgment that can be." Ex MSS. Pymmii. See Selden's Life in his Works.

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faction that the judges did not err in their late Resolutions; but if they did, it was *cum patribus*: the Judges knew nothing of the cause of the gentlemen's imprisonment; if they had known the cause of their imprisonment in private, they would have appealed to his majesty for his grace. For to reiterate all the authorities I will not, I have something to say in the point, to put into the scale, which might have been then said, had it not been for the unhappy difference that might have been between the two courts in Westminster-hall, the King's-bench and the Chancery Court.

In 13 Jac. divers were committed for disobedience to the Decree of the Court of Chancery, as namely Rosswell and others, and it was resolved, That the Judges could not deliver such, and at the same time some were committed by warrant from the king and the lords of the council, and this came in question, Mich. 13 Jac. and so continued divers Terms. There was then recourse had to those arguments, and I have a report here of that time what the judges did then, part whereof I will read.

It was resolved by Coke,* Crook, Doderidge and Houghton, that the return was good, and that the cause need not to be disclosed, being 'per mandatum concilii,' as 'arcana regni' (and the report further saith, That in 34 Eliz. it was resolved accordingly), and by Coke it was said, That if the privy-council commit one, he is not bailable by any court of justice, and Stamford's opinion is so, fol. 72. See what opinion the Judge had of the resolution in 34 Eliz. and of Stamford.

To this sir *Edward Coke* replied: This report moves not me at all; that report is not yet 21 years old, but under age, being in 13 Jac. In truth, when I read Stamford, I was of his opinion at the first, but since, looking into those Records before-mentioned, I was of another mind.† He brings in an ill time 13 Jac. when there was clashing between the Court of King's-bench and Chancery, as also there were then many of the traitors that were of the Powder-Treason, committed 'per mandatum 'concilii.'

Upon Monday, April 1, the Debate being re-assumed, sir Robert Philips moved, That considering the house was now ready for the question, they might hear the resolution read of all the Judges in 34 Eliz. about this matter. Then

Sir *Edward Coke* stood up and said, The glass of Time runs out, and something cast upon us hath retarded us; when I spake against the Loans and this matter, I expected blows, and somewhat was spoken, though not to the matter. Concerning that (that hath been objected), I did when I was a Judge, I will say somewhat. Indeed, a motion was made, but no argument or debate, or resolution upon advice; I will never palliate with this house, there is no Judge that hath an upright heart to God, and a clear heart to the world, but he hath some warrant for every thing that he doth. I confess when I read Stamford then, and had it in my hands, I was of that opinion at the Council-Table; but when I perceived that some members of this house were taken away, even in the face of this house, and sent to prison, and when I was not far off from that place myself, I went to my book, and would not be quiet till I had satisfied myself. Stamford at the first was my guide, but my guide had deceived me, therefore I swerved from it: I have now better guides, Acts of Parliament and other precedents, these are now my guides. I desire to be free from the imputation that hath been laid upon me.

As for the Copy of the intended Judgment, I fear, had it not been for this parliament, it had been entered ere this time; a parliament brings Judges and all other men into good order: if any clerk had drawn this draught, he would have done it by a precedent, and there can be no precedent found that warrants it, and therefore I believe that some other did it. —This draught of the Judgment, should it be entered, will sting us to death, 'quia nulla 'causa fuit ostenta, ideo ne fuit baileabile;' and that it appears to be so by the Records. I persuade myself Mr. Attorney drew it; I had a copy of my lord Anderson's Report of the Judges Resolution, 34 Eliz. long ago; but I durst not vouch it (and it was so in that copy) for that it was Apocrypha, and did not answer his gravity that made it, and yet it was cited in the King's Bench, 'That all the Judges of England ruled it so.'

Then the House of Commons came to the following Resolutions:

Resolved upon the question, nem. con.

'I. That no Freeman ought to be detained 'or kept in prison, or otherwise restrained by 'the command of the king or privy-council, or 'any other, unless some cause of the commit-'ment, detainer or restraint be expressed, for 'which by law he ought to be committed, de-'tained or restrained.

'II. That the Writ of Habeas Corpus may 'not be denied, but ought to be granted to 'every man that is committed or detained in 'prison, or otherwise restrained, though it be 'by the command of the king, the privy-coun-'cil, or any other, he praying the same.

* Coke was then a Judge, and in favour at court.

† "Coke of one mind, when a Judge, and in favour; of another, when out of court, and discontented." (Note to old Edition.)

Of Coke's conduct in parliament, Mr. Barrington, in a Note to his Observations on Statute Westminster the Second, says, "The late publication of the Journals of the House of Commons shews, that he did not, as a Member of Parliament, prostitute his amazing knowledge of municipal law, to political purposes; as he generally argues in the same manner, and from the same authorities, which he cites in his Institutes."

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'III. That if a Freeman be committed or 'detained in prison, or otherwise restrained by 'the command of the king, the privy-council, 'or any other, no cause of such commitment, 'detainer, or restraint being expressed, for 'which by law he ought to be committed, de-'tained, or restrained, and the same be return-'ed upon an Habeas Corpus, granted for the 'said party; then he ought to be delivered or 'bailed.'

And then taking into consideration the Property of the Subject in his Goods, they came to this Resolution, to which there was not a negative; viz.

'That it is the antient and indubitable Right 'of every Freeman, that he hath a full and ab-'solute property in his goods and estate; that 'no Tax, Taillage, Loan, Benevolence, or other 'like charge ought to be commanded, or levied 'by the king, or any of his ministers, without 'common consent by act of parliament.'

The Commons having shewed their care of the Subjects in the Liberty of their Persons, and Propriety in their Goods, did now prepare to transmit their Resolutions to the Lords for their concurrence; and several members were appointed to manage a Conference with the Lords concerning the same; and Monday, April 7, the Conference was held, and opened by sir Dudley Diggs.

A CONFERENCE desired by the Lords, and had by a Committee of both Houses, concerning the Rights and Privileges of the SUBJECTS.

Sir Dudley Diggs.

MY Lords; I shall, I hope, auspiciously begin this Conference this day, with an observation out of an Holy Story, in the days of good king Josiah, 2 Chron. 34, when the land was purged of Idolatry, and the great men went about to repair the House of God; while money was sought for, there was found a Book of the Law which had been neglected, and afterwards being presented to the good king, procured the blessing, which your lordship may read in the Scriptures. 2 Kings 22.

My good lords, I am confident your lordships will as cheerfully join with the commons, in acknowledgment of God's great blessing in our good king Josiah, as the knights, citizens, and burgesses of the house of commons, by me their unworthiest servant, do thankfully remember your most religious and truly honourable invitation of them to the late Petition, for cleansing this land from Popish Abominations; which I may truly call a necessary and a happy repairing of the House of God. And, to go on with the parallel, whilst we the commons, out of our good affections, were seeking for money, we found, I cannot say a Book of the Law, but many, and those fundamental points thereof neglected and broken, which hath occasioned our desire of this Conference: wherein I am first commanded to shew to your lordships in general, that the Laws of England are grounded on reason, more ancient than books, consisting much in unwritten customs, yet so full of justice and true equity, that your most honourable predecessors and ancestors many times propugned them with a *nolumus mutari*; and so ancient, that from the Saxon days, notwithstanding the injuries and ruins of time, they have continued in most parts the same, as may appear in old remaining monuments of the laws of Ethelbert, the first Christian king of Kent, Ina the king of the West-Saxons, Offa of the Mercians, and of Alfred the great monarch, who united the Saxon Heptarchy, whose laws are yet to be seen, published, as some think, by parliament, as he says to that end, 'Ut qui 'sub uno rege, sub una lege regerentur.' And though the Book of Litchfield, speaking of the troublesome times of the Danes, says that then 'Jus sopitum erat in regno, leges et consuetu-'dines sopitæ sunt,' and 'prava voluntas, vis, 'et violentia magis regnabant quam judicia vel 'justitia;' yet, by the blessing of God, a good king, Edward, commonly called St. Edward, did awaken those laws, and as the old words are, 'Excitatis reparavit, reparatas decoravit, de-'coratas confirmavit.' Which 'confirmavit,' shews, that good king Edward did not give those laws, which William the Conqueror, and all his successors, since that time, have sworn unto.

And here, my lords, by many cases frequent in our modern laws, strongly concurring with those of the ancient Saxon kings, I might, if time were not precious, demonstrate that our Laws and Customs were the same.

I will only intreat your lordships leave to tell you, that as we have now, even in those Saxon times they had their Courts-Baron and Courts-Leet, and Sheriff-Courts, by which, as Tacitus says of the Germans their ancestors, 'Jura 'reddebant per pagos et vicos;' and, I do believe, as we have now, they had their parliaments, where new laws were made 'cum con-'sensu prælatorum, magnatum et totius com-'munitatis;' or, as another writes, 'cum con-'silio prælatorum, nobilium, et sapientium lai-'corum.' I will add nothing out of Glanvile that wrote in the time of H. 2, or Bracton that wrote in the days of H. 3, only give me leave to cite that of Fortescue, the learned Chancellor to H. 6, who writing of this kingdom, says, 'Regnum illud in omnibus nationum, et regum 'temporibus, eisdem quibus nunc regitur legi-'bus et consuetudinibus, regebatur.' But, my good lords, as the poet said of Fame, I may say of our Common-Law;

'Ingrediturque solo caput inter nubila condit.'

Wherefore the cloudy part being mine, I will make haste to open way for your lordships to hear more certain Arguments, and such as go on more sure grounds.

Be pleased then to know, that it is an undoubted and fundamental point of this so ancient Common-Law of England, that the Subject hath a true property in his Goods and

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Possessions, which doth preserve, as sacred, that *meum et tuum*, that is the nurse of industry, and mother of courage, and without which, there can be no justice, of which *meum et tuum* is the proper object. But the undoubted birthright of free Subjects, hath lately not a little been invaded and prejudiced by pressures, the more grievous, because they have been pursued by imprisonment, contrary to the franchises of this land; and when, according to the laws and statutes of this realm, redress hath been sought for in a legal way, by demanding Habeas Corpus from the Judges, and a discharge or trial according to the law of the land, success hath failed; that now enforceth the commons, in this present parliament assembled, to examine by acts of parliament, precedents and reasons, the truth of the English Subjects Liberty, which I shall leave to learned gentlemen, whose weighty Arguments, I hope, will leave no place in your lordships memories, for the errors and infirmities of your humblest servant, that doth thankfully acknowledge the great favour of your honourable and patient attention.

MR. LITTLETON'S ARGUMENT.

Made by the command of the House of Commons out of Acts of Parliament, and authorities of law, expounding the same, at the first Conference with the Lords, concerning the Liberty of the Person of every Freeman.*

My lords; Upon the occasions delivered by the gentleman that last spake, your lordships have heard the Commons have taken into their serious consideration the matter of Personal Liberty, and after long debate thereof on divers days, as well by solemn arguments, as single propositions of doubts and answers, to the end no scruple might remain in any man's breast unsatisfied, they have upon a full search, and clear understanding of all things pertinent to the question, unanimously declared: That no Freeman ought to be committed or detained in prison by the command of the King or Privy-Council, or any other, unless some cause of the commitment, detainer, or restraint be expressed, for which by law he ought to be committed, detained, or restrained. And they have sent me, with other of their members, to represent unto your lordships the true grounds of such their Resolution, and have charged me particularly, leaving the reasons of law and precedents for others, to give your lordships satisfaction, that this Liberty is established and confirmed by the whole state, the king, the lords spiritual and temporal, and commons, by several acts of parliament; the authority whereof is so great, that it can receive no answer, save by interpretation or repeal by future statutes. And those that I shall mind your lordships of, are so direct in point, that they can bear no other exposition at all, and sure I am they are still in force.

The first of them is the Grand Charter of the Liberties of England, first granted in the 17th of king John, and renewed in the 9 Hen. 3, and since confirmed in parliament above 30 times. The words are these, ch. 29. 'Nullus liber 'homo capiatur, vel imprisonetur, aut dissesisie-'tur de libero tenemento suo, vel libertatibus, 'vel liberis consuetudinibus suis, aut utlagere-'tur, aut exuletur, aut aliquo modo destruatur, 'nec super eum ibimus, nec super eum mitte-'mus, nisi per legale judicium parium suorum 'vel per legem terræ.'

These words, 'nullus liber homo,' &c. are express enough, yet it is remarkable that Matthew Paris, an author of special credit, doth observe, fol. 432, that the Charter of 9 H. 3, was the very same as that of 17 John, 'in nullo 'dissimilis' are his words; and that of king John he setteth down verbatim, fol. 342, and there the words are directly 'Nec eum in 'carcerum mittemus:' and such a corruption as is now in print, might easily happen betwixt 9 H. 3, and 28 E. 1, when this Charter was first exemplified, but certainly there is sufficient left in that which is extant to decide this question. For the words are, 'That no Free-'man shall be taken or imprisoned, but by the 'lawful judgment of his peers;' which is by a jury of peers, ordinary jurors, or others, who are their peers, or by the law of the land: which words, 'Law of the land,' must of necessity be understood in this nation, to be by due process of the law, and not the law of the land generally, or otherwise it would comprehend bond-men (whom we call Villeins) who are excluded by the word 'Liber;' for the general law of the land doth allow their lords to imprison them at their pleasure without cause, wherein they only differ from the freemen in respect of their persons, who cannot be imprisoned without a cause. And that this is the true understanding of these words, 'Per legem terræ,' will more plainly appear by divers other statutes that I shall use, which do expound the law accordingly. And though the words of this Grand Charter be spoken in the third person, yet they are not to be understood of suits betwixt party and party, at least not of them alone, but even of the king's suits against his subjects, as will appear by the occasion of getting of that Charter, which was by reason of the differences betwixt those kings and their people, and therefore properly to be applied unto their power over them, and not to ordinary questions betwixt subject and subject.

Secondly, The word 'per legale judicium 'parium suorum,' immediately preceding the other of 'per legem terræ,' are meant of Trials at the king's suit, and not at the prosecution of a subject. And therefore, if a peer of the realm be arraigned, at the suit of the king, upon an Indictment of murder, he shall be tried by his

* This Argument of Mr. Littleton is printed in 'Cottoni Posthuma;' as if made by sir Robert Cotton, bart. But whosoever consults the Historians of those times, will find, that Diggs, Littleton, Selden and Coke, were the four lawyers appointed by the House of Commons to manage that memorable Conference.

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peers, that is nobles; but if he be appealed of murder by a subject, his trial shall be by an ordinary Jury of 12 freeholders, as appeareth in 10 E. 4, 6, 33 H. 8, Brooke Title Trials 142. Stan. Cor. li. 3, ca. 1, fol. 152. and in 10 E. 4, 6, it is said, such is the meaning of Magna Charta, for the same reason: therefore as 'per 'judicium parium suorum' extends to the king's suit, so shall these words 'per legem terræ.'

And in 8 E. 2, rot. parl. n. 7, there is a Petition that a Writ under the privy-seal went to the guardians of the great seals, to cause lands to be seized into the king's hands, by force of which there went a writ out of the Chancery to the Escheator, to seize, against the form of the Grand Charter, that the king nor his ministers shall out no man of his freehold without reasonable judgment, and the party was restored to his land: which shewed the statute did extend to the king.

There was no invasion upon this personal liberty, till the time of Edw. 3, which was soon resented by the subject; for in 5 E. 3, c. 9, it is ordained in these words: 'It is enacted that 'no man from henceforth shall be attached by 'any accusation, nor fore-judged of life or limb, 'nor his lands, tenements, goods, nor chattels, 'seized into the king's hands, against the form 'of the Great Charter, and the law of the land.' 25 E. 3, c. 4, it is more full, and doth expound the words of the Grand Charter, and is thus: 'Whereas it is contained in the Grand Charter 'of the franchises of England, that no freeman 'shall be imprisoned, nor put out of his freehold, 'nor free custom, unless it be by the law of the 'land; it is awarded, assented, and established, 'that from hence none shall be taken by pe-'tition or suggestion, made to our lord the king, 'or to his council, unless it be by Indictment, 'or presentment of his good and lawful people 'of the same neighbourhood; which such deeds 'shall be done in due manner, or by process 'made by writ original at the common law, nor 'that none be outed of his franchises, nor of his 'freehold, unless he be duly brought in to an-'swer, and fore-judged of the same by the course 'of the law; and if any thing be done against 'the same, it shall be redressed and holden for 'nought.'

Out of this Statute I observe, that what in Magna Charta, and the preamble of the Statute is termed 'by the law of the land,' is in the body of the Act expounded to be by process made by the writ original at the common law, which is a plain interpretation of the words 'law of 'the land' in the Grand Charter. And I note that this law was made upon the commitment of divers to the Tower, no man yet knoweth for what.

28 E. 3, c. 3, it is more direct, this liberty being followed with fresh suit by the subject, where the words are not many, but very full and significant; 'That no man, of what state or con-'dition soever he be, shall be put out of his 'lands or tenements, nor taken, nor imprisoned, 'nor disinherited, nor put to death, without he 'be brought in to answer by due process of law.' Here your lordships see the usual words, 'the 'law of the land,' are rendered by due proces of the law.

36 E. 3, Rot. Parl. n. 9. Amongst the petitions of the commons, one of them being translated into English out of French, is thus; first, that the Great Charter, and the Charter of the Forest, and other Statutes made in his time, and the time of his progenitors, for the profit of him, and his commonalty, be well and firmly kept; and put in due execution, without putting disturbance, or making arrest contrary to them by special command, or in other manner.

The answer to the Petition, which makes it an act of parliament, is, 'Our lord the king, by the 'assent of the prelates, dukes, earls, barons, and 'the commonalty, hath ordained and establish-'ed, that the said Charters and Statutes be held, 'and put in execution, according to the said 'Petition.' It is observable, that the Statutes were to be put in execution according to the said Petition, which is, that no arrest should be made contrary to the Statutes, by special command. This concludes the question, and is of as great force as if it were printed, for the Parliament Roll is the true warrant of an act, and many are omitted out of the Books, that are extant in the Roll.

36 E. 3, Rot. Parl. n. 22, explaineth it further; for there the Petition is, 'Whereas it is 'contained in the Grand Charter and other 'Statutes, that no man be taken or imprisoned 'by special command without Indictment, or 'other due process to be made by the law, and 'oftentimes it hath been, and yet is, many are 'hindered, taken and imprisoned without In-'dictment, or other process made by the law 'upon them, as well of things done out of the 'Forest of the king, as for other things; that it 'would therefore please our said lord to com-'mand those to be delivered, which are so taken 'by special command against the form of the 'Charter and Statutes as aforesaid.'

The Answer is, 'The king is pleased, that if 'any man find himself grieved, that he come 'and make his complaint, and right shall be 'done unto him.' 37 E. 3, c. 18, agreeth in substance with them: it saith, 'Though it be 'contained in the Great Charter, that no man 'be taken nor imprisoned, nor put out of his 'freehold without process of the law; neverthe-'less divers people make false suggestions to the 'king himself, as well for malice as otherwise, 'whereat the king is often grieved, and divers 'of the realm put in damage, against the form 'of the same Charter; wherefore it is ordained, 'that all they which make such suggestions, shall 'be sent with the same suggestions, to the 'Chancellor, Treasurer, and his grand council, 'and that they there find surety to pursue their 'suggestions, and incur the same pain that the 'other should have had, if he were attainted, in 'case that the suggestion be found evil; and 'that then process of law be made against 'them without being taken or imprisoned, against 'the form of the said Charter, and other Sta-'tutes.' Here the law of the land in the Grand

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Charter is explained to be without process of law.

42 E. 3, c. 13. At the request of the Commons by their Petition put forth in this parliament, to eschew mischief and damage done to divers of his commons by false accusers, which oftentimes have made their accusations, more for revenge and singular benefit, than for the profit of the king, or of his people; of which accused persons some have been taken and caused to come before the king's council by writ, and otherwise upon grievous pains against the law; it is assented and accorded for the good governance of the commons, That no man be put to answer without presentment before justices or matter of record, or by due process and writ original, according to the old law of the land: and if any thing from hence be done to the contrary, it shall be void in the law, and holden for error.

But this is better in the Parliament Roll, where the Petition and Answer, which makes the Act, are set down at large, 42 E. 3, Rot. Parl. n. 12.

The Petition.

'Item. Because that many of your commons are hurt and destroyed by false accusers, who make their accusations more for their revenge and particular gain, than for the profit of the king, or of his people: and those that are accused by them, some are taken, and others are made to come before the king's council by writ, or other commandment of the king, upon grievous pains, contrary to the law: That it would please our lord the king, and his good council, for the just government of his people, to ordain, that if hereafter any accuser propose any matter for the profit of the king, that the same matter be sent to the justices of the one bench or of the other, or the Assizes, to be enquired and determined according to the law; and if it concern the accuser or party, that he take his suit at the Common Law; and that no man be put to answer without presentment before the justices or matter of record, and by due process and original writ, according to the ancient law of the land. And if any thing henceforward be done to the contrary, that it be void in law, and held for error.'

Here by due process and original writ, according to the ancient law of the land, is meant the same thing, as 'per legem terræ,' in Magna Charta; and the abuse was, they were put to answer by the commandment of the king.

The King's Answer is thus:

'Because that this Article is an Article of the Grand Charter, the king willeth that this be done, as the Petition doth demand.' By this appeareth that 'per legem terræ,' in Magna Charta, is meant by due process of the law.

Thus your lordships have heard Acts of Parliament in the point. But the Statute of Westminster, 1. c. 15, is urged to disprove this opinion, where it is expressly said, That a man is not repleviable, who is committed by the command of the king; therefore the command of the king, without any cause shewed, is sufficient to commit a man to prison. And because the strength of the Argument may appear, and the Answer be better understood, I will read the words of the Statute, which are thus:

'And forasmuch as sheriffs and others, which 'have taken and kept in prison persons detected for felony, and oftentimes have let out by 'replevin such as were not repleviable, and 'have kept in prison such as were repleviable, 'because they would gain of the one party, 'and grieve the other; and forasmuch as before this time it was not certainly determined 'what persons were repleviable, and what not, 'but only those that were taken for the death of 'a man, or by the commandment of the king, 'or of his justices, or for the forest; it is provided, and by the king commanded, that such 'prisoners as were before outlawed, and they 'which have abjured the realm, provers, and 'such as be taken with the manner, and those 'which have broken the king's prison, thieves 'openly defamed and known, and such as be 'appealed by approvers; so long as the approvers are living, and if they be not of good 'name, and such as be taken for burning of 'houses feloniously done, or false money, or 'for counterfeiting the king's seal, or persons 'excommunicate taken at the request of the 'bishop, or for manifest offences, or for treason 'touching the king himself, shall be in no wise 'repleviable by the common writ, or without 'writ.'

But such as be indicted of larceny by inquests taken before sheriffs or bailiffs by their office, or of light suspicion, or of petty larceny, that amounteth not above the value of twelvepence, if they were not guilty of some other larceny aforetime, or guilty of receipt of felons, or of commandment, or of force, or of aid of felony done, or guilty of some other trespass, for which one ought not to lose either life or member: and a man appealed by an approver, after the death of the approver; if he be no common thief or defamed, shall from henceforth be let out by sufficient surety, whereof the sheriff will be answerable, and that without giving aught of their goods. And if the sheriff, or any other, let any go at large, by surety, that are not repleviable, if he be sheriff or constable, or any other bailiff, or such as hath a fee, which hath keeping of prisons, and thereof be attainted, he shall lose his office and fee for ever. And if the under-sheriff, constable or bailiff, or such as hath fee for keeping of prisons, do it contrary to the will of his lord, or any other bailiff being not of fee, they shall have three years imprisoment, and make a fine at the king's pleasure; and if any man withhold prisoners repleviable, after that they have offered sufficient surety, he shall pay a grievous amercement to the king; and if he take any reward for the deliverance of such, he shall pay double to the prisoner, and also shall pay a grievous amercement to the king.

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The Answer.

It must be acknowledged, that a man taken by the commandment of the king is not repleviable, for so are the express words of this Statute: but this maketh nothing against the Declaration of the House of Commons; for they say not, the sheriff may replevy such a one by sureties, *scilicet manucaptores*, but that he is bailable by the king's court of justice: for the better apprehending whereof, it is to be known, that there is a difference between repleviable, which is always by the sheriff upon pledges or sureties given, and bailable, which is by a court of record, where the prisoner is delivered to his bail, and they are his gaolers, and may imprison him, and shall suffer for him body for body, as appeareth 33 & 36 Edw. 3, titulo Mainprize 12 & 13, where the difference betwixt Bail and Mainprize is expressly taken. And if the words of the Statute themselves be observed, it will appear plainly, that it extends to the Sheriff and other inferior officers, and doth not bind the hands of the judges.

The Preamble, which is the key that openeth the entrance into the meaning of the makers of the Law, is, 'Forasmuch as Sheriffs and 'others have taken and kept in prison persons 'detected of felony.' Out of these words I observe, that it nominateth Sheriffs, and then if the Judges should be included, they must be comprehended under that general word, 'others;' which doth not extend to those of an higher rank, but to inferiors, for the best by all courses is first to be named. And therefore if a man bring a Writ of Customs and Services, and name Rents and other things, the general shall not include Homage, which is a personal service, and of an higher nature, but it shall extend to ordinary annual service, 31 E. 1, droit 67. So the Statute of 13 Eliz. c. 10, which beginneth with Colleges, Deans and Chapters, Parsons, Vicars, and concludes with these words, 'and others having spiritual Pro-'motions,' shall not comprehend Bishops that are of an higher degree, as appeareth in the archbishop of Canterbury's Case, reported by sir Edw. Coke, lib. 2, fol. 46, B.

And thus much is explained in the very Statute towards the end, when it doth enumerate those who were meant by the word, 'others,' namely, Under-Sheriffs, Constables, Bailiffs, &c.

Again, the words are, 'Sheriffs and others 'which have taken and kept in prison.' Now every man knoweth, Judges do neither arrest, nor keep men in prison; that is the office of Sheriffs and other inferior ministers. Therefore this Statute meant such only, and not Judges.

The words are further, That they let out by replevin such as are not repleviable, that is the proper language for a Sheriff; nay, more express afterward in the body of the Statute, that such as are there mentioned, shall in nowise be repleviable by the common Writ, which is 'De homine replegiando,' and is directed to the Sheriff, nor without writ, which is by the Sheriff *ex officio*. But that which receives no answer is this, that the command of the Justices, who derive their authority from the crown, is there equal as to this purpose with the command of the king. And therefore by all reasonable construction, it must needs relate to officers that are subordinate to both, as sheriffs, under-sheriffs, bailiffs, constables, and the like. And it were a harsh exposition to say, that the Justices might not discharge their own command, and yet that reason would conclude as much; and that this was meant of the sheriff and other ministers of justice, appears by the Recital, 27 Edw. 1, c. 3, and likewise by Fleta, a Manuscript, so called, because the author lay in the Fleet when he made the Book: for he, l. 2, c. 52, in his Chapter of Turns, and the Views of the Hundred Courts in the Country, setteth down the Articles of the Charges that are there to be inquired of; amongst which, one of them is 'De replegiabilibus in-'juste detentis et irreplegiabilibus dimissis;' which cannot be meant of not bailing by the Justices; for what have the inferior courts in the country to do with the acts of the Justices?

And to make that more plain, he setteth down in that Chapter, that concerneth Sheriffs only, the very statute of Westminster 1, which he translates verbatim out of the French into the Latin; save that he renders taken by the command of the Justices, thus, 'per judicium 'Justiciariorum;' and his Preface to the Statute plainly sheweth, that he understood it of Replevin by Sheriffs; for he saith, 'Qui debent 'per plegios dimitti, qui non declarat hoc Sta-'tutum;' and 'per plegios' is before the Sheriff.

But for direct Authority, It is the opinion of Newton, chief justice, 22 Hen. 6, 46, where his words are these: 'It cannot be intended 'that the Sheriff did suffer him to go at large 'by Mainprize; for where one is taken by the 'writ of the king, or the commandment of the 'king, he is irrepleviable; but in such case his 'friends may come to the Justices from him if 'he be arrested, and purchase a Supersedeas.' This Judge concludes, that the sheriff cannot deliver him that is taken by the command of the king, for that he is irrepleviable, which is the very word of the statute: but, saith he, his friends may come to the Justices, and purchase a *Supersedeas*. So he declares the very question, that the Sheriff had no power, but the Justices had power to deliver him that is committed by the king's command, and both the antient and modern practice manifest as much: for he that is taken for the death of a man, or for the Forest, is not repleviable by the sheriff, yet they are ordinarily bailed by the Justices, and were by the king's writs directed to the sheriffs, in the times of Edw. 1 and 2, as appears in the close Rolls, which could not be done if they were not bailable. And it is every day's experience, that the Justices of the King's-bench do bail for murder, and for offences done in the Forest, which they could not do, if the word 'irrepleviable,' in Westminster 1, were meant of the Justices, as well as of the Sheriffs.

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For Authorities that have been offered to prove the contrary, they are in number three. The first is 21 Edw. 3, Rot. 2, which also is in the Book of Pleas in Parliament at the Tower, upon an action there brought, fol. 44. It is not an act of parliament, but a resolution in parliament upon an action there brought, which was usual in those times: and the case is, that Stephen Rabez, the sheriff of the counties of Leicester and Warwick, was questioned, for that he had let at large by surety, amongst others, one William, the son of Walter le Pesons, against the will and command of the king, whereas the king had commanded him by letters under the privy-seal, that he should do no favour to any man that was committed by the earl of Warwick, as that man was; whereunto the sheriff answered, that he did it at the request of some of the king's household upon their letters; and because the sheriff did acknowledge the receipt of the king's letters, thereupon he was committed to prison according to the form of the statute.

To this I answer, the sheriff was justly punished, for that he is expressly bound by the statute of Westminster 1, which was agreed from the beginning; but this is no proof, that the Judges had no power to bail this man.

The next Authority is 33 Hen. 6, in the Court of Common Pleas, fol. 28, b. 29, where Robert Poynings, esq. was brought to the bar upon a Capias, and was returned, that he was committed 'per duos de concilio,' (I believe it is misprinted for 'dnos de concilio,' i. e. 'dominos 'de concilio,' which is strongest against what I maintain) 'pro diversis causis regem tangentib.' And he made an attorney there in an action, whence it is inferred, that the return was good, and the party could not be delivered.

To this the answer is plain: 1. No opinion is delivered in that book, one way or other, upon the return, neither is there any testimony whether he were delivered, or bailed, or not. 2. It appears expressly, that he was brought thither to be charged in an action of debt, at another man's suit, no desire of his own to be delivered, or bailed; and then if he were remanded, it is no way material to the question in hand. But that which is most relied upon, is the Opinion of Stamf. in his Book of Pleas of the Crown, lib. 2, c. 18, f. 72, 73, in his Chapter of Mainprize, where he reciteth the Statute of Westm. 1, c. 15, and then saith thus: 'By this Statute it appears, that in four 'cases at the Common Law a man was not re-'pleviable; to-wit, those that were taken for 'the death of a man, by the command of the 'king, or his justices, or for the forest;' thus far he is most right. Then he goeth on, and saith, 'As to the command of the king, that is 'understood by the command of his own mouth, 'or his council, which is incorporated unto 'him, and spake with his mouth, or otherwise 'every Writ or Capias to take a man, which is 'the king's command, would be as much; and 'as to the command of the Justices, that is 'meant their absolute commandment, for if it 'be by their ordinary commandment, he is re-'pleviable by the sheriff, if it be not in some 'of the cases prohibited by the statute.'

The answer that I gave unto this is, that Stamford had said nothing whether a man may be committed without cause by the king's command, or whether the Judges ought not to bail him in such case, only that such a one is not repleviable; which is agreed, for that belongs to the Sheriff. And because no man should think he meant any such thing, he concludes the whole sentence touching the command of the King and the Justices, that one committed by the ordinary command of the justice, is repleviable by the sheriff; or at least it appears not that he meant that a man committed by the king, or by the privy-council without cause, should not be bailable by the justices, and he hath given no opinion in this case; what he would have said, if he had been asked the question, cannot be known, neither doth it appear, that, by any thing that he hath said, he meant any such thing as would be inferred out of him. And now, my lords, I have performed the commands of the Commons, and as I conceive shall clear the declaration of personal Liberty, an ancient and undoubted truth, fortified with seven acts of parliament, and not opposed by any statute or authority of law whatsoever.—See Littleton's Precedents after Mr. Selden's.

MR. SELDEN'S ARGUMENT.

My lords; Your lordships have heard from the gentleman that last spake, a great part of the grounds upon which the House of Commons, upon mature deliberation, proceeded to that clear Resolution touching the Right of the Liberty of their Persons. The many acts of parliaments, which are the written laws of the land, and are expressly in the point, have been read and opened, and such objections as have been by some made to them, and some objections also made out of another act of parliament, have been cleared and answered. It may seem now perhaps, my lords, that little remains needful to be further added, for the inforcement and maintenance of so fundamental and established a Right and Liberty belonging to every freeman of the kingdom. But in the examination of questions of Law of Right, besides the laws or acts of parliament, that ought chiefly to direct and regulate every man's judgment, whatsoever hath been put in practice to the contrary, there are commonly used also former Judgments, or Precedents, and indeed have been so used sometimes, that the weight of reason, of law, and of acts of parliament, hath been laid by, and resolutions have been made, and that in this very point, only upon the interpretation and apprehension of precedents. Precedents, my lords, are good *media*, or proofs of illustration or confirmation, where they agree with the express law: but they can never be proof enough to overthrow any one law, much less seven several acts of parliament, as the number of them is for the point. The House of Commons therefore taking into con-

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sideration, that in this question, being of so high a nature, that never any exceeded it in any court of justice whatsoever, all the several ways of just examination of the truth should be used, have also most carefully informed themselves of all former Judgments and Precedents concerning this great point either way, and have been no less careful of the due preservation of his majesty's just Prerogative than of their own Rights. The Precedents here are of two kinds, either merely matter of Record, or else the former resolutions of the Judges, after solemn debate in the point.

This point that concerns Precedents, the house of commons have commanded me to present to your lordships, which I shall as briefly as I may, so I do it faithfully and perspicuously. To that end, my lords, before I come to the particulars of any of those Precedents, I shall first remember to your lordships, that which will seem as a general key for the opening and true apprehension of all them of record, without which key, no man, unless he be versed in the entries and course of the king's-bench, can possibly understand them.

In all cases, my lords, where any Right or Liberty belongs to the subjects by any positive law written or unwritten, if there were not also a remedy by law, for the enjoying or regaining this Right or Liberty, when it is violated or taken from him, the positive law were most vain, and to no purpose; and it were to no purpose for any man to have any right in any land or other inheritance, if there were not a known remedy, that is, an action or writ, by which, in some court of ordinary justice, he might recover it. And in this case of Right or Liberty of Person, if there were not a remedy in the law for regaining it, when it is restrained, it were of no purpose to speak of laws, that ordain it should not be restrained. Therefore in this case also, I shall first shew you the remedy that every freeman is to use for the regaining of his liberty, when he is against law imprisoned, that so upon the legal course and form to be held in using that remedy, the precedents or judgments upon it, for all judgments of record rise out of this remedy, may be easily understood. There are in law divers remedies for inlarging of a freeman imprisoned, as the writs of *odio et atia*, and of *homine replegiando*, besides the common or most known writs of Habeas Corpus, or 'Corpus cum causa,' as it is also called.

The first two writs are to be directed to the sheriff of the county, and lie in some particular cases, with which it would be untimely for me to trouble your lordships, because they concern not that which is committed to my charge. But that Writ of Habeas Corpus or Corpus *cum causa*, is the highest remedy in law, for any man that is imprisoned, and the only remedy for him that is imprisoned by the special command of the king, or the lords of the Privy-Council, without shewing cause of the commitment: neither is there in the law any such thing, nor was there ever mention of any such thing in the laws of this land, as a petition of right to be used in such cases for liberty of the person, nor is there any legal course for enlargement to be taken in such cases; howsoever the contrary hath upon no ground or colour of law been pretended. Now, my lords, if any man be so imprisoned by any such command, or otherwise, in any prison whatsoever through England, and desire by himself, or any other in his behalf, this writ of Habeas Corpus for the purpose in the court of king's-bench, the writ is to be granted to him, and ought not to be denied him, no otherwise than another ordinary original writ in the chancery, or other common process of law, may be denied; which amongst other things the house resolved also, upon mature deliberation, and I was commanded to let your lordships know so much. This writ is directed to the keeper of the prison, in whose custody the prisoner remains, commanding him that after a certain day, he bring in the body of the prisoner, 'ad subjiciend. et recipiend. juxta quod curia consideraverit, &c. una cum causa captionis et detentionis;' and oftentimes 'una cum causa detentionis' only, 'captionis' being omitted.

The keeper of the prison thereupon returns by what warrant he detains the prisoner, and with his return filed to his writ, brings the prisoner to the bar at the time appointed; when the return is thus made, the court judgeth of the sufficiency or insufficiency of it, only out of the body of it, without having respect unto any other thing whatsoever: that is, they suppose the return to be true whatsoever it be: if it be false, the prisoner may have his action on the case against the gaoler that brought him. Now, my lords, when the prisoner comes thus to the bar, if he desire to be bailed, and that the court upon the view of the return think him in law to be bailable, then he is always first taken from the keeper of the prison that brings him, and committed to the marshal of the King's-Bench, and afterwards bailed, and the entry perpetually is, 'Committitur Mariscallo et postea traditur in Ball';' for the court never bails any man, until he first becomes their own prisoner, and be 'in custodia Mariscall' of that court. But if upon the return of the Habeas Corpus, it appear to the court, that the prisoner ought not to be bailed, nor discharged from the prison whence he is brought, then he is remanded or sent back again, there to continue, until by course of law he may be delivered; and the entry in this case is, 'Remittitur quousque secundum legem deliberatus fuerit,' or 'Remittitur, quousque,' &c. which is all one, and the highest award or judgment that ever was or can be given upon an Habeas Corpus. But if the Judges doubt only whether in law they ought to take him from the prison whence he came, or give a day to the sheriff to amend his writ, as often they do, then they remand him only during the time of their doubt; or until the sheriff hath amended his return, and the entry upon that is 'Remittitur' only, or 'Remittitur prisonæ præd.' without

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any more. And so 'remittitur' generally is of far less moment in the award upon the Habeas Corpus, than 'remittitur quousque, &c. however the vulgar opinions raised out of the late Judgment be to the contrary. All these things are of most known and constant use in the Court of King's-Bench, as it cannot be doubted but your lordships will easily know from the grave and learned my lords the judges.

These two courses, the one of the entry of 'Committitur Mariscall. et postea traditur in 'Ballium,' and the other 'remittitur quousque '&c. et remittitur' generally, or 'remittitur 'prisonæ præd.' together with the nature of the Habeas Corpus, thus stated; it will be easier for me to open, and your lordships to observe, whatsoever shall occur to the purpose in the Precedents of Record, to which I shall come now in the particular. But before I come to the Precedents, I am to let you know the Resolution of the house of commons touching the enlargement of a man committed by the command of the king, or the privy-council, or any other, without cause shewed of such commitment: it is thus; That if a freeman be committed or detained in prison, or otherwise restrained by the command of the king, the privy-council, or any other, and no cause of such commitment, detainer, or restraint be expressed, for which by law he ought to be committed, detained or restrained; and the same be returned upon an Habeas Corpus granted for the party, then he ought to be delivered and bailed.

This Resolution, as it is grounded upon the acts of parliament already shewn; and the reason of the law of the land, which is committed to the charge of another, and anon also to be opened to you, is strengthened also by many Precedents of Record.

But the Precedents of Record that concern this point are of two kinds, for the house of commons hath informed itself of such as concern it either way. The first, such as shew expressly, that persons committed by the command of the king, or of the privy-council, without other cause shewed, have been enlarged upon bail when they prayed it; whence it appears clearly, that by the law, they are bailable, and so by Habeas Corpus to be set at liberty: for though they ought not to have been committed without a cause shewed of the commitment, yet it is true that the reverend judges of this land did pay such respect to such commitments, by the command of the king, or of the lords of the council, (as also to the commitment sometimes of inferior persons) that upon the Habeas Corpus, they rarely used absolutely to discharge the persons instantly, but only to enlarge them upon bail; which sufficiently secures and preserves the Liberty of the Subject, according to the laws that your lordships have already heard, nor in any of the cases is there any difference made between such commitments by the lords of the council, that are incorporated with him. The second kind of precedents of Record are, such as have been pretended to prove the law to be contrary, and that persons so committed ought not to be set at liberty upon bail, and are in the nature of objections out of record.

I shall deliver them summarily to your lordships with all faith, and also true copies of them; out of which it shall appear clearly to your lordships, that of those of the first kind, there are no less than twelve, most full and directly in the point, to prove that persons so committed are to be delivered upon bail: and amongst those of the other kind, there is not so much as one, not one, that proves at all any thing to the contrary. I shall first, my lords, go through them of the first kind, and so observe them to your lordships, that such scruples as have been made upon them by some that have excepted against them, shall be cleared also according as I shall open them severally.

The first of the first kind is of E. 3d's time, it is in Pasche 18 E. 3, Rot. 33. The case was thus: king E. 3, had committed by Writ, and that under his great seal (as most of the king's commands in those times were) one John de Bildeston, a clergyman, to the prison of the Tower, without any cause shewed of the commitment. The lieutenant of the Tower is commanded to bring him to the King's-bench, where he is committed to the marshal; but the court asks of the Lieutenant, if there were any cause to keep this Bildeston in prison, besides that commitment of the king; he answered no: whereupon the Roll says, 'quia videtur 'cur. bre. præd. sufficient. non esse causam 'præd. Johan. de Bildeston in prisona dom. 'regis hic. detinend. idem Johannes admittitur 'per manucaptionem Willielmi de Wakefield,' and some others, where the Judgment of the point is fully declared in the very point.

The second, in the first kind of precedents of Record, is in the time of H. 8, one John Parker's Case, who was committed to the sheriff of London, 'pro securitate pacis,' at the suit of one Brinton, 'ac pro suspicione feloniæ' committed by him in Gloucestershire, 'ac per man- 'datum dom. rs.' he is committed to the marshal of the King's-Bench, 'et postea isto 'eodem termino traditur in Ball'.' Here were other causes of the commitment, but plainly one was by the command of the king, signified to the sheriffs of London, of which they took notice; but some have interpreted this, as if the commitment had been for suspicion of felony by the command of the king, in which case it is agreed of all hands, that the prisoner is bailable; but no man can think so of this precedent, that observes the context, and understands the grammar of it, wherein most plainly 'ac per mandatum dom. regis' hath no reference to any other cause whatsoever, but is a single cause enumerated in the return by itself, as the record clearly sheweth; it is in 22 H. 8, Rot. 37.

The third is of the same king's time, it is 35 H. 8. Rot. 33. John Binck's Case; he was committed by the lords of the council 'pro suspi- 'cione feloniæ ac pro aliis causis illos moventi-

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'bus, qui committitur Mariscallo et immediate 'ex gratia curiæ speciale traditur in Ball'.' They committed him for suspicion of felony, and other causes them thereunto moving, wherein there might be matter of state, or whatsoever else can be supposed, and plainly the cause of their commitment is not expressed; yet the court bailed him without having regard to these unknown causes that moved the lords of the council. But it has indeed some difference from either of those other two that precede, and from the other nine also that follow; for it is agreed, that if a cause be expressed in the return, insomuch that the court can know why he is committed, that then he may be bailed, but not if they know not the cause. Now if a man is committed for a cause expressed, 'et pro 'aliis causis dominos de concilio moventibus;' certainly the court can no more know in such a case what the cause is than any other.

The fourth of these is in the time of queen Mary, it is Pasch. 2 & 3. P. & Mar. Rot. 58. Overton's Case: Richard Overton was returned upon an Habeas Corpus, directed to the sheriffs of London, to have been committed and detained 'per mandatum prænobilium domi-'norum honorabilis concilii dominorum regis 'et reginæ, qui committitur Marr. et immediate 'traditur in Ball'.' In answer to this precedent, or by way of objection to the force of it, it hath been said, that this Overton at this time stood indicted of High-Treason. It is true, he was so indicted, but that appears in another Roll, that hath no reference to the Return, as the Return hath no reference to that Roll; yet they that object this against the force of this precedent, say, that because he was indicted of treason, therefore though he was committed by the command of the lords of the council, without cause shewed, yet he was bailable for the treason, and upon that was here bailed: than which objection nothing is more contrary, either to law or common reason. It is most contrary to law, for that clearly every Return is to be adjudged by the court out of the body of itself, and not by any other collateral or foreign record whatsoever. Therefore the matter of the indictment here, cannot in law be cause of bailing of the prisoner; and so it is adverse to all common reason, that if the objection be admitted, it must of necessity follow, that whosoever shall be committed by the king, or privy-council, without cause shewed, and be not indicted of treason, or some other offence, may not be enlarged, by reason of supposition of matter of state. But that whosoever is so committed, and withal stands so indicted, though in another record, may be enlarged, whatsoever the matter of state be for which he was committed. The absurdity of which assertion needs not a word for further confutation, as if any of the gentlemen in the last judgment, ought to have been the sooner delivered, if he had been also indicted of treason; if so, Traitors and Felons have the highest privilege in personal liberty, and that above all other subjects of the kingdom.

The fifth of this kind is of queen Mary's time also, it is Pasch. 4. & 5 P. & Mar. Rot. 45. the Case of Edward Newport: He was brought into the King's-Bench by Habeas Corpus out of the Tower of London, 'Cum causa, viz. quod 'commissus fuit per mandatum Concilii Dominæ 'Reginæ, qui committitur Marr. et immediate 'traditur in Ballium.' To this the like answer has been made, as to that other case of Overton's next before cited; they say that in another roll of another term of the same year, it appears he was in question for suspicion of coining, and it is true he was so; but the return, and his commitment mentioned in it, have no reference to any such offence, nor hath the bailment of him relation to any thing, but to the absolute commitment by the Privy-council: So that the answer to the like objection made against Overton's Case, satisfies this also.

The sixth of these is of queen Elizabeth's time, Mich. 9 El. Rot. 35. the Case of Tho. Laurence; this Laurence came in by Habeas Corpus, returned by the sheriffs of London, to be detained in prison 'per mandat. Concilii 'Dominæ Reginæ, qui committitur Marr. et 'super hoc traditur in Ballium.' An objection hath been invented against this also; it hath been said, that this man was pardoned, and indeed it appears so in the margin of the roll, where the word 'pardonatur' is entered: but clearly his enlargement by bail was upon the body of the return only, unto which that note of pardon in the margin of the Roll hath no relation at all; and can any man think, that a man pardoned (for what offence soever it be) might not as well be committed for some Arcanum, or matter of state, as one that is not pardoned, or out of his innocency wants no pardon?

The seventh of these is in the same year, and of Easter-term following: it is P. 9, Rot. 68, Robert Constable's Case: He was brought by Habeas Corpus out of the Tower; and in the return it appeareth he was committed there, 'per mandatum privati Concilii Dominæ Re-'ginæ, qui committitur Mar. et postea isto 'eodem ter' traditur in ball.' The like objection hath been made to this, as that before of Laurence, but the self-same answer clearly satisfies for them both.

The eighth is of the same queen's time, in Pasch. 20 El. Rot. 72, John Browning's Case. This Browning came by H. Corpus out of the Tower, whither he had been committed, and was returned to have been committed, 'per 'privat. Concil. Dominæ Reginæ qui committi-'tur Mar. et postea isto eodem termino traditur 'in ball.' To this it hath been said, that it was done at the C. Justice Wray's chamber, and not in the court: and thus the authority of the precedent hath been lessened or slighted. If it had been done at his chamber, it would have proved at least this much, that sir Christ. Wray, then C. J. of the King's-Bench, being a grave, learned, and upright judge, knowing the law to be so, did bail this Browning, and enlarge him, and even so far the precedent were of valde enough; but it is plain that though the

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H. Corpus were returnable, as indeed it appears in the Record itself, at his chamber in Serjeants-Inn, yet he only committed him to the King's-Bench presently, and referred the consideration of enlarging him to the court, who afterward did it: for the Record says, 'Et postea isto eodem termino traditur in ball.' which cannot be of an enlargement at the C. Justice's chamber.

The ninth of this first kind is Hill. 40 El. Rot. 62, Edward Harecourt's Case; he was imprisoned in the Gatehouse, and that 'per dominos de privato concilio dominæ reginæ pro 'certis causis eos moventibus et ei ignotis:' and upon his H. Corpus was returned to be therefore only detained, 'Qui committitur Marr. et 'postea isto eodem termino traditur in ball.' To this never any colour of answer hath been yet offered.

The tenth is Catesbie's Case in the Vacation after Hill. Term, 43 El. Rot. Robert Catesbie was committed to the Fleet 'per warrantum 'diversor. prænobilium viror. de privato con-'cilio dominæ reginæ;' he was brought before justice Fenner, one of the then justices of the King's-Bench, by H. Corpus at Winchester-house, Southwark; 'Et commiss. fuit Marr. 'per præfat. Edwardum Fenner, et statim tra-'ditur in ball.'

The eleventh is Rich. Beckwith's Case, which was in Hil. 12th of king James, Rot. 158. He was returned upon his H. Corpus to have been committed to the Gatehouse by divers lords of the privy-council; 'Qui committitur Marr. et 'postea isto eodem termino traditur in ball.'

To this it hath been said by some, that Beckwith was bailed upon a letter, written by the Lords of the Council to that purpose to the Judges; but it appears not that there was ever any letter written to them to that purpose: which though it had been, would have proved nothing against the authority of the Record; for it was never heard of, that judges were to be directed in point of law by letters from the lords of the council, although it cannot be doubted, but that by such letters sometimes they have been moved to bail men, that would or did not ask their enlargement without such letters, as in some examples I shall shew your lordships among the Precedents of the Second kind.

The twelfth and last of these is that of sir Tho. Monson's Case; it is Mich. 14 Jac. Rot. 147. He was committed to the Tower 'per 'warrantum à diversis dominis de privato con-'cilio domini regis locum tenenti directum;' and he was returned by the lieutenant to be therefore detained in prison, 'qui committitur 'Marr' et super traditur hoc in Ball.' To this it hath been answered, that every body knows by common fame, that this gentleman was committed for suspicion of the death of sir Tho. Overbury, and that he was therefore bailable: a most strange interpretation, as if the body of the Return and the Warrant of the privy-council should be understood, and adjudged out of fame only. Was there not as much a fame, why the gentlemen, that were remanded in the last judgment, were committed, and might not the self-same reason have served to enlarge them, their offence, if any were, being I think much less than that for which this gentleman was suspected?

And thus I have faithfully opened the number of twelve Precedents, most express in the very point in question, and cleared the objections that have been made against them. And of such Precedents of Record as are of the first kind, which prove plainly the practice of former ages, and judgment of the court of king's bench, in the very point, on the behalf of the subject, my lords, hitherto.

I come next to those of the second kind, or such as are pretended, that persons so committed are not to be enlarged by the Judges upon the Habeas Corpus brought, but to remain in prison still at the command of the King or the Privy-Councill. There are of two natures; the first of these are, where some assent of the King or the Privy-Council appears upon the enlargement of a prisoner so committed; as if, that because such assent appears, the enlargement could not have been without such assent.—The second of this kind, are those which have been urged as express testimonies of the Judges denying bail; and in such cases, I shall open these also to your lordships: which being done, it will most clearly appear, that there is nothing at all in any of these, that makes any thing at all against the Resolution of the house of commons, touching this point; nay it is so far from their making any thing against it, that some of them add good weight also to the proof of that Resolution.

For those of the first nature of this second kind of Precedents, they begun in the time of H. 7. Tho. Brugge, and divers others, were imprisoned in the King's-Bench 'ad mandatum 'domini regis,' they never sought remedy by Habeas Corpus, or otherwise, for aught appears: But the Roll says, that 'dominus rex 'relaxavit mandatum,' and so they were bailed. But can any man think, that this is an argument either in law or common reason, that therefore they could not have been bailed without such assent? It is common in cases of common persons, that one being in prison for surety of the peace or the like, at the suit of another, is bailed upon the release of the party plaintiff; can it follow, that therefore he could not have been bailed without such release? Nothing is more plain than the contrary. It were the same thing to say, that if it appear, that if a plaintiff be non-suit, therefore unless he had been non-suit, he could not have been barred in the suit. The case last cited is Mich. 7 H. 7, rot. 6.

The very like is in the same year, Hill. 7 H. 7, Rot. 13. The case of Will. Bartholomew, Will. Chase, and divers others, and the self-same answer, that is given to the other, clears this.

So in the same year, Pasch. 7 H. 7, Rot. 18. John Beomond's case, is the same in substance

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with those other two, and the self-same answer also satisfies, that clears them.

The next case is, Mich. 22 H. 7, Rot. 8. Tho. Yew's case; he was committed 'ad sec. 'pacis,' for the security of the peace, at the suit of one Freeman, and besides, 'ad manda-'tum dom. regis.' And first, 'Freeman re-'laxavit sec. pacis,' and then sir James Hobbard, the then king's Attorney-General, 're-'laxavit mandatum dom. regis;' and hereupon he is bailed. The release of the king's Attorney no more proves that he could not have been enlarged without such release or assent, than that he could not have been bailed without release of surety of the peace by Freeman.

The very like is in Hill. 9 H. 7. Rot. 14. The case of Humphry Broche, which proves no more here than the rest of this kind already cited.

Then for this point also, Broome's case of queen Elizabeth's time, is Trin. 39 El. Rot. 128. Laurence Broome was committed to the Gate-house 'per mandatum dom. concilii 'dominæ reginæ,' and being returned so upon the H. Corpus, is first committed to the Marshalsea as the course is, and then bailed by the court; which indeed is an express precedent, that might perhaps well have been added to the number of the first twelve: which so plainly shews the practice of enlarging prisoners in this case, by judgment of the court upon the H. Corpus. But it is true, that in the Scrolls of that year, where the bails are entered, but not in the Record of the H. Corpus, there was a note, that this Broome was bailed 'per man-'datum privati concilii;' but plainly this is not any kind of argument, that therefore in law he might not have been otherwise bailed.

The self-same is to be said of another of this kind, in Mich. 40 El. Rot. 37, Wenden's Case. Tho. Wenden was committed to the Gatehouse by the queen and the lords of the council 'pro 'certis causis' generally; he is brought by H. Corpus into the King's-Bench, and bailed by the court. But it is said, that in the Scrolls of that year, it appears that his enlargement was 'per consensum dom. privati concilii;' and it is true that the queen's Attorney did tell the court, that the lords of the council did assent to it. Follows it therefore, that it could not have been without such assent?

Next is Hill. 43 El. Rot. 89, when divers gentlemen of special quality were imprisoned by the command of the privy-council; the queen being graciously pleased to enlarge them, sends a commandment to the judges of the King's-Bench, that they should take such a course, for delivering them upon bail, as they should think fit: and they did so, and enlarged them upon writs of H. Corpus. Follows it therefore, that this might not have been done by law, if the parties themselves had desired it?

So in Trin. 1 Jac. Rot. 30. Sir John Brocket being committed to the Gatehouse, is returned to stand committed 'per mandatum 'privati concilii,' and he is enlarged 'virtute 'warranti a concilio prædicto.' But the same answer that satisfies for the rest before cited, serves for this also.

The last of these, is Reyner's case, in Mich. 12 Jac. Rot. 119. He was committed to the Gatehouse by the lords of the council, and being brought into the King's-Bench by Habeas Corpus, is enlarged upon bail; but this they say was upon a letter written from one of the lords of the council to the judges. It is true, that such a letter was written, but the answer to the former precedents of this nature, are sufficient to clear this also.

And in all these observe, 1. That it appears not, that the party ever desired to be enlarged by the court, or was denied it. 2. Letters either from the king or council cannot alter the law in any case: so that hitherto nothing hath been brought on the contrary part, that hath any force or colour of reason in it.

We come now, my lords, to those Precedents of the other nature cited against the Liberty of the Subject: that is, such as have been used to mislike the persons so committed may not be enlarged by the court. They are in number eight, but there is not one of them that proves any such thing, as your lordships will plainly see upon opening them. The first four of them are exactly in the same words, saving that the names of the persons and the prisons differ; I shall therefore recite them all one after another, and then clear them together.

The first is Richard Everard's case, Hill. 7 H. 7, Rot. 18. He and others were committed to the Marshalsea of the houshold, 'per 'mandatum domini regis,' and so returned upon a H. Corpus into the King's-Bench; whereupon the entry is only 'Qui committitur 'Marr.' &c.

The second is Hill. 8 Hen. 7, Richard Cherry's case; he was committed to the mayor of Windsor, 'per mandatum domini regis,' and so returned upon a H. Corpus; and the entry is only, 'Qui committitur Marr.' &c.

The third is Hill. 9 Hen. 7, Rot. 14, Christ. Burton's case, who was committed to the Marshalsea of the houshold, 'per mandatum do-'mini regis,' and so returned upon his Habeas Corpus; and the entry is likewise, 'Qui com-'mittitur Marr.' &c.

The fourth is George Urswick's case, Pasch. 19 Hen. 7, Rot. 19. He was committed to the sheriffs of London, 'per mandatum domini 'regis,' and returned so upon his Habeas Corpus, 'Qui committitur Marr.' &c.

These four have been used principally, as express Precedents, to prove that a prisoner so committed cannot be enlarged; and perhaps at the first sight, to men that know not, and observe not the course and entries of the court of King's-Bench, they may be apprehended to prove as much: but in truth they rather prove the contrary, at least there is no colour in them of any such matter as they have been used for. To which purpose I beseech your lordships to call to your memories, that which I first observed to you touching the course of

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that court. Where a prisoner is brought in by *H. Corpus*, he is (if he be not to be remanded) first committed to the marshal of the court, and then bailed as his case requires. This is so certain, as it can never be otherwise. Now these men being thus committed by the express command of the king, are first, you see, taken from the prisons whither they were first committed; wherein you may observe, my lords, that if a general suspicion of matter of state were of force in such a case, it might be as needful in point of state, to have the prisoner remain in the prison, where the king by such an absolute command committed him, as to have him at all committed. When they have taken them from the prisons where before they were, they commit them to the marshal of their own court, which is but the first step to bailing them. Now it appears not indeed that they were bailed, for then 'Traditur in Ball' had followed, but nothing at all appears that they were denied it; perhaps they never asked it, perhaps they could not find such as were sufficient to bail them. And in truth, whensoever any man is but removed from any prison in England (though it be for debt or trespass only) into that court, the entry is but in the self-same syllables as in these four cases.

And in truth if these Proceedings did prove, that any of the prisoners named in them were not bailable, or had been thought by the court not to have been bailable; it will necessarily follow, that no man living that is ordinarily removed from any prison into the King's-Bench; or that is there upon any ordinary action of debt, or action of trespass, could be bailed; for every man that is brought thither, and not remanded, and every man that is arrested but for a debt or trespass, and was returned into that court, is likewise committed to the marshal of that court, and by the self-same entry, and not otherwise; yet these four have been much stood on, and have strangely misled the judgment of some that did not, or would not, seem to understand the course of that court.

The fifth of this nature is Edward Page's Case; it is Tr. 7 Hen. 8. This might have been well reckoned with the former four, had not the misentry of the clerk only made it vary from them. Edward Page was committed to the Marshalsea of the houshold, and that 'per 'mandatum domini regis,' and returned to be therefore detained, and the entry is 'Qui com-'mittitur Mar' hospitii dom. regis.' This word 'Marr.' is written in the margin of the Roll; this hath been used to prove, that the judges remanded this prisoner; if they had done so, the remanding had been only while they advised, and not any such award which is given when they adjudge him not bailable. But in truth the word 'committitur' shews, that there was not any remanding of him, nor doth that court ever commit any man to the Marshalsea of the houshold: and besides, the word 'Marr.' for Marescallo in the margin, shews plainly that he was committed to the marshal of the King's-bench, and not remanded to the Marshalsea of the houshold; for such entry of that word in the margin, is perpetually in cases of that nature, when they commit a man to their own prison, and so give him the first step to bailment, which he may have if he ask it, and can find bail. And doubtless these words of 'Hospitii præd.' were added by the error of the clerk, for want of distinction in his understanding, from the 'Marr.' of the King's-bench, to the marshal of the houshold.

The sixth of these is Thomas Cæsar's Case; it is 8 Jac. rot. 99. This Cæsar was committed to the Marshalsea of the houshold, 'per man-'datum domini regis,' and returned to be therefore detained, and indeed a 'remittitur' is in the roll, but not a 'remittitur quousque,' but only that kind of 'remittitur' which is only used while the court advises. And in truth this is so far from proving any thing against the resolution of the house of commons, that it appears that the opinion of the reverend Judges of that time was, that the return was insufficient, and that if it were not amended, the prisoner shall be discharged. For in the Book of Rules in the court of Mich. Term (when Cæsar's Case was in question), they expressly ordered, that if the steward's marshal did not amend their return, the prisoner should be absolutely discharged: the words of the rule are, 'nisi 'senescallus et marescal. hospitii domini regis 'sufficienter returnaverint breve de Habeas 'Corpus Thomæ Cæsar dier. Mercur. prox. 'post quindenam scilicet Martin. def. exone-'rabitur.' And this is also the force of that precedent, but yet there hath been an interpretation upon this rule. It hath been said that the judges gave this rule, because the truth was, that the return was false, and that it was well known, that the prisoner was not committed by the immediate command of the king, but by the command of the lord-chamberlain, and thence (as it was said) they made this rule; but this kind of interpretation is the first that ever was supposed, that judges should take notice of the truth or falshood of the return, otherwise than the body of the return could inform them. And the rule itself speaks plainly of the sufficiency only, and not of the truth or falshood of it.

The seventh of these, is the Case of James Desmaistres, Edward Emerson, and some others that were Brewers, and were committed to the Marshalsea of the houshold, 'per mandatum 'domini regis,' and so returned upon H. Corpus: and it is true, that the roll shews that they were remanded, but the remanding was only upon advisement. And indeed the grave and upright judges of that time were so careful, lest upon the entry of the remanding, any such mistake might be, as might perhaps mislead posterity in so great a point, that they would expressly have this word 'immediate' added to the 'remittitur,' that so all men that should meet with the roll might see, that it was done for the present only, and not upon any debate of the question. And besides, that there is no 'quousque' to it, which is usually added, when

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the highest award upon debate or resolution of this kind is given by them.

The eighth of these is the Case of Saltonstall; it is Hill. 12 Jac. Sir Samuel Saltonstall was committed to the Fleet, 'per mandatum domini regis;' and besides, by the Court of Chancery, for disobeying an order of that court, and is returned upon his Habeas Corpus, to be therefore detained. And it is true that a 'remittitur' is entered in the roll, but it is only a 'remittitur prisonæ prædict.' without 'quousque secundum legem deliberatus fuerit:' and in truth it appears on the record, that the court gave the Warden of the Fleet three several days at several times to amend his return, and in the interim 'remittitur prisonæ præd'.' Certainly if the court had thought that the return had been good, they would not have given so many several days to have amended it; for if that 'mandatum domini regis' had been sufficient in the case, why need it to have been amended?

The ninth and last of these is, Tr. 13 Jac. rot. 71, the Case of the said sir Samuel Saltonstall: he is returned by the Warden of the Fleet, as in the case before, and generally, 'remittitur' is in the roll, which proves nothing at all, that therefore the court thought he might not by law be inlarged; and besides, in both cases he stood committed also for disobeying an order in the Chancery.

These are all that have been pretended to the contrary in this great point, and upon the view of them thus opened to your lordships, it is plain that there is not one, not so much as one at all, that proveth any such thing, as that persons committed by the command of the king, or the lords of the council without cause shewed, might not be enlarged; but indeed the most of them expressly prove rather the contrary.

Now, my lords, having thus gone through the Precedents of Record, that concern the point of either side, before I come to the other kind of Precedents, which are the solemn Resolutions of Judges in former times, I shall (as I am commanded also by the house of commons) represent unto your lordships somewhat else they have thought very considerable; with which they met, whilst they were in a most careful enquiry of whatsoever concerned them in this great question.

It is, my lords, a Draught of an Entry of a Judgment in that great Case lately adjudged in the court of King's-bench, when divers gentlemen imprisoned 'per speciale mandatum 'domini regis,' were by the award and order of the court, after solemn debate, sent back to prison, because it was expressly said, they could not in justice deliver them, though they prayed to be bailed. The Case is famous, and well known to your lordships, therefore I need not further to mention it: as yet indeed there is no Judgment entered upon the Roll, but there is room enough for any kind of Judgment to be entered. But, my lords, there is a form of a Judgment, a most unusual one; such a one as never was in any such case before (for indeed there was never before any case so adjudged), and thus drawn on by a chief clerk of that court (by direction of Mr. Attorney-General), as the house was informed by the clerk, in which the reason of the Judgment, and remanding of those gentlemen, is expressed in such sort, as if it should be declared upon Record for ever, that the laws were, that no man could ever be inlarged from imprisonment that stood committed by such an absolute command.

The draught is only in sir John Hevenigham's Case, being one of the gentlemen that was remanded, and it was made for a form for all the rest. The words of it are after the usual entry of a *Curia advisare vult* for a time; that 'Visis retur. prædict. nec non diversis antiquis 'recordis in curia hic remanent. consimiles 'casus continentibus, maturaq. deliberatione, 'inde prius habita, eo quod nulla specialis 'causa captionis sive detentionis præd. Johannis exprimitur, sed generaliter quod detentus 'est in prisona præd'. per speciale mandatum 'domini regis, ideo præd'. Johannes remittitur 'præfat. custodi marr. hospitii præd. salvo custodiend. quousq. &c.' that is, 'quousque secundum legem deliberatus fuerit.' And if that court, that is the highest for ordinary justice, cannot deliver him *secundum legem*; what law is there, I beseech you, my lords, that can be sought for in any other inferior court to deliver him? Now, my lords, because this draught, if it were entered in the Roll, (as it was prepared for no other purpose) would be as great a declaration, contrary to the many acts of parliament already cited, contrary to all precedents of former times, and to all reason of law; to the utter subversion of the highest liberty and right belonging to every freeman of this kingdom, and for that especially also it supposes, that divers ancient records had been looked into by the court in like cases, by which records their judgments were directed; whereas in truth, there is not any one record at all extant that with any colour (not so much indeed as with any colour) warrants the judgment: therefore the house of commons thought fit also, that I should, with the rest that hath been said, shew this draught also to your lordships.

I come now to the other kind of Precedents, that is, solemn Resolutions of Judges, which being not of Record, remain only in authentic copies: but of this kind there is but one in this case, that is the Resolution of all the Judges in the time of queen Elizabeth. It was in the 34th of her reign, when divers persons had been committed by absolute command, and delivered by the Justices of the one Bench or the other; whereupon it was desired, that the Judges would declare in what cases persons committed by such command were to be inlarged, which hath been variously cited, and variously apprehended. The House of Commons, therefore, desiring with all care to inform themselves as fully of the truth of it as possibly they might, got into their hands from a member

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of their house, a Book of selected cases, collected by a reverend and learned Chief-Justice of the Common-Pleas, that was one of them that gave the Resolution, which is entered at large in that Book: I mean the L. C. Justice Anderson, it is written in the Book with his own hand, as the rest of the Book is, and howsoever it hath been cited, and was cited in that great Judgment upon the Habeas Corpus in the King's-Bench, as if it had been, that upon such commitments the Judges might not bail the prisoners; yet it is most plain, that in the Resolution itself no such thing is contained, but rather expressed the contrary. I shall better represent it to your lordships by reading it, than by opening it.

Then it was read here. (See *ante*, p. 76).

If this Resolution doth resolve any thing, it doth indeed upon the enquiry resolve fully the contrary to that which hath been pretended, and enough for the maintenance of the ancient and fundamental point of liberty of the person, to be regained by Habeas Corpus when any is imprisoned. And I the rather thought it fit now to read it to your lordships, that it might be at large heard; because in the great Judgment in the King's-Bench, though it was cited at the Bar, as against this point of personal liberty, as also at the Bench, yet though every thing else of record that was used, were at large read openly, this was not read either at bar or bench: for indeed if it had, every hearer would easily have known the force of it to have been indeed contrary to the Judgment.

My lords, having thus gone through the charge committed to me by the house of commons, and having thus mentioned to your lordships, and opened the many Precedents of Records, and that Draught of the Judgment in this like case, as also this Resolution; I shall now (as I had leave and direction given me, lest your lordships should be put to much trouble and expence of time in finding or getting copies at large of those things which I have cited) offer also to your lordships authentic copies of them all, and so leave them, and whatsoever else I have said, to your lordships further consideration.

The true Copy of the Precedents of Record.

Inter Record. Dom. Regis Caroli in Thesauro Recept. Scaccarii sui sub custodia Dom. Thesaurar. et Camerar. ibidem remanen. viz. Placita coram Domino Rege apud Westmonast. de Ter' Pasche anno Regi Edwardi 3. post conquest. Angliæ 18. inter alia sic continetur ut sequitur.

Rot. 33. Adhuc de termino Pasch.

Dominus Rex mandavit dilecto et fideli suo Roberto de Dalton constabular' Turris sue London vel ejus locum tenent' bre. suum in hæc verba: Edwardus Dei gratia rex Angliæ, Franciæ, et dominus Hiberniæ dilecto et fideli suo Roberto de Dalton constabular' Turris suæ London vel ejus locum tenent. salutem. Mandamus quod Johannem Bildeston capellan' quem vic. nostr. London ad mandatum nostrum apud pred. Turrim vobis liberavit ab eisdem recipiatis et in prisona nostra Turris London pred. salvo custodir' fac' quousque aliud super hoc duxerimus demandand. teste meipso apud Turrim nostram London 30 die Martii anno regni nostri Angliæ 16. regni vero nostri Franciæ 30. Et modo scilt. in Crast. Ascen. Dom. anno regis nunc 8. coram domino rege apud Westmin-st. venit Johannes de Wynwick locum tenens pred. constabular. et adduxit coram justiciar' hic in cur. pred. Johannem de Bildeston quem ille a prefat. vicecomit. virtute brevis pred. recepit. &c. Et dicit quod ipse a domino rege habuit mandat. ducend. et liberand. corpus ipsius Johannis de Bildeston prefat. justiciar. hic, &c. Et quesitum est de pred. Johanne de Wynwick si quam aliam detentionis prefat. Johannis de Bildeston habeat causam. Qui dicit quod non nisi bre. pred. tantum. Et quia videtur cur. bre. pred. sufficien. non esse predict. Johannis de Bildeston prison. Marr' regis hic retinen. &c. Idem Johannes dimittitur per manus Willielm. de Wakefield rectoris eccle. de Willingham, Johannis de Wynwick in com. Kanc. Johannis de Norton in com. Norff. Nicolai de Blandefford in com. Middl. et Rogeri de Bromley in com. Stafford, qui eum manuceperunt habend. eum coram domino rege in octabis Sancti Trin. ubicunque, &c. viz. Corpus pro corpore, &c. Ad quas octabis Sanct. Trin. coram domino rege apud Westm. ven. pred. per manus pred' Et super hoc mandavit justiciar. suis hic quoddam bre. suum claus. in hæc verba, Edwardus Dei gratia rex Angliæ, et Franciæ, et dominus Hiberniæ, dilectis et fidel. suis Willielmo Scot, et sociis suis justiciar' ad placita coram nobis tenend. assignat. saltem cum nuper mandaverimus dilecto et fideli nostro Roberto de Dalton constabular' Turris nostræ London vel ejus locum tenen. quod Johannem de Bildeston capellanum capt. et detent. in prisona Turris pred. per preceptum nostrum pro suspicione contrafactionis magni sigilli nostri cum attachiat. et aliis causis caption. et detentionem pred. tangent. salvo et secur' duci fac' coram nobis in Crast. Ascen. Dom. ubicunque tunc fuissemus in Anglia, prisonæ Marescall. nostr. coram nobis liberand. in eadem quousque per quendam informatorem essemus plenius informat. custod. et tuta inde informatione pred. ulterius pred. super hoc fieri fecerimus quod fore viderimus faciend. secundum legem, et consuetudinem regni nostri Angliæ, nos in casu quod dictus informator non ven. coram nobis ad informand. nos plenius super premiss. volentes eadem Johannem ea de causa justiciar' deferre in hac parte vobis mandamus quod si pred. informator in quinden. Sanct. Trin. prox. futur. vel circa non venit super hoc plenius informat. tunc advent. ejusdem informator is minime expectat. eidem Johanni super hoc fieri fac. justic. complement. prout fore videritis faciend. secundum legem et consuetudinem regni nostri Angliæ, teste meipso apud Westminst. 12 Maii anno regni nostri Angliæ 18. Regni vero nostri Franc' quinto. Quo quidem bre. respect. fact. est proclamatio quod siquis dictum regem super premiss. informare vel erga

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ipsum Johannem prosequi voluerit, quod veniat. Et super hoc venit pred. W. de Wakefield, Nicholas de Wandsworth, Jo. Brynwyn, Jo. de Longham, Jo. de Norton, et Rogerus de Bromley omnes de com' Midd' et man' pred. Johannem de Bildeston habend. eum coram domino rege de die in diem usque ad prefat' quinden. Sanct. Trin. ubicunque, &c. Ad quem diem anno 18. coram domino rege apud Westminst. venit pred. Johannes de Bildeston per manus pred. et iterata facta est proclam. in forma qua superius, &c. et nullus venit ad dictum regem informand' &c. per quod concess. est quod pred. Johannes de Bildeston eat inde sine die salva semper actione dom. regis si qua, &c.

De Ter' Sanct. Hillar' anno 22 H. 8, et per cont. Rot. ejusdem Rotul. 31.

Johannes Parker per Ricardum Choppin, et W. Daunsey vic' London virtute brevis dom. regis de latitat, pro pace versus ipsum Johannem Parker ad sect. Johannis Bruton eis inde direct. et coram rege duct. cum causa, viz. quod idem Johannes Parker capt. fuit in civitate pred. pro secu' pacis pred. et pro suspicione feloniæ per ipsum apud Crowesall in com. Glocest. perpetrat. per nomen Johannis Parker de Thornbury in com. Glocest. corser, alias dict. Johan. Charbs de eodem com' surgeon, ac per mandatum dom. regis nunciat' per Robertum Peck gen' de Cliffords-Inn, qui committitur Marr' &c. et postea iste eodem termino traditur in Ballium Thomæ Atkins de Thornbury pred. weaver, et Willi. Nole de eadem villa et dom. usque a die Pasche in unum men. wenver ubicunque, &c. Et quod idem Johannis Parker citra eundem diem personaliter comparuit coram justiciar' dom. regis ad prox. general. Gaol Deliberation' in com. Glocest. prox. tenend. ad subjiciend. et recipiend. ea omnia, et singula quæ prefat. justiciar' de eo tunc ordinare contigerint, &c. viz. Corpus pro corpore, &c. Ad quem diem pred. Johannis Parker licet ipsi 4. placit. solemniter exact. ad comparend. non ven. ideo caperet eum pler' Trin. ad quem diem ex octab. Trin. postea Trin. 21 H. 8, ex Crast. quinden. Pasche. Ad quem diem bre. et vic' return' quod ad Hust. tent. apud London. die Lune prox' post fest. Sancte Scholastice anno regis H. 8, 25. Johannes Parker, et W. Nole utl' fuer. prout patet per bre. regis de Ter' Pasche anno 25. Rs. pred.

De Ter. Sanct. Mich. anno 35 H. 8, et per cont. ejusdem Rot. 33.

Johannem Bincks per Ro. Baker ar. senescall. cur. Marr. et Radum Hapton Mar' ejusdem cur. virtute brevis dom. regis de Habeas Corpus ad subjiciend. et recipiend. &c. eis inde direct. coram domino rege duct' cum causa, viz. quod ante adventum brevis pred. Johannes Byncks captus fuit per mandatum privati concilii dom. regis pro suspicione feloniæ, et pro aliis causis illos movent. et duc' ad gaol. Marr. et ibidem detent. virtute gaol' pred. qui committitur Marr. &c. Et immediate ex gra' cur. special' pred. Johannes Byncks de Magna Marlow in com. Buck. weaver traditur in Ball. Thomæ Bignam de London gent. et Johanni Woodward de Marlow pred. taylor, usque in crast. Sanct. Martin. ubicunque, &c. utque pleg. corpus pro corpore, &c. Ad quem diem comperuit et Robertus Drury ar' et Johannes Bosse gen. domino justiciar' dom regis ad pacem in com' Buck. virtute brevis dom. regis eis direct. domino regi certificaverunt quod nullum indictamentum de aliquibus feloniis et transg. versus ipsum Johannem Byncks coram eis ad presens resident. Et ulterius de fama et gestu ipsius Johannis Byncks per sacram. proborum et legalium homin. com. Buck. diligenter inquiri fecerunt, et nihil aliud preter bonum de eo coram eis est compertum. Ideo concess. est quod pred. Jo. Byncks de premissis eat inde sine die deliberatur per proclamationem et jur. prout moris est.

De Ter. Pas. anno 2 et 3 Ph. et Mar. Rot. 58.

Ricardus Overton nuper de London gen. per Tho. Leigh, et Johannem Machell vic' London virtute brevis dom. regis et reginæ de Habeas Corpus ad stand. rect. &c. eis inde direct. coram Willielmo Portman mil' capital. justiciar. &c. duct. cum causa, viz. quod pred. Ricardus Overton 9. die Octobr. ult. preter commiss. fuit prison. de Newgate, et ibidem in eadem prisona sub custod. dict. vic. detent. ad mandatum pernobilium duorum honorabilis concil. pred. regis et reginæ qui committit. Marr. &c. et immediate traditur in Ball. Willielmo Overton de London gen. et Johanni Tayler de parochia Sanct. Martini apud Ludgate London merc. usque octab. Trin. viz. uterque manucaptor. pred. corpus pro corpore et postea Tr. 2. El. reginæ, corpus Overton et pleg. suos octabis Michael. ad quem diem ex mens. Pasch. ad quem diem vic. ret. quod ad Hust. suum tent. Guildhall civitatis London die Lunæ post festum Sanct. Gregor. epi. pred. W. Overton utl' est et per bre. Pas. anno suprad.

De Ter. Sanct. Mich. anno 2 et 3 P. et Mar. Rot. 16. habet Chart. allocat. Trin. 2 et 3 Phil. et M.

Ricardus Overton nuper de Lond. gen. capt. octab. Hill. pro quibusdam altis prodic. unde indictat. est, ad quem diem Pasc. ad quem diem ex Cr. Animarum.

De Termino Pasch. 4 et 5 P. et Mar. et per cont. ejusdem Rot. 45.

Edwardus Newport gen. per Robertum Oxenbridge mil' constabular' Turris pred. virtute bre. dominor. regis et reginæ de Habeas Corpus ad subjiciend. &c. ei inde direct. ad Barr. coram domino rege et regina duct. cum causa, viz. quod ipse sibi commiss. fuit per mandat. concilii dominæ reginæ, qui committitur Marr. et immediate traditur in Ball. prout, &c. Et postea sine die per proclamation. virtute brevis de gestu et fama prout, &c. Rot. 17. ejusdem anni.

De Ter. Mich. anno 4 et 5 P. et Mar. per Cont. ejusdem Rotul. 17.

Memorand. quod 14. die Octobr. anno 4 et 5 Phil. et Mar. Edwardus Newport de Hanley in com. Wigorn. ac capt. fuit per Uxbridge in com. pred. pro suspicione contra factionis que-

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rundem pec. auri vocat. French crowns, per ipsam et alibi in com. Wigor. fier. supposit. et ea de causa per mandatum concil' dominor. regis et reginæ commiss. ad barr. tunc duct. fuit, qui committitur Marr. &c. et super hoc idem Edwardus Newport traditur in ball. Thomæ Charge de Latton in com. Essex gener' Edwardo Hales de parochia Sancti Olavi, London, gen. Johanni Baker, clerico ordinar. London, Johanni Gill de parochia Sanct. Tho. Apostoli London, cloth-worker, et Richardo Parks de Brownsgrave in com. Wigorn. yeoman, usque octabas Hill. ubicunque, &c. viz. quilibt. pleg. proced. sub pœna 100*l.* et pred. Edwardus sub pœna 200*l.* quas, &c. Ad quem diem comperuit et committitur constabular. Turris London per mandatum concil. dom. regis et reginæ ibid. salvo custodiend. quousque, &c. Et postea Pas. 4 et 5 P. et M. traditur in ball. prout patet per scrivect. finium istius ter. et postea M. 5 et 6 P. et M. exonerat. per cur. eo quod tam per sacram. 12 probor. et legalium hominum de pred. com. Midd. coram dom. rege et domina regina hic in cur. mea parte jurat. et onerat. quam per sacrament. 12 probor. legal homin. de pred. com. Wigor. coram Edwardo Saunders, et Johanne Whiddon mil. et aliis justicior' dictor' dom. regis et reginæ ad pacem ac de diversis feloniis transgress. et aliis malefact. in eodem com' perpetrat. audiend. et terminand. assignat. virtute brevis dictor. dominor. regis et reginæ eis inde direct. in ea parte jurat. et onerat. ad inquirend. de gestu et fama ipsius Edwardi compert. existit quod idem Edwardus est de bonis gestu et fama, ideo proclamatio est inde facta prout moris est secund. legem et consuetudinem reg. Angliæ, &c. concess. est. quod pred. Edwardus eat inde sine die.

De Ter. Pas. 9. El. Rot. 35.

Tho. Lawrence per Christopher' Drap. majorem civitatis London' Ambrosium Nicholas et Ric' Lambert vic. ejusdem civitatis virtute brevis dom. reginæ de Habeas Corpus, &c. eis inde direct. et coram domina regina dict. cum causa, viz. quod 7 die Novembr. anno regni dom. El. nunc reginæ Angliæ 8, pred. Thomas Lawrence indicto brevi nominat. captus fuit in civitate pred. et in prisona dom. reginæ sub custod. pred. coram vic. detent. per mandatum concil' dom. reginæ qui committitur Marr. &c. et super hoc tradit. in ball' prout patet per scrivect. finium istius ter.

De Ter. Pasch. 9 El. Rot. 68.

Robertus Constable Ar' per Franciscum Jobson mil' locum tenend. Turris London virtute brevis dom. reginæ de Habeas Corpus ei inde direct. et coram domina regina dict. cum causa, viz. quod idem Robertus Constable prefat. Francisco Jobson commissus fuit per mandatum privat. concil' dom. reginæ salvo custodiend. qui committitur Marr. &c. et postea isto eodem ter. traditur in ball. prout patet inter scrivect. finium istius ter.

Ter. Pas. anno 20 El. et per cont. ejusdem Rot. 62.

Johannes Browning per Owen Hopton mil' locum tenen' Turris dominæ reginæ London virtute brevis Habeas Corpus ad subjiciend. ei inde direct. et coram dilecto et fideli Ch. Wray mil. capit. justiciar. dom. reginæ ad placita coram nobis tenend. assignat. apud hospitium suum in Serjeants-Inn Fleet-street London' die Lunæ, viz. 12 die Maii duct. cum causa viz. quod pred. Johannes Browning commissus fuit eidem locum tenend. per mandatum privati concil' reginæ salvo custodiend. &c. qui com. Marr. &c. et postea isto eodem ter. traditur in ball' prout pat. per scrivect. finium istius ter.

De Ter. Sanct. Hillar. anno 40 El. Reginæ et per cont. ejusdem Rot. 62.

Edwardus Harecourt per Hugonem Parlour custod. prisonæ dominæ reginæ de Gatehouse infra civitatem Westminst. in com. Middl. virtute brevis dominæ reginæ de Habeas Corpus ad subjiciend. &c. ei inde direct. et coram domina regina apud Westminst. dicta cum causa, viz. quod ante advent. brevis pred. scil. 7. die Octobr. an. regni dom. regin. nunc 39. corpus Edw. Harecourt, per duos privat. concil. dictæ dominæ reginæ ei commiss. fuit salvo et secure custodiend. certis de causis ipsos movent. et ei ignotis, qui committitur Marr. &c. et postea isto eodem ter. traditur in ball. prout patet per scrivect. finium istius termini.

De Vacatione Hillar. anno 43 El.

Robertus Catesbie per Johannem Philips guardian' de le Fleet virtute brevis dominæ reginæ de Habeas Corpus, ad subjiciend. &c. ei inde direct. et coram Edwardo Fenner uno justiciar. dominæ reginæ ad placita coram ipsa regina tenend. assignat. apud Winchester-house in burgo de Southwark in com. Surr. dict. cum causa, viz. quod pred. Robertus commissus fuit prisonæ pred. primo die Martii anno 43 El. War. diversorum prænobilium virorum de privato concilio dominæ reginæ in hæc verba: 'To the Warden of the Fleet, or his deputy: 'These shall be to will and require you, to re-'ceive at the hands of the Keeper of the 'Compter of Wood-street, the person of Robert 'Catesbie, esq. and him to detain, and keep 'safely in that prison under your charge, until 'you shall have other direction to the contrary, 'whereof this shall be your warrant.'—Et prefat. Robertus commissus fuit Marr. per prefat. Edwardum Fenner, et statim traditur in ball' prout patet, &c.

Ter. Hill. anno 43 Eliz. Reginæ 12 Jac. Regis.

Ricardus Beckwith gen' per Aquilam Wykes custod. prisonæ de Gatehouse in com. Midd. virtute brevis dom. regis de Habeas Corpus ad subjiciend. ei inde direct. et coram domino rege duct. cum causa, viz. quod ante advent. brevis predict. scilicet 10 die Julii anno regni dom. Jac. regis Dei gratia Angliæ, Franc. et Hiberniæ fidei defensor. &c. 11 et Scot. 47 predict. Ricardus Beckwith sibi commissus fuit prisonæ predict. sub custod. sua virtute cujusdem warrant. sibi fact. et direct. per Georgium divina providentia Cant. archiepiscopum totius Angliæ primat. et metropolitan. Henric. com. Northampton dominum guardian. 5 portuum

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et un. de privato concil. regis, Tho. com. Suffolk dom. camerar' regiæ familiæ ac sacr' concil. dom. regis Edwardum domini Wooton gubernator regiæ familiæ, Johannem dom. Stanhope vice-camerar' regiæ familiæ; cujus warrant sequitur in hæc verba: 'To Aquila Wykes, 'Keeper of the Gatehouse in Westminster, or 'his deputy: Whereas it is thought meet that 'Miles Rayner and Richard Beckwith be re-'strained of their liberty, and committed to the 'prison of the Gatehouse; These shall be to 'will and require you to receive the persons of 'the said Rayner and Beckwith into your 'charge and, safe keeping in that prison, there 'to remain until you shall have further order 'from us in that behalf, for which this shall be 'your warrant. Dated at Whitehall the 10th 'of July, 1613.'—Et postea isto eodem termino.

De Ter. Mich. an. 14 Jac. per cont. ejusd. Rot. 147.

Thomas Mounson miles per Georgium More locum tenent' Turris dom. regis London' virtute brevis dom. regis de Habeas Corpus ad subjiciend. &c. ei inde direct. coram domino rege apud West. duct. cum causa, viz. quod ante adventum brevis predict. Thomas sibi commissus fuit per warrant. advers. dominis de privato concilio regis sibi direct. &c. Qui committitur Marr. &c. et super hoc traditur in ball' prout pater per scrivect. fin. istius termini.

De Ter. Mich. 7 H. 7. et per cont. ejusdem Rot. 6.

Tho. Brugg junior, nuper de Yanington in com' Hertford gen', Johannes Rawleus nuper de Lemster in com' pred' yeoman, Rob. Sherman nuper de Lemster in com. predict. Walter Thomas nuper de eadem in com. predict. hosier, Tho. Ballard nuper de eadem in eodem com. smith, Cadwallader ap John Duy nuper de Kerry in Marchia Walliæ in com. Salop adjacen. gen. Reginald ap Breingham, alias Sherman, nuper de Lemster in com. Hereford Sherman, et Thomas Turner nuper de Kingsland in com. Hereford courser, sunt in custod. Marr. ad mandatum dom. regis, &c. ac pro aliis certis de causis prout patet alibi de record. &c. per record. istius ter. postea isto termin. dominus relaxavit mandatum suum et prosecut. predict. comparuerint per attorn. &c. Et quod utlag. versus prefat. Thomam Brugg revocatur isto termino et predict. Johannes Rawleus pro felon. et murdro predict. traditur in ball' prout patet alibi, &c. ideo hic Marr. de ejus corpore per cur. exoneratur, &c.

Ter. Hillar. 7 H. 7. et per cont. ejusdem Rot. 18.

W. Bartholomew, Johannes Bartholomew, Willielmus Chace, Henr. Carr, Tho. Rotesley, Tho. Street, Robertus Feldone, et Hen. Bancks sunt in custod. Marr. ad cust. mandat. dom. regis, &c. per record. istius termin. ac predict. Willielmus Chace pro pace Randulpho Josselen inveniend. &c. Pasche sequen. per postea termin. sequen. dictus dominus rex mandatum suum predict. quoad Willielmus Chace relaxavit per regis attornat. et pro pace et pro felon. et murdro traditur in ball.

De Ter. Pas. 7 H. 7. et per cont. Rot. ejusdem 18.

Johannes Beomond de Wednesbury in com' Staff. ar' est' in custod. Mar' ad mandatum dom. regis. &c. per record. istius ter' postea scilicet Trin' 7 Hen. 7. sequen' predict. Johannes Beomond de mandato predict. exoneratus existit ideo Mar' de eo per eandem cur' exoneratus exist.

De Ter. Mich. anno 12 H. 7, Rot. 8.

Thomas Yewe de villa de Staff. in com' Stafford yeoman, per Johannem Shawe et Ricardum Haddon vic' London virtute brevis dom. regis de Habeas Corpus, ad sect. ipsius regis eis inde direct. coram rege duct. cum causa quod idem Thomas Yewe attachiatus fuit per Ricardum Whittington serjeant apud Baynard's Castle civitatis predict. et prisona dicti dom. regis infra eandem civitatem salvo custodiend. causa pro suspicione felon. apud Coventrie in com.' War' perpetrat. ad suggestionem Willielmi King innholder, ac insuper idem Tho. Yewe detinetur in prisona predict. virtute cujusdem alterius querel. versus ipsum ad sectam Johannes Freeman serjeant de eo quod inveniat. ei insufficiend. secur. pacis indicta cur. coram Johanne Waiger nuper vic. Ac ulterius idem Tho. Yewe detent. est in dicta prisona pro 23*l.* debit, et 2*s.* 8*d.* dampnis et custag. quos Robertus Corbet mercer, ex cognitione ipsius defend. versus eum recuperavit in eadem cur. coram eodem Johanne Waiger nuper vic. Ac etiam idem Tho. detinetur in dicta prisona ad mandatum domini regis, per Johannem Shawe, alderman, civitatis London, qui committitur Marr. &c. postea scilicet ter. Sanct. Trin. anno 19 regis H. 7, predict. Johannes Freeman relaxavit secur. pacis versus eundem Tho. Yewe dictus; Robertus Corbet cognovit se fore satisfact. de debito et dampnis predict. Ac Jacobus Hubberd attornat. general. dom. regis relaxavit mandatum dom. regis, ac pro suspicione feloniæ predict. traditur in ball. Symon Little de London taylor, et Johanni Ashe de London skinner, usque octabis Mich. ubicunq; &c. Ad qui diem comperuit et Robertus Throgmorton miles unus custod. pacis predict. com' Warr' return' quod null. indictament. de aliquibus felon' sive transgress. versus prefat. Tho. Yewe coram eo et sociis ad presens resident. et ulter. virtute brevis dom. regis sibi et sociis suis direct. per sacrament. 12 probor. et legal. hominum de villa de Coventry predict. de gestu et fama predict. Thome diligenter inquisitionem fecerunt, et nihil de eo preter bonum coram eo et sociis suis est compertum sed de bono gestu et fama, ideo concess. est quod predict. Tho. eat inde sine die.

Ter. Hillar. anno 9 H. 7, et per cont. ejusdem Rot. 14.

Humfridus Broche nuper de Canterbrig. in Cantabr. scholar. per Robertum Willoughbie dom' Brook mil. seneschall. hospitii dom. regis,

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ac Johannem Digbie mil. Marr' cur' Marr' hospitii predict' virtute cujusdem brevis dom. regis de Habeas Corpus ad sectam ipsius regis ad stand. rect', &c. ad sect. partis utlag. eis inde direct. coram rege duct. cum causa viz. quod idem Humfridus commissus fuit Gaol. Marr' hospitii dom. regis et hac de causa et non alia idem Humfridus in prisona pred. detinetur, qui committitur Marr' &c. postea Pas. sequen' rex relinquit mandatum suum capital. justiciar' per Tho. Lovett mil. osten' et pro utlag. pred. traditur in ball. prout patet alibi.

De Ter' Sct. Trinit' anno 39 El. et per cont. Rot. ejusdem 113.

Lawrence Broome per Hugonem Parlour custod. prisone domine regine de la Gatehouse, virtute brevis domine regine de Habeas Corpus ad subjiciend. &c. ei inde direct. et coram domina regina apud Westminst' duct. cum causa viz. quod predict. Lawrence Broome in arcta custod. sua remanset per mandatum duorum de concilio dicte domine regine pro certis causis eos movent' qui committitur Marr' et postea iste eodem termino traditur in ball. prout patet, &c.

Per Scrivect. Fin. Ter' Sct' Trin. anno 39 El. Regine.

Lawrence Broome de Parva Baddow in com. pred. husband. traditur in ball' ad subjiciend. &c. ad mandat. privat. concil. domine regine super Habeas Corpus.—Versus Rando. Mayall de Hatfield Beverell in com' pred' gener.; versus Henrico Odall de eadem gen.; versus Will. Eckasden de Westminst' bricklayer; versus Ric. Morgan de Westminst' labourer;—Uterq; sub pena 40*l.* et princeps sub pena 100 marcarum.—Pro suspicione proditionis cum Johanne Smith mil.

De Ter' Sct' Michaelis anno 4 El. et per cont. Rot. ejusdem 37.

Tho. Wenden per Hugonem Parlour gen' custod. prisone domine regine de le Gatehouse, virtute brevis domine regine de Habeas Corpus ad subjiciend. &c. ei inde direct' et coram domina regina apud Westm' duct. cum causa, viz. quod 18 die Junii, anno regni domine El. nunc regine Anglie 38. corpus, &c. infra nominat. Tho' Wenden extra cur' ejusdem domine regine coram ipsa domina regina privati concilii dom. regis cujus tenor sequitur in hæc verba, scilicet; 'These are to will and require 'you to receive into your charge and custody, 'the person of John Brocket, knight, and him 'to retain in safe keeping under your charge 'until you shall have further order for his in-'largement; whose commitment being for some 'special matter concerning the service of our 'sovereign lord the king, you may not fail to 'regard this warrant accordingly. From the 'king's palace at Whitehall, the last of March, '1605.' Esq; fuit causa detentionis pred. Johannis in prisona pred. qui committitur Marr. &c. et postea traditur in ball' prout patet, &c.

Ter. Mich. anno 12 Jac. Regis, Rot. 119.

Milo Reyner per Aquilam Wykes custod. prisone de le Gatehouse, virtute brevis dom. regis de Habeas Corpus ad subjiciend. &c. coram domino rege duct. cum causa viz. quod ante advent. brevis pred. scilt. 10 Julii anno dom. 1613. pred. Milo Reyner commissus fuit prisonæ pred' et huc usq; detent. virtute warr' cujusdem fact. et direct. per Georgium archiepiscopum Cant. Henr. com. Northampton. Tho. com. Suffolk, Willielm. dom. Knolles, Edwardum dom. Wooton, et Edwardum dom. Stanhope, cujus warranti tenor sequitur in hæc verba: 'To Aquila Wykes, keeper 'of the Gatehouse in Westminster, or his 'deputy: Whereas it is thought meet that 'Miles Reyner and Richard Beckwith be re-'strained of their liberty, and committed to the 'prison of the Gatehouse: These shall be to 'will and require you, to receive the persons 'of Reyner and Beckwith into your charge and 'keeping, until you shall have further order 'from us in that behalf, for which this shall be 'your sufficient warrant, dated at Whitehall, 'the 10th of July, 1613.' Et hæc est causa detentionis sue in prisona pred. qui committitur Marr' &c. et postea isto eodem ter' traditur in ball' prout patet, &c.

Ter. Hill, 5 H. 7, et per cont. ejusdem Rot. 18.

Ric'us Everard nuper de Colchester in com. Essex clericus, et Robertus Wight nuper de Norwico smith, per Robertum Willoughbie mil. dom. de Brooke, seneschall' hospitii dom. regis, et Johannem Turberville mil' Marr' hospitii pred. virtute bre. de Habeas Corpus ad sectam ipsius regis pro quibusdam proditionibus, et felon' unde indicto com. Essex indictat sunt eis inde direct. coram domino rege duct. cum causa, viz. quod iidem Ricardus Everard et Robertus Wight commiss. fuer' custod. Marr. pred. per mandat. dom. regis, qui committitur Marr. &c.

Ter. Hill. 8 H. 7, et per cont. ejusdem Rot. 14.

Roger Cherrie nuper de Nova Windsor in com' pred. yeoman, alias dict. Rogerus Stearries nuper de eadem in eodem com' yeom. per Johan. Baker, majorem villæ dom. regis de Nova Windsor in com. pred. virtute brevis dom. regis de Habeas Corpus ad sect. ipsius regis pro quibusdam feloniis et transgr. unde in com. Midd. indictatus est sibi inde direct. coram domino rege duct. cum causa, viz. quod idem Roger' commissus fuit gaol. dom. regis infra villa pred. per mandat. dom. regis qui committitur Marr. &c.

Ter. Hill. 9 H. 7, et per cont. ejusdem Rot. 14.

Christophorus Burton nuper de Rochester in com' Cantii hackneyman, per Robertum Willoughbie dom. Brooke, mil' seneschall' hospitii dom. regis, et Johannem Digbie mil' Marr. cur. Marr. hospitii pred. per mandatum dom. regis. Et hæc est causa et non alia, qui committitur Marr. &c.

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Ter. Pas. anno 19 H. 7, et per cont. ejusdem Rot. 23.

Georgius Ursewicke de London, mercer, per Oliverum Wood locum tenen. prisone dom. regis de le Fleet, virtute brevis dom. regis de conservand. diem, &c.. ei inde direct. coram rege duct. cum causa, viz. quod idem Georgius, 13 Maii, anno 19, regis commissus fuit prisone de le Fleet, per mandatum ipsius dom. regis salvo custodiend. sub pena 40*l.* qui committitur Marr. &c.

Ter. Trin. anno 8 H. 8, per cont. ejusdem Rot. 23.

Edwardus Page nuper de London, gent. per Georgium com. Salopiæ seneschall. hospitii dom. regis et Henricum Shamburne Marr. cur. Mar. hospitii pred. virtute brevis dom. regis de Habeas Corpus, ad sect. ipsius regis ad conservand. diem, &c. eis inde direct. et coram rege duct. cum causa, viz. quod idem Edwardus captus et detentus in prisona regis Marr. pred. per mandatum dom. regis ibidem salvo custodiend. &c. qui committitur Marr. hospitii dom. regis.

Ter. Mich. anno 8 Jac. et per cont. ejusdem Rot. 99.

Tho. Cæsar per Tho. Vavasour mil' Mar. hospitii dom. regis et Marr. ejusdem hospitii dom. regis, virtute brevis domini regis de Habeas Corpus ad subjiciend. &c. ei inde direct. et coram rege apud Westminst. duct. cum causa, viz. quod ante adventum brevis pred. scil. 18 Julii anno regni dicti dom. regis nunc Angliæ, &c. 7. Tho Cæsar, in brevi fuit pred. nominat. captus apud Whitehall in com' Middl. per speciale mandatum dom. regis ac per eundem regem adtunc et ibidem commiss. fuit prison. Marr. ibidem salvo custodiend. quousq; &c. Et ea fuit causa captionis et detentionis ejusdem Tho. Cæsar, qui committitur prisonæ Marr. pred.

Ter. Sancti Mich. 8 Jac. Regis.

Nisi pred. seneschall. et Marr. hospitii dom. regis sufficienter return' bre. de Habeas Corpus, Tho. Cæsar die Mercur. per quinden. Sanct. Martini defendens exonerabitur.

Ter. Hill. 12 Jac Rot. 153.

Jacobus Demaistres, Edwardus Emerson, Georgius Brookeshall et W. Stephens, per Tho. Vavasour mil' Marr. Marr. hospitii regis virtute bre. dom. regis de Habeas Corpus ad subjiciend. &c. ei inde direct. coram domino rege apud Westminst. duct. cum causa, viz. quod ante adventum brevis pred. scilt. 22 Januar. anno regis Jacobi Angliæ, &c. 12, et Scot. 4, pred. Jacobus Demaistres, Edwardus Emerson, Georgius Brookeshall, et W. Stephens in brevi huic schedul' annex. nominat. commiss. fuer' gaol' Marr. hospitii dom. regis, pro causis ipsum regem et servic' suum tangen. et concernen. Et hæc est causa captionis pred. Jacobi, Edwardi, Georgii et Willielmi, et postea immediatè remittitur præfat. Marr. hospitii pred.

Ter. Hill. 12 Jac. Regis.

Samuel Saltonstall miles per Johannem Wilkinson arm' guard. de le Fleet, virtute brevis dom. regis de Habeas Corpus ad subjiciend. &c. ei inde direct. et coram domino rege apud Westminst. duct. cum causa, viz. quod pred. Samuel commiss. fuit prisonæ pred. 11 Martii. 1608, per warrant. a dominis de privato concilio dom. regis et quod detentus fuit etiam idem Samuel in prisona pred. virtute cujusdem ordinis in cur. Can' dom. regis fact. cujus ordinis tenor patet per rot. record. istius termini ad quem diem pred. Samuel remittitur prisonæ pred. Et secundus dies prox. ter' datus est guardian. prisonæ pred. ad emendand. return. suum sufficien. super pred. bre. de Habeas Corpus, et quod tunc intulerit hic in cur' corpus pred. Samuel Saltonstall mil'. Ad quem quidem diem prefat. guardian. prisonæ pred. super pred. bre. de Habeas Corpus return. quod pred. Samuel commissus fuit prisonæ pred. 11 die Martii, 1608, per warrant. a dom. de privat' concil. dicti dom. regis apud Whitehall tunc seden. et quod postea 11 die Febr. 1610, commiss. fuit extra cur. Canc. dom. regis apud Westminst. pro contemptu suo eidem cur. illat. Et quod detent. fuit etiam idem Samuel in prisona pred. per mandat. dom. cancellar' Angliæ super quo pred. Samuel iterum remittitur prisonæ pred. et ulterius dies dat. est prefat. guardian. ad emendand. return. suum super Habeas Corpus ver. defend. prout stare voluit usq; diem Jovis prox' Mens. Pasch. Et tunc ad habend. corpus, &c. Ad quam diem prefat. guardian. intulit corpus hic in cur' et return' super Habeas Corpus quod pred. Samuel commiss. fuit prisonæ pred. 11 die Martii, 1608, virtute cujusdem warranti a dominis de privato concil' dom. regis tunc seden. apud Whitehall, et quod etiam idem Sam. commiss. fuit prisonæ 11 Febr. anno regis Jac. 8, per cur. Canc. dom. regis apud Westminst. tunc existen. pro quadam contempt. per eundem Samuel eidem cur. illat. et perpetrat. proinde salvo custodiend. qui remittitur prisonæ pred.

Ter. Tr. anno 13 Jac. & per cont. ejusdem Rot. 17.

Samuel Saltonstall miles per Johannem Wilkinson guardian. prisonæ de le Fleet, virtute brevis dom. regis de Habeas Corpus ad subjiciend. et recipiend. &c. ei inde direct. et coram domino rege apud Westminst. duct. cum causa, viz. quod pred. Samuel Saltonstall commissus fuit prisonæ pred. 12 die Martii anno regis Jacob. Angliæ, &c. sexto, virtute cujusdam warrant. a dominis de privat. concilio dom. regis tunc seden. apud Whitehall commissus fuit etiam idem Samuel Saltonstall miles prisonæ pred. 12 die Febr. anno 1610. et anno reg. Jac. Angliæ, &c. 8. per considerat. cur. Cancell' dicti dom. regis apud Westminst. pro contempt. eidem cur. adtunc per pred. Samuel illat. ibidem proind. salvo custodiend. Et hæc sunt causæ captionis et detentionis pred. Sam. Saltonstall mil. in prisonæ pred. cujus tamen

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corpus ad diem et locum infra content. parat. habeo prout mihi precipitur.

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Inter Record. Domini Regis Caroli in Thesaur. Recept. Scaccarii sui sub custodia Thesaurar. et Camerar. ibidem remanent. viz. Pl. coram ipso Domino Rege, et Concilio suo, ad Parliamentum suum post Pasch. apud London in Maner' Arch-Episcopi Ebor', anno Regni Domini Regis Ed. 3. 21. Inter alia sic continetur, *et sequitur*, Rot. 2. indorso.

Stephanus Rabaz vicecomes Leic. et Warw. coram ipso domino rege et ejus concilio arenatus et ad rationem positus de hoc quod cum J. B. E. H. & W. H. nuper balliv' ipsius vicecomitis per dom. regem fuissent assign' ad gaolas domini regis deliberand. eidem vic' quendam W. P. per quendam appellatorem ante adventum eorum justiciariorum ibidem appellat. et capt. vivente ipso appellatore usque diem deliberationis coram eis fact. demiss. per pleviam contra formam statuti, &c. Et etiam quendam R. de C. qui de morte hominis judicatus fuit, et per eundem vicecomit' captus, idem R. sine ferris coram eisdem justiciar' ad deliberationem præd' produxit contra consuetudinem regni, et similiter quendam Walterum filium Walteri de Persone qui per præceptum comitis Warwici captus fuit, dimisit per pleviam contra vocem et preceptum domini regis; cum idem dominus rex per literas suas sub privato sigillo suo eidem vicecomit. precipiet quod nulli per preceptum pred. com. Warwici capt. aliquam gratiam vel favorem fac. &c. Et super hoc prefat. J. B. qui presens est, et qui fuit primus justiciar. pred premiss. recordatur et pred. vicecomes dicit quoad pred. W. P. ipse nunquam a tempore captionis ipsius W. per pred. appellatorem demiss. fuit per pleviam aliquam ante advent. pred. justiciar. Imo dicit quod per dimid. anni ante adventum eorum justiciar. captus fuit. Et quoad pred. R. bene cognoscit quod ipse dimisit eum per pleviam, et hoc bene facere potuit ratione ac authoritate officii sui, eo quod captus fuit pro quadam simplici transgressione, et non pro aliqua felonia, pro qua replegiari non potuit. Et quoad 3. viz. W. filium Persone bene cognoscit quod ipse captus fuit per preceptum pred. com. Warwici et quod dimisit eum per pleviam. Sed dicit quod hoc fecit ad rogatum quorundam de hospitio et curia dom. regis, qui eum specialiter inde rogaverint per literas suas. Et super hoc idem vicecom. quesivit per dom. regem quis eum rogavit, et literas suas ei direxit, et ubi literæ illæ sunt, dicit quod Walterus de Langton eum per literas suas inde rogavit, sed dicit quod literæ illæ sunt in partibus suis Leic. Et super hoc idem vicecomes profert bre. dom. regis de privato sigillo eidem vic. direct. quod testatur quod dominus rex eidem vic. precepit, quod omnes illos trans. contra pacem et de quibus comes Warwici ei scire fecit, caperet, et salvo custodir. absque aliqua gratia eis facienda. Et quia pred. justiciar' expresse recordat. quod ipsi et socii sui per bonam et legalem inquisitionem de militibus et aliis communibus coram eis fact. invenerunt quod pred. W. de Petling dimissus fuit per pleviam per magnum tempus ante adventum eorundem justic. usq; adventum eorundem et per vic. pred. Et etiam quia pred. vic. cognoscit quod pred. R. dimissus fuit per pleviam per ipsum vic. et hoc dic. quod bene facere potuit, eo quod captus fuit pro levi transgression. et per record. ejusdem justiciar. compert. est quod captus fuit pro morte hominis quod est contrar. dict. pred. vicecom. et similiter quod idem vicecom. cognovit, quod recepit literam dom. regis per quam rex ei precepit, quod nullam gratiam fecerit illis qui capt. fuer. per preceptum pred. com. et idem vicecomes contra preceptum illud dimisit pred. Willielmum filium Walteri per pleviam qui captus fuit per preceptum pred. comitis prout idem vicecomes fatetur. Et sic tam ratione ipsius transgr. quam aliarum pred. incidit in penam stat. cons. est quod pred. vicecomes committatur prisonæ juxta formam statuti, &c.

Ex Rot. Parliamenti de anno 35 Regis Ed. 3. Numero 9.

Primerement que le Grand Chartre, et le Chartre de Forest, et les autres statuts fait en son temps et de ses progenitors per profits de lui, et de la commenalty soient bien et ferment gardes, et mise en due execution sauns disturbançe mettre ou arrest faire le contre per special mandement, ou en autre manere. Nostre seignior le roy per assent prelates, dukes, comites, barons, et la commenaltie ad ordeine et estabili que les dits chartres et statuts soient tenus et mise en execution selon le dit Petition.

Stat. 36 Ed. 3. Numb. 22.

Item, comme il soit contenus en le Grand Chartre et autres statuts que nul home sera prise ne imprison per special mandement sauns indictment, ou autre proces a faire per le ley et soient foits ad estre, et uncore est que plesures gents sont empesches prise, et imprison sauns indictement ou autre proces fait per le ley sur eux, cibien del chose fait hors de le forest le roy, come per autre cause que plese a nostre dit sr. command. et deliv. ceux que sont auxi prise per tiel special mandement contre le forme de chartres et statuts avant dits.

Item, plest ou roy et si nul de sent greine vingne, et fait le plaint et droit serra fait a luy.

Parliament. anno 42 Ed. 3. Numero 12.

Item, pur ceo que plusours de vestre come sont amerce et disturbes per faulx accusors queux sont lour accusements plus pur lour vengeances et singulers profits que pur le profit de roy ou de son peuple, et les accuses per eux ascuns ont est pris et ascuns sont faire ven. de le conceil roy per brief ou autre mandement de roy sub grande pain encountre la ley, Plese a nostre sr. le roy et son conceil pur droit gouvernment de son peuple ordeign que si desire ascun accusors purpose ascun matire pur profit du roy que cele matire soit mander a ses justices.

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del' un banke ou del' autre, ou d'assises deut enquere et terminere selonque la ley, et si le touche la onsour ou partie eit sa sont a la come ley, et que null home soit mis a respondere sans presentment deut justices, ou chose de record, ou per due proces et briefe original, selon l'ancient ley de la terre, et si rien desire enorant soit fait a l' encontre, soit voide en ley, et tenu pur error. Pur ceo que ceste Article est Article de le Grande Chartre le roy voet que ceo soit fait come la Petition demande.

Ex Rot. claus. de anno Regni Regis, Edw. 1. primo, Membrano 1.

Thomas de Clere de Beckwith captus et detent. in prisona de Northampton pro transgressione forest. habet literas Rogero de Clifford, justiciar' forest. citra Trent. quod ponatur per ball. Dat. apud Sanct. Martin. Magn. London 20 die Octobr.

Membrano 7.

Stephanus de Lindley capt. et detent. in prisona pro transgres. per ipsum fact. in forest. regis de Lindley habet literas regis Galfrido de Nevill, justiciar. ultra Trent. quod ponatur per ballium.

Membrano 8.

Tho. Spademan capt. et detent. in prisona de Oxon. pro morte Willielmi Winne unde rectat. est, habet literas regis vicec. Oxon. quod ponatur per ball.

Membrano 9.

Willielmus de Deane, Matheus Crust, Roger de Bedell, W. Halfrench, Robertus Wyat, Alexander Hareing, Harry de Shorne, Nicolas de Snodilonde, Turgesius de Hertfield, Robertus de Pole, et Ricardus Galiot, capti et detent. in prisona de Cant. pro morte Galfridi de Cottiller unde appellati sunt, habent literas regis vic' Kan. quod ponantur per ball'. Dat. 23 Martii.

Claus. anno 2 Ed. 1. Membr. 12.

Rex Rogero de Clifford, justiciar. forest. citra Trent. mandamus vobis quod si Robertus Unwin, capt. et detent. in prisona nostra de Aylesbury pro transgres. forest. nostr. invenerit vobis 12 probos et legales homines de ball. vestra qui manucapiant eum habere coram justiciar. nostr. ad placita forest. cum in partes, &c. ad stand. inde rectat. tunc apud Robertum si secundum assisam forest. fuer. repleg. per dictos duodecim, interim traditur in ball. sicut pred. est et habeatis nomina illorum 12 hominum. Et hoc bre. &c. Dat. 27 Februar.

Claus. anno 2 Ed. 1. Num. 14.

Unwynus de Boycot, Galfridus de Wickeram, et Hugo de Stone, detent. in prisona regis de Aylesbury pro transgr. venationis habuit bre. direct. Rogero de Clifford justiciar. forest. quod si secundum assis. forestæ erunt repleg. usque advent. justiciar. regis ad placita forest. cum in partes illas venerint. Dat. apud Coddington, 28 die Decembr.

Numero 15.

Guilbert Conray de Keddington, et Hugo le Taylor de Keddington capt. et detent. in prisona sancti Edmundi pro morte Edmundi Bunting unde rectati sunt habuerint literas regis vic' Suff. quod ponantur per ball.

Claus. anno 3 Ed. 1. Num. 11.

Galfridus de Hairton captus et detentus in prisona regis Ebor' pro morte Adel' Clerke, unde rectatus est habet literas regis vic' Ebor. quod ponatur per ball. Dat. apud Westminst. 15 Junii.

Numero 20.

Robertus Belbarbe captus et detentus in prisona de Newgate pro morte Thomæ Pollard, unde rectatus est habet literas regis vic. Midd. quod ponatur per ball. Dat. 28 Februar.

Claus. num. 4 Ed. 1. Membr. 5.

Mandatum est Rado de Sandwico quod si W. de Pattare, & Jo. filius ejus, Walterus Home, Walterus Corwen, Hen. Path, et W. Cadegan, capt. et detent. in prisona regis de S. Brionell pro transgr. for. unde rectati sunt, invenerint sibi 12 probos et legales homines de ball. sua, viz. quilibet eorum 12 qui eos manucap' habere coram justiciar. regis ad placita forest. cum in partes illas venerint ad stand. inde rectat. tunc ipsos Willielm. Johannem, Walterum, Walterum, Henricum, et Willielm. pred. 12 si secundum assiss. fuer. repleg. tradantur in ball' ut pred. est, et habeant ibi nomina illorum 12 hominum et hoc bre. Test. Rege apud ball' locum regis 29 die Augusti.

Claus. anno 4 Ed. 1. Memb. 16.

Henricus filius Rogeri de Kenn de Cottersbrooke capt. et detent. in prisona nostra Northampton pro morte Simonis de Charrettell, unde appellatus est, habet literas regis vic' Northampton quod ponatur per ballium.

Claus. anno 5 Ed. 1, Memb. 1.

Mandatum est Galfrid. de Nevil justiciar. forest. ultr. Trent. quod S. Walterus de le Greene captus et detentus in prisona de Nottingham pro transgr. for' invenerit sibi 12 probos et legales homines qui eum manucapiant, &c. ad stand' inde rectat. secundum assiss. for' regis tunc ibidem Walter. pred. 12 traditur in ballium sicut pred. est. Dat. 16 Nov.

Membrano 2.

Thomas de Upwell et Juliana uxor ejus capt. et detent. in prisona de Wynbotesham pro morte Stephani Southel, unde rectat. sunt, habent literas vic' Norff. quod ponantur per ballium. Dat. apud Rothelm 28 die Septembr.

Claus. anno 6 Ed. 1. num. 2.

Billierus Pestle captus et detentus fuit in prisona regis de Norwic. pro morte Julianæ quondam uxor' suæ, unde rectatus est et habet literas vic' Norff. quod ponatur per ball' Teste Rege apud Westminst. 12 Novemb.

Membrano 4.

Mandatum est vic' Nottingham quod si Tho. de Cudart rectat. de transgr. forest. quod fecisse dicebatur in forest. de Sherwood, invenerit sibi sex probas et legales homines de ballivæ sua-qui eum manucap' habere coram rege ad

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mandatum regis ad stand. rect. coram rege cum rex inde cum eo loqui voluerit, tunc pred. Tho. pred. sex hominib. tradat in ballium juxta manucapt. supradict. Dat. 15. die Decembr.

Membrano 4.

Tho. Burrell captus et detent. in prisona regis Exon. pro morte Galfrid. Geffard unde rectat. est habet literas dom. regis vic' Devon. quod ponatur per ball'.

Claus. anno 1 Ed. 2. Membr. 1.

Johannes Bryun de Rollinwrith capt. et detent. in prisona regis Oxon. pro morte Johannis de Sutton, unde rectat. est habet literas regis vic. Oxon. quod ponatur per ball. usque prim. assis. si ea occasione, &c. Teste Rege apud Bristol, 28 Junii.

Membrano 2.

W. Spore Capell. capt. et detent. in prisona regis Oxon. pro morte Johannis Spore unde indictatus est, et habet literas regis vic' Devon. quod ponatur per ballium usque ad prox. assis. si ea occasione, &c. Teste Rege apud Windsor 28 die Maii.

Numero 10.

Gilbertus Fairchild capt. et detent. in gaole regis Dorchester pro morte Henrici de Langton, unde indictat. est habet literas quod ponatur per ballium usque ad prim' assiss. Teste Rege apud Westminst. 28. Februar'.

Claus. anno 2 Ed. 2, Membr. 1.

Willielmus Sandie de Cobham capt. et detent. in prisona regis Cant. pro morte Johannis de Sprink, Johannis Ermona de Dunberke, unde rectatus est habet literas regis vic' Kanc' quod ponatur per ball' usque ad primum assis. si ea occasione, &c. Teste Rege apud Cestre. 29 Junii.

Radulph. Corynn capt. et detentus in gaole regis de Lincolne pro morte Willielmi filii Symonis Porter unde rectat. est et habet literas regis vic' Lincolne quod ponatur per ball' usque ad primam assis. si ea occasione, &c. Teste Rege apud Sheene 3 diei Junii.

Membrano 7.

Johannes de Githerd capt' et detent. in prisona regis Ebor' pro morte Mathei Sampson de Ebor' unde rectatus est habet literas regis vic' Ebor' quod ponatur per ball' usque ad prim' assis. Dat. apud Langele 30 die Aprilis.

Claus. 3 Ed. 2, Membr. 13.

Adam de Pepper captus et detent. in gaole regis Ebor' pro morte Henrici le Symer' de Eastrick unde rectatus est habet literas regis vic' Ebor' quod ponat' per ball' usque ad primam assis. Teste Rege apud Westminst. 7 die Febr.

Numero 14.

Margareta uxor Willielmi Calbot capta et detenta in gaole regis Norwici pro morte Agnetis filiæ Willielmi Calbot, et Matildæ sororis ejusdem Agnetis, unde rectata est habet literas regis vic' Norff. quod ponatur per ball'. Teste rege apud Sheene 22 Jan.

Numero 18.

Johannes Frere captus et detent. in gaole regis Oxon. pro morte Adæ de Egeleigh unde rectat. est habet literas regis vic' Devon. quod ponatur per ball'. Teste apud Westminst. 8 Decembr.

Claus. anno 4. Ed. 2, Membr. 7.

Robertus Shereve capt. et detent. in gaole regis de Colcestr. pro morte Roberti le Moigne, unde rectat. est habet literas regis vic' Essex quod ponatur per ball' usque ad prim' assis. Dat. 22 die Maii.

Numero 8.

W. filius Roberti le Fishere de Shirborne capt. et detent. in gaole regis Ebor' pro morte Roberti le Monus de Norton, unde rectatus est habet literas regis vic. Ebor. quod ponatur per ball. usque ad primam assis. Dat. 25 April.

Claus. anno 4 Ed. 2, Numero 22.

Thomas Ellis de Stanford capt. et detent. in prisona regis Lincolne pro morte Michaelis filii Willielmi de Fodering, unde rectat. est habet literas regis vic. Lincolne quod ponatur per ball' usque ad prim. assis. Teste rege apud novam Westmonast. 8 die Septembr.

Sir EDWARD COKE took up the Argument, as to the rational part of the Law, and began with this INTRODUCTION.*

Your lordships have heard seven acts of parliament in point, and thirty-one Precedents summarily collected, and with great understanding delivered; which I have perused, and understand them all thoroughly, and that there was not one of them against the Resolution of the house of commons. Twelve of the Precedents are *in terminis terminantibus*, a whole Jury of Precedents, and all in point; and to my understanding, they admit of no answer: but I am persuaded in my conscience, that a number of them was never shewed at the King's-bench, be-

* "The Lord President, who reported the Conference to the house, begun thus: The Conference upon Monday last with the lower house, was about the Liberty of the Subject; to set this forth, they employed four Speakers: the first was sir Dudley Diggs, a man of a voluble and eloquent speech, his part was the introduction; the second was Mr. Littleton, a grave and learned lawyer; whose part was to represent the Resolution of the house, and their grounds whereupon they went; the third was Mr. Selden, a great antiquary, and a pregnant man, his part was to shew the law, and the precedents in point; the fourth was the lord Coke, that famous reporter of the law, whose part was to shew the reason of all that the others had said, and all that which was said was but an affirmance of the common law." From a MS. belonging to the late Peter le Neve, esq.; and written at that time, wherein the Conference is related.

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cause I know out of whose quiver two of them came, and that they were not known before. I am much transported with joy, because of the hopes to proceed with good success in this weighty business, your lordships being so full of justice, and the very theme and subject doth promise success, which was, 'Corpus cum causa,' the freedom of an Englishman, not to be imprisoned without cause shewn; which is my part to shew, and the reason and the cause why it should be so. And I doubt not but we shall go on happily; and, my lords, it would be unseasonable to be prolix and copious, because, 'quod 'intempestum injucundum.' I would speak here a little to some points which are not so clear and obvious, for otherwise 'perspicua vera 'non sunt probanda,' and to gild gold were idle and superfluous; therefore shall briefly clear to your lordships some doubts made of the Statute of Westminster, which says, Sheriffs and others may not replevy men in prison for four causes;

1. For death of a man.
2. Commandment of the king.
3. Absolute command from the Justices.
4. For matters of the forest.

I was once a Judge of the King's-bench, and did wonder how the Judges of these times thus interpret the Statute. The Statute only shews what Sheriffs can only do, by way of replevin; the Sheriffs Court is a petty and base court, and not of record, where the Sheriff is not the Judge, but the Jurors, that is, John a Noke, and John a Stiles, William Roe, and John Doe, and such worthies as these. Again, the Statute saith there, he cannot be replevied if he be taken for the death of a man; and no marvel, whoever thought it; for the Scripture saith, 'Sanguis 'nullo modo expiari potest nisi sanguine.' But if he cannot be there replevied, at the King's-bench he may, it is there done every day. Mr. Sheriff, you should replevy a man in such a case, *ergo*, not bail him, my lords the Judges, *(non sequitur)*: What not Judges bail? What not the King's-bench, the highest Court of Record of ordinary jurisdiction? For the King's-bench is higher than the Chancery. And this he proved by heraldry, 'Additio probat minoritatem,' that addition proves the younger brother. Now the Teste of the King's-bench is 'coram dom. 'rege,' without any addition, but that of the Chancery, 'coram dom. rege in cancellaria,' with that addition of a cadet, a younger brother. I am very sorry I am so much straitened for want of time, for I am much delighted with these things. What, may not the Judges meddle with any thing in the Forest? If that were so, I would never dwell in a forest, to be wholly under the jurisdiction of the wardens and regarders. These glosses and interpretations are very strange to me, and others who have been Judges. My lords, all those Arguments offered unto your lordships in this last conference, are of a double nature. 1. Acts of Parliament. 2. Judicial Precedents. For the first, I hold it a proper argument for your lordships, because you, my lords temporal, and you, my lords spiritual, gave your assent unto those acts of parliament; and therefore if these cannot persuade you, nothing can. For the second, which are judicial precedents, it is 'Argumen-'tum ab authoritate,' and 'Argumentum ab 'authoritate valet affirmative:' that is, I conceive, though it be no good argument to say negatively, the Judges have given no opinion in the point, *ergo*, that is not law; yet affirmatively it concludes well: the Judges have clearly delivered their opinions in the point, *ergo*, it is good law; which I fortify with a strong axiom, 'Neminem oportet sapientorum esse legibus,' as long as these laws stand unrepealed. Now, these two arguments being so well pressed to your lordships by my colleagues, I think your lordships may wonder what my part may be; it is short, but sweet: it is the reason of all those laws and precedents, and reason must needs be welcome to all men; for all men are not capable of the understanding of the law, but every man is capable of reason. And those reasons I offer to your lordships, in affirmance of the ancient laws and precedents made for the liberty of the subject, against imprisonment without cause expressed, and shall shew them in order and method, to confirm the same.

1. *A re ipsa.*
2. *A minori ad majus.*
3. From the Remedies provided.
4. From the extent and universality of the same.
5. From the infiniteness of the time.
6. *A fine.*

The first general reason is, *à re ipsa*, even from the nature of imprisonment, 'ex visceribus causæ;' for I will speak nothing but *ad idem*, be it close or other imprisonment: and this argument is threefold, because an imprisoned man upon will and pleasure is,

1. A Bondman.
2. Worse than a Bondman.
3. Not so much as a man; for 'mortuus 'homo non est homo,' a prisoner is a dead man.

1. No man can be imprisoned upon will and pleasure of any, but he that is a Bondman and Villein, for that imprisonment and bondage are 'propria quarto modo' to villeins.* Now 'propria quarto modo,' and the species, are convertible; whosoever is a Bondman, may be imprisoned upon will and pleasure, and whosoever may be imprisoned upon will and pleasure is a Bondman.

2. If a Freeman of England might be imprisoned at the will and pleasure of the king or his commandment, then were they in worse case than Bondmen or Villeins; for the lord of a villein cannot command another to imprison his villein without cause, as of disobedience, or refusing to serve, as it is agreed in the Year-books. And here he said, that no man should reprehend any thing that he said out of the Books or Records: he said, he would prove a freeman imprisonable upon command or pleasure, without cause expressed, to be absolutely

* See the Writ De Nativo habendo.

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in worse case than a villein; and if he did not make this plain, he desired their lordships not to believe him in any thing else: and then produced two Book-cases, 7 E. 3, fol. 50, in the new print, 348 old print. 'A Prior had 'commanded one to imprison his Villein, the 'Judges were ready to bail him till the Prior 'gave his reason, that he refused to be bailiff 'of his manor; and that satisfied the Judges. '2d Case, 33 Ed. 3, title Tresp. 253. in *Faux 'imprisonment*, it was of an abbot, who com-'manded one to take and detain his villein, 'but demanded his cause; he gives it, because 'he refused, being thereunto required, to drive 'his cattle.' '*Ergo*, Freemen imprisoned, with-'out cause shewn, are in worse case than vil-'leins, that must have a cause shewn them why 'they are imprisoned.'

'3. A Freeman imprisoned without cause, 'is so far from being a Bondman, that he is 'not so much as a man, but is indeed a dead 'man, and so no man: imprisonment is ac-'counted in law a civil death, 'perdit domum, 'familiam, vicinos, patriam,' and is to live 'amongst wretched and wicked men, malefac-'tors, and the like.' And that death and im-prisonment was the same, he proved by an argument *ab effectis*, because they both produce the like immediate effects; he quoted a Book for this: if a man be threatened to be killed, he may avoid a Feoffment of Lands, Gifts of Goods, &c. 39 H. 1, 65, &c. so it is if he be threatened to be imprisoned; the one is an actual, the other is a civil death. And this is the first general argument, drawn *à re ipsa*, from the Nature of Imprisonment, to which 're ipsa consilium dedit.'

The second general Reason he took also from his Books; for he said he had no law, but what by great pains and industry he learnt at his book; for at ten years of age, he had no more law than other men of like age: and this second Reason is, *à minori ad majus;* he takes it from Bracton, fol. 105, 'Minima pœna 'corporalis, est major qualibet pecuniaria.'

But the king himself cannot impose a Fine upon any man, but it must be done judicially by his Judges, 'per justiciarios in curia, non per 'regem in camera;' and so it hath been resolved by all the Judges of England: he quoted 3 R. 2, fol. 11.

The third general Reason is taken from the number and diversity of Remedies, which the laws give against imprisonment, viz.

Breve de homine replegiando.
De odio et atia.
De Habeas Corpus.
An Appeal of Imprisonment.
Breve de manucaptione.

Two of these are antiquated, but the Writ 'de odio et atia' is revived, for that was given by the Statute of Magna Charta, c. 26, and therefore though it were repealed by the Statute of 28 E. 3, c. 9, yet it is revived again by the Statute 42 E. 3, c. 1, by which it is provided, that all Statutes made against Magna Charta are void. Now the law would never have given so many Remedies, if the Freemen of England might have been imprisoned at free will and pleasure.

The fourth general Reason is from the Extent and Universality of the pretended Power to imprison: for it should extend not only to the commons of this realm, and their posterities, but to the nobles of the land, and their progenies, to the bishops and clergy of the realm, and their successors. And he gave a cause why the commons came to their lordships, 'Commune periculum commune requirit auxilium.' Nay, it reacheth to all persons, of what condition, or sex, or age soever; to all judges and officers, whose attendance is necessary, &c. without exception; and therefore an imprisonment of such an extent, without reason, is against reason.

The fifth general Reason is drawn from the Indefiniteness of Time; the pretended power being limited to no time, it may be perpetual during life; and this is very hard: to cast an old man into prison, nay, to close prison, and no time allotted for his coming forth, is a hard case, as any man would think that had been so used. And here he held it an unreasonable thing, that a man had a remedy for his horse or cattle, if detained, and none for his body thus indefinitely imprisoned; for a prison without a prefixed time, is a kind of hell.

The sixth and last Argument is *à fine;* and 'sapiens incipit à fine,' and he wished he had begun there also; and this argument he made threefold.

Ab honesto.	This being less honourable.
Ab utili.	This being less profitable.
A tuto.	This imprisonment by will and pleasure, being very dangerous for the king and kingdom.

1. *Ab honesto.* It would be no honour to a king or kingdom, to be a king of bondmen or slaves; the end of this would be both *dedecus et damnum*, both to king and kingdom, that in former times hath been so renowned.

2. *Ab utili.* It would be against the profit of the king and kingdom, for the execution of those laws before remembered, Magna Charta, 5 E. 3, 25 E. 3, 28 E. 3, whereby the king was inhibited to imprison upon pleasure: you see (quoth he) that this was *vetus querela*, an old question, and now brought in again, after seven acts of parliament: I say, the execution of all these laws are adjudged in parliament to be for the common profit of the king and people; (and he quoted the Roll) this pretended power being against the profit of the king, can be no part of his prerogative.—He was pleased to call this a binding reason, and to say, that the wit of man could not answer it; indeed the great men kept this Roll from being printed, but that it was equivalent in force to the printed Rolls.

3. A Reason *à tuto.* It is dangerous to the king for two respects; 1. of loss; 2. of des-

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troying the endeavours of men. First, If he be committed without the expression of the cause, though he escape, albeit in truth it were for treason or felony, yet this escape is neither felony nor treason; but if the cause be expressed for suspicion of treason or felony, then the escape, though it be innocent, is treason or felony. [The Act, which is in Latin, is, 'nisi causa pro qua captus, et imprisonat. fuit 'tale judicium requirat, si de illa pro legem et 'consuetudinem terræ fuisset convictus.'] He quoted a cause in print like a reason of the law, not like 'remittitur' at the rising of the court; for there the prisoner 'traditur in 'ballium quod breve regis non fuit sufficiens 'causa:' The king's command. He quoted another famous cause; the commons in parliament, incensed against the duke of Suffolk, desire he should be committed: the lords and all the Judges, whereof those great worthies, Prescot and Fortescue, were two, delivered a flat opinion, that he ought not to be committed without an especial cause. He questioned also the name and etymology of the writ in question, 'Corpus cum causa;' *ergo*, the cause must be brought before the judge, else how can he take notice hereof?

Lastly, he pressed a place in the Gospel, Acts 25. last verse, where Festus conceives it an absurd and unreasonable thing, to send a prisoner to a Roman emperor, and not to write along with him the Cause alledged against him: send therefore no man a prisoner without his Causes along with him, *hoc fac et vives*. And that was the first reason, *à tuto*, that it was not safe for the king, in regard of loss, to commit men without a cause.

The second Reason is, that such commitments will destroy the endeavours of all men. Who will endeavour to employ himself in any profession, either of war, merchandize, or of any liberal knowledge, if he be but a tenant at will of his liberty? For no tenant at will will support or improve any thing, because he hath no certain estate; *Ergo*, to make men tenants at will of their liberties destroys all industry and endeavours whatsoever. And so much for these six principal Reasons: taken,

1. *A re ipsa.*
2. *A minori ad majus.*
3. *A remediis.*
4. From the Extent and Universality.
5. From the Infiniteness of the Time.
6. *A fine.*

Loss of { Honour. Profit. Security. Industry.

These were his Reasons.

Here he made another Protestation, That if a Remedy had been given in this Case, they would not have meddled therewith by no means; but now that remedy being not obtained in the King's-bench, without looking back upon any thing that hath been done or omitted, they desire some provision for the future only. And here he took occasion to add four Book-cases and Authorities, all in the point; saying, that if the learned counsel on the other side could produce but one against the Liberties, so pat and pertinent, oh! how they could hug and cull it! 16 Hen. 6. *tit. Monstrance de fait* 82, by the whole Court, the king in his presence cannot command a man to be arrested, but an action of false imprisonment lieth against him that arresteth: If not the king in his royal presence, then none others can do it. 'Non sic itur ad astra.' 1 Hen. 7, 4. Hussey reports the Opinion of Markham, C. Justice to Ed. 4, that he could not imprison by word of mouth; and the reason, because the party hath no Remedy; for the law leaves every man a remedy of causeless imprisonment. He added, that Markham was a worthy judge, though he fell into adversities at last by the lord Rivers's means. Fortescue, chap. 8. 'Pro-'prio ore nullus regum usus est,' to imprison any man, &c. 4 Eliz. Times blessed and renowned for justice and religion, in Plowden, 235, the Common Law hath so admeasured the king's prerogative, as he cannot prejudice any man in his inheritance; and the greatest inheritance a man hath, is the Liberty of his Person, for all others are accessary to it. For thus he quoted the orator Cicero, 'Major hæ-'reditas venit unicuique nostrum à jure legibus 'quam à parentibus.'

And these are the Authorities he cited in this point.

Now he propounded and answered two Objections: first, in point of State; secondly, in the course held by the House of Commons.

May not the Privy Council commit, without cause shewed, in no matter of state where secrecy is required? Would not this be an hindrance to his majesty's service?

It can be no prejudice to the king by reason of matter of State, for the cause must be of higher or lower nature. If it be for suspicion of treason, misprision of treason, or felony, it may be by general words couched; if it be for any other thing of smaller nature, as Contempt, and the like, the particular cause must be shewed, and no 'individuum vagum,' or uncertain cause to be admitted.

Again, if the law be so clear as you make it, why needs the Declaration and Remonstrance in parliament?

The Subject hath in this case sued for Remedy in King's-bench by Habeas Corpus, and found none; therefore it is necessary to be cleared in parliament.

And here ended his Discourse. And then he made a Recapitulation of all that had been offered unto their lordships, that generally their lordships had been advised by the most faithful counsellors that can be; dead men, these cannot be daunted by fear, nor misled by affection, reward, or hope of preferment, and therefore your lordships might safely believe them: particularly their lordships had three several kinds of Proofs.

1. Acts of Parliament, judicial Precedents, good Reasons. First, You have had many an-

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cient acts of parliament in the point, besides Magna Charta; that is, seven acts of parliament, which indeed are thirty-seven, Magna Charta being confirmed thirty times, for so often have the kings of England given their royal assent thereto.

2. Judicial Precedents of grave and reverend Judges, *in terminis terminantibus*, that long since departed the world, and they were many in number. Precedents being twelve, and the Judges four of a Bench, made four times twelve, and that is forty-eight Judges.

3. You have, as he termed them, *vividas rationes*, manifest and apparent Reasons: towards the conclusion he declareth to their lordships, that they of the House of Commons have, upon great study and serious consideration, made a great manifestation unanimously, *nullo contradicente*, concerning this great Liberty of the Subject, and have vindicated and recovered the body of this fundamental Liberty, both of their lordships and themselves, from shadows, which sometimes of the day are long, sometimes short, and sometimes long again; and therefore we must not be guided by shadows: and they have transmitted to their lordships, not *capita rerum*, Heads or Briefs, for these *compendia are dispendia;* but the Records at large, *in terminis terminantibus*. And so he concluded, that their lordships are involved in the same danger, and therefore 'ex congruo et condigno,' they desired a Conference, to the end their lordships might make the like Declaration as they had done; 'Commune periculum requirit 'commune auxilium;' and thereupon take such farther course as may secure their lordships and them, and all their posterity, in enjoying of their ancient, undoubted, and fundamental Liberties.

The Substance of the OBJECTIONS made by Mr. Attorney-General (Sir Robert Heath) before a Committee of both Houses, to the ARGUMENT that was made by the House of Commons, at the first Conference with the Lords.

AFTER the first Conference, which was desired by the Lords, and had by a Committee of both Houses in the Painted Chamber, touching the Reasons, Laws, Acts of Parliament, and Precedents concerning the Liberty of the Person of every Freeman; Mr. Attorney-General being heard before the Committee of both Houses, as it was assented to by the house of commons, that he might be, before they went up to the Conference; after some preamble made, wherein he declined the answering all Reasons of Law, and Acts of Parliament, came only to the Precedents used in the Argument before delivered; and so endeavoured to weaken the strength of them, that had been brought in behalf of the subjects, and to shew that some other were directly contrary to the law, comprehended in the resolutions of the house of commons, touching the bailing of prisoners, returned upon the Writ of Habeas Corpus to be committed by the special command of the king, or the council, without any cause shewed, for which by law they ought to be committed. And the course which was taken (it pleased the Committee of both houses to allow of) was, that Mr. Attorney should make his Objections to every particular Precedent, and that the Gentlemen appointed, and trusted herein by the house of commons, by several replies should satisfy the lords touching the Objections made by him, against, or upon every particular, as the order of the Precedents should lead them. He began with the first twelve Precedents that were used by the House of Commons at the Conference desired by them, to prove that prisoners returned to stand so committed, were delivered upon bail by the Court of King's-Bench.

The first was that of Bildeston's Case, in the 18 Edw. 3, Rot. 33.

To this he objected; first, that in the return of him into the Court, it did not appear, that this Bildeston was committed by the king's command; and secondly, that in the Record it did appear also that he had been committed for suspicion of counterfeiting the great seal, and so by consequence was bailable by the law, in regard there appeared a cause why he was committed: in which case it was granted by him (as indeed it was plain and agreed of all hands) that the prisoner is bailable, though committed by command of the king. And he said that this part of the Record, by which it appeared he had been committed for suspicion of Treason, was not observed to the lords in the Argument before used; and he shewed also to the lords, that there were three several kinds of Records, by which the full truth of every award, or bailing upon an Habeas Corpus is known. First, the Remembrance-Roll, wherein the award is given; secondly, the File of the Writ and the Return; and thirdly, the Scruet-Roll or Scruet *finium*, wherein the bail is entered, and that only the Remembrance-Roll of this case was to be found: and that if the other two of it were extant, he doubted not but that it would appear also, that upon the return itself the cause of the commitment had been expressed. And so he concluded, that this proved not for the Resolution of the house of commons, touching the matter of bail, where a prisoner was committed by the king's special command without cause shewed.

To these Objections the reply was, First, that it was plain that Bildeston was committed by the king's express command. For so the very words of the Writ are to the Constable of the Tower, 'quod eum teneri et custodiri fa-'cias,' &c. than which nothing can more fully express a commitment by the king's command. Secondly, however it be true, that in the latter part of the Record it doth appear, that Bildeston had been committed for suspicion of Treason, yet if the times of the proceeding, expressed in the Record, were observed, it would be plain that the objection was of no force; for this one ground, both in this case and in all the rest, is infallible, and never to be doubted

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of in the law, That Justices of every court adjudge of the force and strength of a return out of the body of itself only, and as therein it appears. Now in Easter term in the 18 Ed. 3, he was returned and brought before them, as committed only by the Writ; wherein no cause is expressed, and the Lieutenant and the Constable of the Tower, that brought him into the court, says, That he had no other warrant to detain him 'nisi breve predictum,' wherein there was no mention of any cause; and the Court thereupon adjudged, that 'breve predictum,' or that special command, was not sufficient cause to detain him in prison, and thereupon he is by judgment of the court in Easter Term let to Mainprise. But that part of the Record wherein it appears, that he had indeed been committed for suspicion of Treason, is of Trinity Term following, when the king, after the letting of him to Mainprise, sent to the Judges that they should discharge his Mainprise, because no man prosecuted him. And at that time it appears (but not before) that he had been in for suspicion of Treason; so that he was returned to stand committed by the king's special command only, without cause shewed, in Easter Term, and then by judgment of the court let to Mainprise, (which to this purpose is but the same with Bail, though otherwise it differ). And in the Term following upon another occasion the court knew, that he had been committed for suspicion of Treason, which has no relation at all to the letting of him to Mainprise, nor to the judgment of the court then given; when they did not, nor could possibly know any cause for which the king had committed him. And it was said, in behalf of the house of commons, that they had not indeed in their Argument expressly used this latter part of the Record of Bildeston's Case, because it being only of Trinity Term following, could not concern the reason of an award given by the court in Easter Term next before; yet notwithstanding that they had most faithfully, at the time of their Argument, delivered in to the lords, as indeed they had, a perfect copy at large of the whole Record of this case; as they had done also of all other precedents whatsoever cited by them; insomuch as in truth there was not one precedent of Record on either side, the copy whereof they had not delivered in likewise, nor did Mr. Attorney mention any one besides those that were so delivered in by them. And as touching those three kinds of Records, the Remembrance-Roll, the Return and File of the Writ, and Scruets; it was answered by the Gentlemen employed by the house of commons, that it was true, that the Scruet and the Return of this case of Bildeston was not to be found; but that did not lessen the weight of the precedent, because always in the award or judgment drawn up in the Remembrance-Roll, the cause (whatsoever it be) when any is shewed, upon the return is always expressed, as it appears clearly by the constant entries of the King's-Bench court. So that if any cause had appeared unto the court, it must have appeared plainly in that part of the Roll which belongs to Easter Term, wherein the judgment was given: but the return of the commitment by the king's command without cause shewed, and the Judgment of the court, that the prisoner was to be let to mainprise, appears therein only. And so, notwithstanding any objection made by Mr. Attorney, the cause was maintained to be a clear proof, among many others, touching that Resolution of the house of commons.

To the second of these twelve, which is Parker's Case, in the 22 H. 8. Rot. 37, his objections were two; 1, that it is true, that he was returned to be committed 'per mandatum 'domini regis;' but it appeared that this command was certified to the sheriffs of London by one Robert Peck gentleman; and that in regard that the command came no otherwise, the return was held insufficient, and that therefore he was bailed. 2. That it appears also in the Record that he was committed 'pro suspicione feloniæ ac per mandatum domini 'regis:' so that in regard that the expression of the cause of his commitment, suspicion of felony, precedes the command of the king, therefore it must be intended that the court took the cause why the king committed him to be of less moment than felony, and therefore bailed him. For he objected, that even the house of commons themselves, in some arguments used by them, touching the interpretation of the Statute of Westminster the first, cap. 15, about this point, had affirmed, that in enumeration of particulars, those of greatest nature were first mentioned, and that it was supposed, that such as followed were usually of less nature or moment.

But the reply was to the first Objection, That the addition of the certifying of the king's command by Robert Peck, altered not the case: 1, because the sheriffs in their return, took notice of the command as what they were assured of: and howsoever it came to them, it was of equal force, as if it had been mentioned without reference to Peck. 2, As divers Patents pass the great seal by writ of privy-seal, and are subscribed 'per breve de privato 'sigillo;' so divers 'per ipsum regem,' are so subscribed; and oftentimes in the Roll of former times, to the words 'per ipsum regem,' are added 'nunciante A. B.' So that the king's command generally, and the king's command related or certified by such a man, is to this purpose of like nature. 3, In the late great case of Habeas Corpus, where the return of the commitment was 'per speciale manda-'tum domini regis mihi significatum per do-'minos de privato concilio;' the court of King's-Bench did agree, that it was the same, and of like force as if 'mihi significatum, &c., had not followed, and that those words were void. According whereunto, here also 'per mandatum 'dom. regis nunciatum per Robert Peck,' had been wholly omitted and void likewise. And in truth in that late case, this Case of Parker

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was cited both at the bar and bench; and at the bench it was interpreted by the Judges no otherwise, than if it had been only 'per mandatum domini regis' in place of it: but the objection there was made of another kind, as was delivered in the first Argument, made out of Precedents in behalf of the house of commons. Therefore to the second objection, touching the course of enumeration of the causes in the Return, it was said, that howsoever in some acts of parliament, and elsewhere in the solemn expressions used in the law, things of greater nature preceded, and the less follow; yet in this case, the contrary was most plain, for in the Return it appears, that there were three causes for detaining the prisoners; Surety of the peace, suspicion of felony, and the king's command: and surety of the peace is first mentioned, which is plainly less than felony. And therefore it is plain, if any force of argument be taken from this enumeration, that the contrary to that which Mr. Attorney inferred is to be concluded: that is, that as felony is a greater cause than surety of the peace, so the matter whereupon the king's command was grounded, was greater than felony. But in truth this kind of argument holds neither way here, and whatsoever the cause were, why the king committed him, it was impossible for the court to know it: and it also might be of very high moment in matter of state, and yet of far less nature than felony. All which shews, that this precedent hath its full force also, according as it was first used in argument by the house of commons.

To the third of these, which is Binck's case in the 35 H. 8, Rot. 33, the objection was, that there was a cause expressed 'pro suspicione 'felonie:' and though 'pro aliis causis illos 'moventibus' were added in the return, yet because in the course of enumeration, the general name of *aliis* coming after particulars, includes things of less nature than the particular doth, therefore in this case suspicion of felony being the first, the other causes afterwards generally mentioned must be intended of less nature, for which the prisoner was bailable, because he was bailable for the greater, which was suspicion of felony. Hereunto it was replied, that the argument of enumeration in these cases is of no moment, as is next before shewed: and that although it were of any moment, yet *aliæ causæ*, though less than felony, might be of very great consequence in matter of state, which is pretended usually upon general returns of command, without cause shewed; and it is most plain, that the court could not possibly know the reasons, why the prisoner here was committed, and yet they bailed him, without looking further after any unknown thing under that title of matter of state, which might as well have been in this case as in any other whatsoever.

To the fourth of these, which is Overton's Case, in Pasch. 2. et 3. Phil. et Mar. Rot. 58. And to the fifth, which is Newport's Case, Pasch. Phil. et Mar. 4 et 5 Rot. 45, only these objections were said over again by Mr. Attorney, which are mentioned in the Argument made out of the Precedents in behalf of the house of commons at the first conference: and in the same argument are fully and clearly satisfied, as they were in like manner now again.

To the sixth of these, which was Lawrence's Case, 9 Eliz. Rot. 35, and the seventh, which is Constable's, Pasch. 9 Eliz. Rot. 68, the same objections were likewise said over again by Mr. Attorney, that are mentioned, and are clearly and fully answered in the argument made at the conference out of precedents in behalf of the house of commons; the force of the objection being only, that it appeared in the margin of the Roll, that the word Pardon was written: but it is plain that the word there hath no reference at all to the reason why they were bailed, nor could it have reference to the cause why they were committed, in regard the cause why they were committed is utterly unknown, and was not shewed.

To the eighth of these Precedents, which was Browning's Case, Pasch. 20 Eliz. Rot. 72. it was said by Mr. Attorney, that he was bailed by a letter from the Lords of the Council, directed to the Judges of the Court; but being asked for that letter, or any testimony of it, he could produce none at all; but said, he thought the testimony of it was burnt, among many other things of the Council-table, at the burning of the Banqueting-House.

To the 9th, being Harecourt's Case, Pasch. 40 Eliz. Rot. 62, the self same objection was made by him, but no warrant was shewed to maintain his objection.

To the 10th, which is Catesby's Case, *in vacatione Hill.* 43 Eliz. he said, That it was by direction of a privy-seal from the queen: and to that purpose he shewed the privy-seal of 43 Eliz. which is at large among the transcripts of the Records concerning bails taken in cases, where the king or the lords assented. But it was replied, That the privy-seal was made only for some particular gentlemen mentioned in it, and for none other, as indeed appears in it: and then he said, that it was likely that Catesby here had a privy-seal in this behalf, because those other had so: which was all the force of his objection.

To the 11th of these, which is Beckwith's Case in Hill. 12 Jac. Rot. 153, he said, that the lords of the council sent a letter to the court of King's-Bench to bail him. And indeed he produced a letter, which could not by any means be found when the arguments were made at the first conference: and this letter, and a copy of an obscure report made by a young student (which was brought to another purpose, as is hereafter shewed), were the only things written of any kind that Mr. Attorney produced, besides the particulars shewed by the house of commons at the first conference. To this it was replied, That the letter was of no moment, being only a direction to the Chief-Justice, and no matter of Record, nor any way concerning the rest of the Judges:

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and besides, either the prisoner was bailable by the law, or not bailable; if bailable by the law, then he was to be bailed without any such letter; if not bailable by the law, then plainly the Judges could not have bailed him upon the letter, without breach of their oath, which is, 'That they are to do justice according to the law, without having respect to 'any command whatsoever.' So that the letter in this case, or the like in any other case, is for point of law to no purpose, nor hath any weight at all by way of objection against what the Record and the Judgment of the court shew us.

To the 12th and last of these, which is sir Thomas Monson's Case in the 14 Jac. Rot. 147, the same objection only was said over by him, which was mentioned and clearly answered in the argument; and that one ground which is infallible, 'That the judgment upon a return 'is to be made only out of what appears in the 'body of the return itself,' was again insisted upon in this case, as it was also in most of the rest. And indeed that alone which is most clear law, fully satisfies almost all kind of objections that have been made to any of these precedents; which thus rightly understood, are many ample testimonies of the Judgment of the Court of King's-Bench, touching this great point, in the several ages, and reigns of the several princes under which they fall.

After his Objections to the twelve, and the replies and satisfactions given to these objections, he came next to those wherein the assent of the king and privy-council appears to have been upon the enlargement: but he made not to any of these any other kind of objections whatsoever, than such as are mentioned and clearly answered, as they were now again, in the Argument made at the first Conference. And for so much as concerns letters of assent or direction, the same was here said again by way of reply to him, as is before said touching the letter in Beckwith's Case.

After these were dispatched, he came to urge the eight Precedents, which seemed to make for the other side against the Resolution of the house of commons: which eight were used, and copies of them also were given into the lords at the first Conference.

Of these eight, the first four were urged by him, as being of one kind; the difference of them only being such, that, save only in the names of prisons and of persons, they are but the self-same.

To the force of these four he objected thus: that Richard Everard, for the purpose, in the first of them, which is 5 H. 7, Rot. 18. Roger Cherry in the second of them, which is 8 H. 7. Rot. 12, Christ. Burton, in the third of them, which is 9 H. 7, Rot. 14, and George Ursewick in the fourth of them, which is 19 H. 7, Rot. 13, were returned into the King's-Bench upon several writs of Habeas Corpus, to have been committed and detained in the several prisons whence they came 'per mandatum domini 'regis,' and that upon that Return they were committed to the marshal of the King's-Bench; and that however it had been objected against those precedents, that this kind of commitment was by the course of that court always done before the bailing of the prisoner, yet, that it did not appear that they were bailed.

The Reply to this objection was, That by constant course of King's-Bench, whosoever came in upon Habeas Corpus, or otherwise upon any writ in that court, cannot be bailed until he be first committed to the marshal of that court; and that thence it was, that all those four were committed to the marshal, as appears by the entry, 'Qui committitur Marescallo, '&c.' which is the usual entry in such a case, and that the clerks of that court acknowledge this course and entry to be most constant. So that all the inference, that can be made out of these four, is, that four prisoners being brought from four several prisons by Habeas Corpus into the King's-Bench, and returned to stand committed 'per mandatum domini regis,' were so far from being remanded by the law, that in all these four cases, they were first taken from the several prisons, wherein they had been detained, by such a general command (which could not have been if they had not been adjudged in every one of the cases to have been bailable by the court), and that this commitment of them to the marshal of the King's-Bench, was the first step towards the bailing of them, as in all other cases. But that it appears not, that either they ever demanded to be bailed, or that they were able to find sufficient bail; and if they did not the one, or could not do the other, it may follow indeed that they were not bailed. But this commitment to the King's-Bench being the first step to the bailing of them, as by the constant course it is, shews most plainly that they were bailable by the law, which is the only thing in question. So that although these four precedents were ranked among them, that may seem to make against the Resolution of the house of commons, which was done, both because they have this small colour in them for the other side, to any man that is not acquainted with the nature and reasons of the Entries, and courses of the court of King's-Bench, and also because all or some of them had been used in the late great case in the King's-Bench, as precedents that made against the liberty claimed by the subject; yet, in truth, all four of them do fully prove their Resolution: that is, they plainly shew that the court of King's-Bench in every one of them resolved, that the prisoners so committed were bailable, otherwise they had been remanded, and not committed to the marshal of the King's-Bench. And this was the Answer to the Objection made by Mr. Attorney upon those four precedents, being all of the time of king Henry the seventh.

To the fifth of these eight, being Edward Page's Case, in 7 H. 8, Rot. 23. Mr. Attorney objected thus: He said, that Edward Page was committed to the Marshalsea of the Houshold, 'per mandatum domini regis ibidem salvo cus-'todiend. &c.' 'Qui committitur Marescallo,

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' &c. Hospitii domini regis.' By which it appeareth, as he said, that the court remanded him back to the prison of the Marshalsea of the Houshold: and he said, that whereas it had been objected at the first conference, that there was some mistaking in the entry; he conceived, indeed, that there was a mistaking, but it was that the clerk had entered ' committitur' for ' remittitur,' and that it should have been ' Qui remittitur Marescallo Hospitii domini regis:' for whenever they remanded the prisoner, ' remittitur' and not ' committitur' should be entered. And that mistaking being so rectified and understood, he conceived it was a direct precedent against the Resolution of the house of commons.

To this it was answered by the Gentlemen of the house of commons, That there was no doubt, indeed, but that a mistake was in the entry by the clerk, but that the mistaking was quite of another nature. The addition of those words, ' hospitii dom. regis,' was the mistaking, and the entry should have been, ' qui ' committitur Marescallo, &c.' only; that is, he was committed to the Marshal of the King's Bench; and so indeed the force of this precedent should be but just the same with the first four; but the ignorance of the clerk that entered it, knowing not how to distinguish between the Marshal of the Houshold and the Marshal of the King's Bench, was the cause of the addition of these words, ' hospitii dom. regis.'

And to confirm fully this kind of interpretation of that precedent, and of the mistaking of it, it was observed by the Gentlemen of the House of Commons, that there is in the margin of the Roll an infallible character that justifies so much. For by the course of that court, whensoever a prisoner is committed to the Marshal of the King's Bench and not remanded, the word *Marescallo* is written in the margin short by *Marr'* turned up: and that is never written there, but when the meaning and sense of the entry is, that the prisoner is committed to the prison of the same court. Now in this case ' Marr' ' in the margin is likewise written: which most clearly shews that the truth of this case was, that this Page was committed to the Marshal of the King's Bench, and not remanded; which if it had been, neither could the entry have been ' committitur,' nor should the margin of the Roll have had ' Marr' written in it.

And thus they have answered Mr. Attorney's objections touching this precedent, and concluded that now, besides the first four of the eight, they had another, and so five to prove that a prisoner committed ' per mandatum domini regis,' generally was bailable by the judgment of the court. However, it appears not in these particulars that they were bailed; which perhaps they were not, either because they prayed it not, or because they could not find sufficient bail.

The sixth of these Precedents, being the case of Thomas Cæsar, in the 8 Jac. Regis Rot. 99. Mr. Attorney objected to it thus: That Cæsar being committed ' per mandatum domini regis' to the Marshalsea of the Houshold, was returned upon Habeas Corpus to be so committed, and therefore detained in prison, and that the entry is, ' Qui committitur prisonæ Marescal. prædict.' by which it appears clearly, that he was remanded to the same prison from whence he came.

To this the Gentlemen of the House of Commons gave this answer: They said, that the usual entry of a ' remittitur,' when it is to shew that the court by way of judgment, or award upon a resolution, or debate, remands the prisoner, is, ' remittitur quousque secundum legem deliberatus fuerit:' but when they advise, or give way to the keeper of the prison to amend his return, or the like, then the entry is only ' remittitur' generally, or ' remittitur prisonæ prædict.' But it was indeed affirmed by Mr. Keeling, a clerk of great experience in that court, that the entry of a ' remittitur' generally, or ' remittitur prisonæ ' prædictæ,' was indifferently used for the same, as ' remittitur quousque,' &c. Yet it was expressly shewed by the gentlemen of the House of Commons, that there was sometimes a difference, and that so it might well be in this case. For in the last of these eight precedents, which is Saltonstall's Case, they observed that ' remittitur prisonæ prædictæ' is often used; and that it is twice used only for a remanding, during the time that the court gave leave to the Warden of the Fleet to amend his return; which shews plainly, that though sometimes ' remittitur' generally, and ' remittitur quousque,' &c. may mean the same, yet sometimes it doth not. And that, in this case of Cæsar it doth not mean any other, but only so much as it doth twice in that of Saltonstall's case, was proved also by a Rule of the court, which was cited out of the Rule-book of the court of King's Bench, by which rule the court expressly ordered, that unless the steward and marshal of the Houshold did sufficiently return the writ of Habeas Corpus for Cæsar, that he should be discharged. The words of the rule are, ' Nisi ' prædicti Senescallus et Marescallus hospitii ' domini regis sufficientur returnaverint breve ' de Habeas Corpus, Tho. Cæsar die Mercurii ' proximæ post quindenam Sancti Martini de ' prisona exonerabitur.' And this was the opinion of the court: which shews that the court was so far from remanding him upon the return, that they resolved, that unless some better return were made, the prisoner should be discharged of his first imprisonment, though it appeared to them out of the body of the return (upon which they were only to judge), that he was committed ' per mandatum domini regis' only. And the rule not only shews the opinion of the court then to have been agreeable with the Resolution of the house of commons, but also proves that ' Remittitur:' generally, or ' Remittitur prisonæ prædictæ,' doth not always imply a remanding upon judgment or debate. And this answer was given to this of Cæsar's Case, that is the sixth of this number.

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The seventh is the Case of James Demetrius. It was 12 Jac. Rot. 153. Mr. Attorney objected that this Demetrius and divers others being brewers, were committed 'per concilium domini 'regis' to the Marshalsea of the Houshold, and that upon the commitment so generally returned, they were remanded, and that the entry was 'immediatè remittitur præfacto marescallo 'prædicti hospitii;' where he observed, that 'immediatè' shews that the Judges of that time were so resolved of this question, that they remanded them presently, as men that well knew what the law was herein.

Hereunto the Gentlemen of the House of Commons gave these Answers. 1. That the Remittitur in this case is but as the other in Cæsar's, and so proves nothing against them. 2. That 'immediatè' being added to it, shews plainly that it was done without debate, or any argument or consideration had of it, which makes the authority of the precedents to be of no force in point of law; for judgments and awards given upon deliberation only and debate are proofs and arguments of weight, and not any sudden act of the court without debate or deliberation. And the entry of 'immediatè' being proposed by Mr. Keeling, it was confirmed by him, that by that entry it appears by this course, that the remanding of him was the self-same day he was brought, which, as it was said by the Gentlemen of the House of Commons, might be at the rising of the court, or upon advisement, and the like. And this answer was given to this precedent of the brewers.

The last of the eight, to which Mr. Attorney objected, is Saltonstall's Case, in the 13 Jac. regis. He was committed 'per mandatum dominorum regis de privato concilio:' and being returned by the Warden of the Fleet to be so, 'Remittitur prisonæ prædictæ;' and in the 13 Jac. in the same case there is 'remittitur' generally in the roll. And these two make but one case, and are as one precedent.

To this the Gentlemen of the House of Commons answered, That it is true, the Rolls have such entries of 'remittitur' in them generally, but that proves nothing, upon the reason before used by them in Cæsar's case. But also Saltonstall was committed for another cause besides 'per mandatum dom. regis,' a contempt against an order in the chancery, and that was in the return also. And besides the court, as it appears in the record, gave several days to the Warden of the Fleet to amend his return, which they would not have done, if they had conceived it sufficient, for that which is sufficient needs not amendment.

To this Mr. Attorney replied, That they gave him a day to amend his return, in respect of that part of it which concerns the order in Chancery, and not in respect of that which was 'per mandatum dom. regis.' But the Gentlemen of the House of Commons answered, That that appeared not any where, nor indeed is it likely at all, nor can be reasonably so understood: because if the other return 'per 'mandatum dom. regis' had been sufficient by itself, then doubtless they would have remanded him upon that alone; for then they needed not at all to have stood upon the other part of the return in this case. So that out of the Record itself it appears fully, that the court conceived the return to be insufficient.

So the Gentlemen of the House of Commons concluded, that they had a great number of Precedents besides divers acts of parliament, and Reasons of Common Law, agreeable to their Resolution; and that there was not one precedent at all that made against them, but indeed, that almost all that were brought, as well against them as for them, if rightly understood, made fully for the maintenance of their Resolution: and that there was not one example or precedent of a Remittitur in any kind upon the point before that of Cæsar's case, which is before cleared with the rest, and is but of late time, and of no moment against the Resolution of the House of Commons.

And thus, for so much as concerned the Precedents of Record, the first day of the Conference desired by the lords ended.

The next day, they desired another Conference with the House of Commons, at which it pleased the Committee of both houses to hear Mr. Attorney again make what Objections he could against other parts of the Argument formerly delivered from the House of Commons. He then objected against the Acts of Parliament, and against the Reasons of Law, and his objections to those parts were answered, as it appears by the Answers by order given into the House of Commons by the gentlemen that made them. (Vide postea.) He objected also upon the second day against the second kind of Precedents, which are Resolutions of Judges in former times, and not of record, and brought also some other testimonies of the opinions of Judges in former times, touching this point.

First, for that Resolution of all the Judges of England in 34 Eliz. mentioned and read in the Arguments at the first Conference, he said, That it was directly against the Resolution of the House of Commons, and observed the words of it in one place to be, that persons so committed by the king, or by the council, may not be delivered by any of the courts, &c. And in another, that if the cause were expressed, either in general or in specialty, it was sufficient; and he said that the expressing of a cause in generality was to shew the king or the council's command: and to this purpose, he read the whole words of that Resolution of the Judges. Then he objected also, that in the Report of one Roswell's Case in the King's-bench, in 13 Jac. he found that the opinion of the Judges of that court (sir Edward Coke being then Chief Judge and one of them) was, that a prisoner being committed 'per mandatum dom. regis,' or 'privati concilii,' without cause shewed, and so returned, could not be bailed because it might be matter of state, or 'Arcana imperii,' for which he stood committed. And to this

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also be added, an opinion he found in a Journal in the House of Commons of 13 Jac. wherein sir Edward Coke speaking to a Bill preferred for the explanation of Magna Charta touching imprisonment, said in the same house, That one so committed could not be inlarged by the law, because it might be matter of state for which he was committed. And amongst these objections of the other nature also, he spake of the confidence that was shewed in behalf of the House of Commons: and he said, it was not confidence on either part could add any thing to the determination of the question: but if it could, that he had as much reason of confidence for the other side against the Resolution of the House of Commons, grounding himself upon the force of his objections, which, as he conceived, had so weakened the arguments of the House of Commons.

To this a reply was made; and first it was said to the lords on the behalf of the House of Commons, That notwithstanding any thing yet objected, they were upon clear reason still confident of the truth of their first Resolution, grounded upon so just examination, and deliberation taken by them. And it was observed to the lords also, that their confidence herein was of another nature, and of greater weight, than any confidence that could be expressed by Mr. Attorney, or whomsoever else being of his majesty's counsel learned.

To which purpose the lords were desired to take into their memories the difference between the present qualities of the Gentlemen that spake in behalf of the House of Commons, and of the King's learned Counsel in their speaking there, howsoever accidentally they were both men of the same profession: for the King's Counsel spake as counsel perpetually retained by fee, and if they made glosses or what advantageous interpretation soever for their own part, they did but what belonged to their place and quality, as Mr. Attorney had done. But the Gentlemen that spake in behalf of the House of Commons, came there, bound on the one side by the trust reposed in them by their country that sent them, and on the other side by an oath taken by every of them before he sit in the house, to maintain and defend the Rights and Prerogatives of the Crown: so that even in the point of confidence alone, those of them that speak as retained counsel by perpetual fee, and those that by their place being admitted to speak, are bound to utter nothing but truth, both by such a trust and such an oath, were no way to be so compared or counterpoised, as if the one were of no more weight than the other.

And then the Objections before mentioned were also answered.

For that of the Resolution of all the Judges of England in 34 Eliz. it was shewed, that plainly it agreed with the Resolution of the House of Commons: for although indeed it might have been expressed with more perspicuity, yet the words of it, as they are, sufficiently shew the meaning of it to be no otherwise. To that purpose, besides the words of the whole frame of this Resolution of the Judges, as it is in the copy transcribed out of the L. C. Justice Anderson's Book, written in his own hand, which book was here offered to be shewed in the behalf of the house of commons; it was observed, that the words of the first part of it shew plainly, that all the Judges of England then resolved, that the prisoners spoken of in the first part of their Resolution were only prisoners committed with cause shewed; for they only say they might not be delivered by any court without due trial by law, and judgment of acquittal had; which shews plainly they meant that by trial and acquittal they might be delivered. But it is clear that no trial or acquittal can be had, where there is not some cause laid to their charge, for which they ought to stand committed. Therefore in that part of the Resolution such prisoners are only meant as are committed with cause shewed, which also the Judges in that Resolution expressly thought necessary, as appears in the second part of their Resolution, wherein they have these words: 'If upon the return of their 'Habeas Corpus, the cause of their commit-'ment be certified to the Judges, as it ought to 'be, &c.' By which words they shew plainly, that every return of a commitment is insufficient that hath not a cause shewed of it. And to that which Mr. Attorney said, as if the cause were sufficiently expressed in generality, if the king's command or the council's were expressed in it, as if that were meant in the resolution for a sufficient general cause; it was answered, That it was never heard of in law, that the power or person that committed the prisoner was understood for the 'causa captionis' or 'causa detentionis,' but only the reason why that power or person committed the prisoner. As also in common speech, if any man ask why or for what cause a man stands committed, the answer is not, that such a one committed him, but his offence or some other cause is understood in the question, and is to be shewed in the answer. But to say that such a one committed the prisoner, is an answer only to the question, who committed him? and not why, or for what cause he stands so committed?

Then for that of the copy of the Report, in 13 Jac. shewed forth by Mr. Attorney, it was answered by the Gentlemen of the House of Commons, That the report itself which had been before seen, and perused among many other things at a committee made by the house, was of slight or no authority, for that it was taken by one, who was at that time a young student, and as a reporter in the King's Bench, and there was not any other report to be found that agreed with it. Secondly, Although the reports of young students, when they take the words of Judges as they fall from their mouths at the Bench, and in the same person and form as they have spoken, may be of good credit; yet in this case there was not one word so reported: but in truth there being three cases at a time in the King's-Bench, one Roswell's case,

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Allen's, and Saltonstall's case, every of which had something of like nature in it, the student having been present in the court, made up the frame of one report or case out of all three in his own words, and so put it into his Book: so that there is not a word in the report, but it is framed according to the student's fancy, as it is written; and nothing is expressed in it, as it came from the mouth of the Judges, otherwise than his fancy directed him.

Thirdly, There are in the report plain falshoods of matter of fact, which are to be attributed either to the Judges or to the reporter. It is most likely by all reason, that they proceeded from the Reporter's fault; howsoever, these matters of falshood shew sufficiently that the credit of the rest is of light value. It is said in the report, that Harecourt being committed by the council, was bailed, in 40 Eliz. upon a privy-seal or a letter, whereas in truth there is no such thing. And it is said there, that kind of letters are filed in the crown-office, whereas in truth there was not any such kind of letters filed there in any case whatsoever. That Resolution of the Judges in 34 Eliz. is mis-cited there, and made in 36 Eliz. And it is said there, that by that Resolution, a prisoner returned to be committed by the command of the king, might not at all be delivered by the court; whereas no such thing is comprehended in that Resolution.

But that which is of most moment is, that howsoever the truth of the report were, yet the opinion of the Judges being sudden, and without any debate had of the case, is of light moment: for, in difficult points especially, the most grave and learned men living may on the sudden let fall (and that without any disparagement to them) such opinions as they may well, and ought to change upon further inquiry, examination, and full debate had before them, and mature deliberation taken by them. Now plainly in that of 13 Jac. there is not so much as a pretence of any debate at the bar or bench. All that is reported to have been, is reported as spoken of the sudden. And can any man take such a sudden opinion to be of value against solemn debates and mature deliberations since had of the point? And indeed this great point, and all circumstances belonging to it, have within this half year, been so fully examined and searched into, that it may well be affirmed, that the most learned man whatsoever that hath now considered of it, hath within that time, or might have, learned more reason of satisfaction in it, than ever before he met with. Therefore the sudden opinion of the Judges to the contrary is of no value here, which also is to be said of that opinion obviously delivered in the commons house in 18 Jac. as Mr. Attorney objected out of the Journal of the house. But besides, neither was the truth of that report of that opinion in the Journal any way acknowledged; for it was said in behalf of the house of commons, that their Journals were for matters of Orders and Resolutions of the house of such authority, as that they were as their records. But for any particular man's opinion, noted in any of them, it was so far from being of any authority with them, that in truth no particular opinion is at all to be entered in them, and that their clerk offends, whenever he doth to the contrary. And, to conclude, no such opinion whatsoever can be sufficient to weaken the clear law comprehended in these resolutions of the house of commons, grounded upon so many acts of parliament, so much reason of the common-law, and so many precedents of record, and the resolution of all the judges of England; and against which not one law, written or unwritten, not one precedent, not one reason hath been brought, that makes any thing to the contrary.

And thus ended the next day of the Conference desired by the lords, and had by a Committee of both houses.

Serjeant ASHLEY'S ARGUMENT, seconding Mr. Attorney, in the behalf of his Majesty.

I hope it will be neither offensive nor tedious to your lordships, if I said somewhat to second Mr. Attorney: which I the rather desire, because yesterday it was taken by the Gentlemen, and argued on the behalf of the Commons, that the cause was as good as gained by them, and yielded by us, in that we acknowledged the statute of Magna Charta, and the other subsequent Statutes, to be yet in force: for on that they enforced this general conclusion; 'That therefore no man could be committed, 'or imprisoned, but by due process, present-'ment or indictment.' Which we say is a *Non sequitur* upon such our acknowledgment; for then it would follow by necessary consequence, that no imprisonment could be justified but by process of law, which we utterly deny. For in the cause of the Constable cited by Mr. Attorney, it is most clear, that by the ancient law of the land a constable might *ex officio*, without any warrant, arrest, and restrain a man to prevent an affray, or to suppress it. And so is the authority 38 Hen. 8, Brook's Abstract. So may he, after the affray, apprehend and commit to prison the person that hath wounded a man that is in peril of death, and that without warrant or process; as it is in 38 E. 3, fol. 6.

Also any man that is no Officer may apprehend a felon without writ, or warrant, or pursue him as a wolf, and as a common enemy to the Commonwealth, as the Book is 14 Hen. 3, fol. 16. So might any one arrest a night-walker, because it is for the common profit, as the reason is given 4 Hen. 7, fol. 7.

In like manner the Judges in these several Courts may commit a man, either for contempt or misdemeanor, without either process or warrant, other than 'Take him Sheriff,' or 'Take him Marshal, or Warden of the Fleet.' And the adversaries will not deny, but if the king will alledge cause, he may commit a man 'per 'mandatum' as the Judges do, without process or warrant.—And various are the cases that may be instanced, wherein there may be a

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lawful commitment without process. Wherefore I do positively and with confidence affirm, that if the imprisonment be lawful, whether it be by process, or without process, it is not prohibited by the law.

Which being granted, then the question will aptly be made, Whether the King or Council may commit to prison 'per legem terræ,' were only that a part of the municipal law of this realm, which we call the Common-Law? For there are also divers jurisdictions in this kingdom, which are also reckoned the law of the land.

As in Cawdry's Case in Coke's 5th report, fol. 1. the first ecclesiastical law is held the law of the land, to punish blaspfiemies, schisms, heresies, simony, incest, and the like, for a good reason there rendered, viz. That otherwise the king should not have power to do justice to his subjects in all cases, nor to punish all crimes within his kingdom.

The Admiral's jurisdiction is also *lex terræ*, or things done upon the sea: but if they exceed their jurisdiction, a prohibition is awarded upon the Statute of *nullus liber homo;* by which appears that the statute is in force, as we have acknowledged.

The Martial Law likewise, though not to be exercised in times of peace, when recourse may be had to the king's courts, yet in times of invasion, or other times of hostility, when an army-royal is in the field, and offences are committed, which require speedy reformation, and cannot expect the solemnity of legal Trials; then such imprisonment, execution, or other justice done by the law-martial is warrantable, for it is then the law of the land, and is *jus gentium*; which ever serves for a supply in the defect of the common law, when ordinary proceeding cannot be had.

And so it is also in the case of the Law of the Merchant, which is mentioned 13 Edw. 4, fol. 9, 10, where a Merchant-stranger was wronged in his goods, which he had committed to a carrier to convey to Southampton, and the carrier imbezzled some of the goods: for remedy whereof the Merchant sued before the council in the Star-Chamber for redress. It is there said thus: Merchant-strangers have by the king safe-conduct for coming into this realm; therefore they shall not be compelled to attend the ordinary trial of the common law, but, for expedition, shall sue before the king's council, or in Chancery, 'de die in diem 'et de horâ in horam;' where the case shall be determined by the law of merchants.

In the like manner it is in the Law of State; when the necessity of state requires it, they do and may proceed to natural equity; as in those other cases where the law of the land provides not, there the proceeding may be by the law of natural equity: and infinite are the occurrences of state, unto which the common law extends not. And if these proceedings of state should not also be accounted the law of the land, then we do fall into the same inconveniency mentioned in Cawdry's case, that the king should not be able to do justice in all cases within his own dominions.

If then the king nor his council may not commit, it must needs follow, that either the king must have no council of state, or having such a council, they must have no power to make orders, or acts of state; or if they may, they must be without means to compel obedience to those acts: and so we shall allow them jurisdiction, but not compel obedience to those acts: but not correction, which will be then as fruitless as the command. 'Frustra potentia quæ nun-'quam redigitur in statutum.' Whereas the very act of Westminster the first, shews plainly that the king may commit, and that his commitment is lawful, or else that act would never have declared a man to be irrepleviable when he is committed by the command of the king, if the law-makers had conceived that his commitment had been unlawful. And Divine Truth informs us, that the kings have their power from God, the Psalmist calling them 'the children of the Most High;' which is in a more special manner understood than of other men: for all the sons of Adam are by election the sons of God, and all the sons of Abraham by recreation, or regeneration, the children of the Most High, in respect of the power which is committed unto them; who hath also furnished them with ornaments and arms fit for the exercising of that power, and hath given them sceptres, swords, and crowns; sceptres to institute, and swords to execute laws; and crowns as ensigns of that power and dignity, with which they are invested.' Shall we then conceive that our king hath so far transmitted the power of his sword to inferior magistrates, that he hath not reserved so much supreme power as to commit an offender to prison? 10 Hen. 6, fol. 7, it appears that a steward of a court leet may commit a man to prison, and shall not the king, from whom all inferior power is deduced, have power to commit? We call him the Fountain of Justice, yet when these streams and rivulets, which flow from that fountain, come fresh and full, we would so far exhaust that fountain, as to leave it dry. But they that will admit him so much power, do require the expression of the cause; I demand whether they will have a general cause alledged, or a special? If general, as they have instances for treason, felony, or for contempt, (for to leave fencing, and to speak plainly as they intend it) viz. If loan of money should be required and refused, and thereupon a commitment ensue, and the cause signified to be for contempt, this being unequal inconvenience from yielding, the remedy is sought; in the next parliament would be required the expression of the particular cause of the commitment. Then how unfit would it be for king or council in cases to express the particular cause, it is easily to be adjudged, when there is no state, or policy of government, whether it be monarchical, or of any other frame, which have not some secrets of state, not communicable to vulgar understanding.

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I will instance but one; if a king employ an ambassador to a foreign country or state, with instructions for his negociation, and he pursue not his instructions, whereby dishonour and damage may ensue to the kingdom, is not this committable? And yet the particular of his instruction, and the manner of his miscarrying, is not fit to be declared to his keeper, or by him to be certified to the Judges, where it is to be opened and debated in the presence of a great audience.

I therefore conclude, for offences against the State, in case of State Government, the king and his council have lawful power to punish by imprisonment, without shewing particular cause, where it may tend to the disclosing of State Government. It is well known to many that know me, how much I have laboured in this law of the subjects liberty very many years before I was in the king's service, and had no cause then to speak, but to speak *ex animo;* yet did I then maintain and publish the same opinion which now I have declared concerning the king's supreme power in matters of state, and therefore cannot justly be censured to speak at this present only to merit of my master. But if I may freely speak my own understanding, I conceive it to be a question too high to be determined by any legal direction; for it must needs be an hard case of contention, when the conqueror must sit down with irreparable losses, as in this case. If the subject prevails, he gains liberty, but loseth the benefit of that State Government, by which a monarchy may soon become an anarchy; or if the State prevails, it gains absolute sovereignty, but loseth subjects: not their subjection, for obedience we must yield, though nothing be left us but prayers and tears, but yet loseth the best part of them, which is their affections, whereby sovereignty is established, and the crown firmly fixt on his royal head. Between two such extremes there is no way to moderate, but to find a medium for the accommodation of the difference; which is not for me to prescribe, but only to move your lordships, to whom I submit.

After Mr. Serjeant's speech ended, my Lord President said thus to the Gentlemen of the House of Commons; 'That though at this free 'conference, liberty was given by the Lords to 'the king's counsel to speak what they thought 'fit for his majesty, *yet Mr. Serjeant Ashley 'had no authority, or direction from them to 'speak in that manner he had done.*' And he was committed into custody, and afterwards, being sorry for any hasty expression he might have used, was discharged.

The OBJECTIONS of the King's Counsel, with the ANSWERS made thereunto, at the two Conferences touching the same matter.

It was agreed by the Attorney-General, sir Robert Heath, that the seven Statutes urged by the Commons were in force, and that Magna Charta did extend most properly to the king. But he said, 1. That some of them are in general words, and therefore conclude nothing, but are to be expounded by the precedents; and others that be more particular, are applied to the suggestions of subjects, and not to the king's command simply of itself. Hereunto it was answered, That the Statutes were as direct as could be, which appeareth by the reading of them; and that though some of them speak of suggestions of the subjects, yet others do not: and they that do, are as effectual, for that they are in equal reason, a commitment by the command of the king, being of as great force, when it moveth by a suggestion from a subject, as when the king taketh notice of it himself; the rather for that kings seldom intermeddle with matters of this nature, but by information from some of their people.

2. Mr. Attorney objected, that 'per legem 'terræ' in Magna Charta, (which is the foundation of this question) cannot be understood for process of the law and original writs; for that in all criminal proceedings no original writ is used at all; but every constable either for felony or breach of the peace, or to prevent the breach of the peace, may commit without process or original writ, and it were hard the king should not have the power of a constable. And the statute cited by the commons, makes process of the law and writ original, to be all one.

The answer of the Commons to this objection was, that they do not intend original writs only by law of the land, but all other legal process, which comprehends the whole proceedings of law upon cause, other than trial by jury, *Judicium parium*, unto which it is opposed. Thus much is imported *ex vi termini* out of the word process; and by the true acceptation thereof in the statutes that have been used by the commons to maintain the declaration, and most especially the statutes of 25 Ed. 3, cap. 4, where it appeareth that a man ought to be brought in to answer by the course of the law, having former mention of process made by original writ.

And in 28 Ed. 3, cap. 3, 'by the course of the law' is rendered 'by due process of the law.' And 36 Ed. 3, Rot. Parl. n. 20, the petition of the commons saith, 'that no man ought to be imprisoned by special command without indictment or other due process to be made by the law,' 37 Ed. 3, cap. 18, calleth the same thing 'process of the law;' and 42 Ed. 3, cap. 3, stileth it 'by due process and writ original;' where the conjunctive must be taken for a disjunctive, which change is ordinary in an exposition of statutes and deeds, to avoid inconveniences, to make it stand with the rest; and with reason, as it may be collected, 'by the law of the land' in Magna Charta, 'by the course of the law' in 25 Ed. 3, 'by the due process of law' in 28 Ed. 3, 'other due process to be made by the law' in 36 Ed. 3, 'process of the law' in 37 Ed. 3, and 'by due process and writ original' in 42 Ed. 3, are meant one and the same thing; the latter of these statutes referring always to the former, and that all of them import any due and regular proceedings of law upon a cause

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other than the Trial by Jury. And this appeareth 10 Rep. 74, in the case of the Marshalsea, and 11 Rep. 99, James Bagg's case, where it is understood of giving jurisdiction by charter or prescription, which is the ground of a proceeding by course of law. And in Selden's Notes on Fortescue, fol. 29, where it is expounded for law-wager, which is likewise a trial at law by the oath of the parties differing from that by jury. And it doth truly comprehend these and all other regular proceedings in law upon cause, which gives authority to the constable to arrest upon cause. And if this be not the true exposition of these words 'per legem terræ,' the king's counsel were desired to declare their meaning, which they never offered to do; and yet certainly these words were not put into the statute without some intention of consequence.

And thereupon Mr. Serjeant Ashley offered an interpretation of them thus: namely, That there were divers laws of this realm, as the Common Law, the Law of the Chancery, the Ecclesiastical Law, the Law of the Admiralty or Marine Law, the Law of the Merchants, the Martial Law, and the Law of State; and that these words 'per legem terræ,' do extend to all these laws.

To this it was answered, That we read of no Law of State, and that none of these laws can be meant there, save the Common Law, which is the principal and general law, and is always understood by way of excellency, when mention is made of the law of the land generally: and that though each of the other laws, which are admitted into this kingdom by custom or act of parliament, may justly be called *a* law of the land, yet none of them can have the pre-eminence to be stiled *the* law of the land. And no Statute, Law-Book, or other Authority, printed or unprinted, could be shewn, to prove that the law of the land, being generally mentioned, was ever intended of any other than the Common Law; and yet even by these other laws, a man may not be committed without a cause expressed.

But it standeth with the rule of other legal expositions, that 'per legem terræ,' must be meant the Common Law, which is the general and universal law by which men hold their inheritances; and therefore if a man speak of escuage generally, it is understood, as Littleton observeth, sect. 99, of the incertain escuage, which is a knight's service tenure, for the defeace of the realm, by the body of the tenant in time of war, and not of certain escuage, which giveth only a contribution in money, and no personal service.

And if a Statute speak of the King's Courts of Record, it is meant only of the four at Westminster by way of excellency, Coke's 6 Rep. 20, Gregory's case. So the Canonists by the Excommunication simply spoken, do intend the greater Excommunication. And the Emperor in his Institutions saith, That the Civil Law being spoken generally, is meant of the Civil Law of Rome, though the law of every city is a civil law; as when a man names The Poet, the Grecians understand Homer, the Latinists, Virgil.

2. Admit 'per legem terræ' extend to all the laws of the land, yet a man must not be committed by any of them, but by the due proceedings that are executed by those laws, and upon a cause declared.

Again, it was urged, That the king was not bound to express a cause of imprisonment, because there may be in it matter of state, not fit to be revealed for a time, lest the confederates thereupon make means to escape the hands of justice. And therefore the Statutes cannot be intended to restrain all commitments, unless a cause be expressed; for that it would be very inconvenient and dangerous to the state, to publish the cause at the very first.

Hereunto it was replied by the Commons, That all danger and inconvenience may be avoided by declaring a general cause, as for treason, suspicion of treason, misprision of treason, or felony, without specifying the particular; which can give no greater light to a confederate, than will be conjectured by the very apprehension upon the imprisonment, if nothing at all were expressed.

It was further alledged, That there was a kind of contradiction in the position of the Commons, when they say, a party committed without a cause shewed, ought to be delivered or bailed; bailing being a kind of imprisonment; delivery a total freeing.

To this it hath been answered, that it hath always been the discretion of the Judges, to give so much respect to a commitment by the command of the King or the privy-council, (which are ever intended to be done in just and weighty causes) that they will not presently set them free, but bail them to answer what shall be objected against them on his majesty's behalf; but if any other inferior officer do commit a man without shewing cause, they do instantly deliver him, as having no cause to expect their leisure. So the delivery is applied to an imprisonment by the command of some mean minister of justice; bailing, when it is done by the command of the king or his council.

It was argued by Mr. Attorney, that bailing was a grace and favour of a court of justice, and that they may refuse to do it.

This was agreed to be true in divers cases; as where the cause appears to be for Felony, or other crimes expressed, for that there is another way to discharge them in some convenient time by their trial; and yet in these cases, the constant practice hath been anciently and modernly to bail men: but where no cause of the imprisonment is returned, but the command of the king, there is no way to deliver such person by trial or otherwise, but that of the Habeas Corpus. And if they should be then remanded, they might be perpetually imprisoned, without any remedy at all; and consequently a man that had committed no offence, might be in a worse case than a great offender; for

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the latter should have an ordinary trial to discharge him, the other should never be delivered.

It was further said, that though the statute of Westminster 1. c. 15, be a statute which by way of provision did extend only to the sheriff, yet the recital of that statute touching the four cases, wherein a man was not repleviable at the common law, namely, those that were committed for the death of a man, by the command of the king, or of his justices, or for the forest; did declare that the justices could not bail such a one, and that repleviable and bailable were synonimous or all one: and that Stamford, a judge of great authority, doth expound it accordingly (Stam. pl. Cor. 72.) and that neither the statute nor he say 'repleviable by the sheriff,' but generally 'without restraint;' and that if the chief justice commits a man, he is not to be inlarged by any other court, as appeareth in the Register.

To this it was answered, 1. That the recital of the body of the statute, relateth to the sheriff only, as appeareth by the very words. 2. That replevial le is to the sheriff, for that the word imports no more; but a man committed by the Chief Justice, is bailable by the court of King's-Bench. 3. That Stamford meaneth all of the sheriff, or at least he hath not sufficiently expressed that he intended the justices. 4. It was denied that repleviable and bailable were the same, for they differ in respect of the place where they are used, bail being in the King's Court of Record, repleviable before the sheriff; and they are of several natures, repleviable being a letting at large upon sureties, bailing being when one 'traditur in ballium,' the bail are his gaolers, and may imprison him, and shall suffer body for body; which is not true of replevying by sureties: and bail differeth from mainprize in this, that mainprize is an undertaking in a sum certain, bailing is to answer the condemnation in civil causes, and in criminal, body for body.

The reasons and authorities in the first Conference were then renewed, and no exceptions taken to any, save that in 22 Hen. 6, it doth not appear that the command of the king was by his mouth, which must be intended, or by his council, which is all one, as is observed by Stamford; for the two words are, that a man is not repleviable by the sheriff, who is committed by the writ or the commandment of the king.

21 Ed. 1, Rot. 2, dors. was cited by the King's Counsel; but it was answered, that it concerned the sheriff of Leicestershire only, and not the power of the judges. 33 Hen. 6, the king's Attorney confessed, was nothing to the purpose; and yet that book hath been usually cited by those that maintain the contrary to the declaration of the commons. And therefore such sudden opinions as have been given thereupon, are not to be regarded, the foundation failing.

And where it was said that the French of 36 Ed. 3, Rot. Parl. n. 9, which can receive no answer, did not warrant what was inferred thence; but that these words, 'sans disturbance mettre, ou arrest faire, et le contre per special 'mandement ou en autre maniere,' must be understood, that the Statutes should be put in execution, without putting disturbance, or making arrest to the contrary by special command or in other manner; the commons did utterly deny the interpretation given by the king's counsel: and to justify their own did appeal to all men that understood French. And upon the seven statutes did conclude, that their declaration remained an undoubted truth, not controlled by any thing said to the contrary.

[THE PROCEEDINGS AGAINST THE EARL OF SUFFOLK, APRIL 14, 1628.*

Mr. *Kerton* acquainted the house, that the earl of Suffolk had said to some gentlemen, 'That Mr. Selden had razed a Record, and 'deserved to be hanged, for going about to set 'division betwixt the king and his subjects.' And being demanded to whom the words were spoken, he was unwilling to name any, till upon the question it was resolved he should nominate him. He then named sir John Strangways; who was unwilling to speak what he had heard from the earl: but being commanded by the house, and resolved upon the question, he confessed,

That upon Saturday last, he being in the Committee-Chamber of the lords, the earl of Suffolk called to him, and said, 'Sir John, will 'you not hang Selden?' To whom he said, For what? The earl replied, 'By God he hath razed 'a Record, and deserves to be hanged †.'

This the House of Commons took as a great injury done to the whole house, Mr. Selden being employed by them in the Conference with the lords in the great cause concerning the Liberty of the Persons of the Subjects.

The House presently sent sir Robert Phillips with a Message to the Lords to this effect; he expressed the great care the Commons had upon all occasions to maintain all mutual respect and correspondency betwixt both houses: then he informed them of a great injury done by the earl of Suffolk to the whole house, and to Mr. Selden, a particular member thereof,

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* This was Theophilus earl of Suffolk, son to James earl of Suffolk Lord-Treasurer, temp. Jac. 1.

† Mr. *Selden*. "I am called up to justify myself. I see the words charge me to have razed Records. I hope no man believes I ever did it. I cannot guess what this lord means. I did deliver in whole copies of divers Records examined by myself, and divers other gentlemen of this house. These I delivered in to the lords house; and the Clerk of the Crown brought in the Records of the office before the lords: I desire that there may be a Message from this house to the lords, to make at the bar there a Charge against the lord that spoke thus; and I hope we shall have justice." Ex MSS. Pymmii in Selden's Life, in his Works, vol. , p. 16.

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who by their command had been employed in the late Conference with their lordships: that the house was very sensible thereof, and according to former precedents, made them truly acquainted with it, and demanded justice against the earl of Suffolk. He read the words, saying they were spoken to sir John Strangways, a member of their house.

After a short stay, the lords called for the messenger, to whom the Lord-Keeper gave this answer; he signified the great desire and care of their lordships to maintain and increase the correspondencies betwixt both houses, and as a testimony thereof they had partly taken into consideration the charge: that the earl of Suffolk, being a man of great place and honour, had voluntarily protested upon his honour and soul, that there passed no such words as those from him to sir John Strangways: and the Lord-Keeper wished that their lordships speedy proceedings in this business might testify their love and good-will to the commons house.

The next day being the 15th of April, sir John Strangways made a Protestation openly in the house, wherein he avowed that (notwithstanding the Earl's denial) he did speak those words positively unto him, and would maintain it any way fitting a member of that house, or a gentleman of honour.

They ordered that this Protestation should be entered into the Journal-book, and that a committee should take into consideration what was fit for the house to proceed to, for the justification of sir John Strangways, and what was fitting to be done in this case, and to examine witnesses of the proof of the words.

Upon the 17th day sir John Elliot reported what the committee had done; That they had sent for and examined sir Christ. Nevil; who related, that upon Saturday being in the Lords Committee-Chamber, the earl of Suffolk said thus to him: Mr. Attorney hath cleared the business, and hath made the cause plain on the king's side; and further said, Mr. Selden hath razed a Record, and hath deserved to be hanged, and the lower house should do well to join with the higher in a petition to the king to hang him; and added as a reason, for Mr. Selden went about, and took a course to divide the king from his people, or words to that effect. And being asked, whether he conceived that those words of dividing the king from his people, had relation to the whole and general action of Mr. Selden before the lords, or to the particular of razing a record? He conceived they were referred to the general action.

They had examined one Mr. Littleton, who confessed he heard the earl of Suffolk speak to a gentleman, whom he knew not, words to this effect, viz. That he would not be in Mr. Selden's coat for 10,000*l.* and that Mr. Selden deserved to be hanged.

The second part of this report concerned the particular of sir John Strangways, wherein though the committee found no witness to prove the words spoken to sir John Strangways, yet there were many circumstances which persuaded them of the truth thereof. 1. That the same words in the same syllables were spoken to sir Christ. Nevil, and that the earl as he called to him sir John Strangways, so he called to him sir Christ. Nevil. 2. That the earl of Suffolk called sir John Strangways to him, and spake to him, was proved by sir George Fane, and sir Alex. St. John, at which time the earl seemed full of that which he delivered. 3. That sir John Strangways instantly after his discourse with the earl of Suffolk went to the earl of Hertford and delivered him the passages betwixt them, being the same related in the house. 4. From the unwillingness of sir John Strangways, though called upon by the house, to testify against the earl, till it was resolved by question he should do it: from a probability, that had not these words been spoken to himself, it is like he would have produced sir Christ. Nevil, from whom he also heard the same. 5. From the worth of the gentleman, and his ingenuous Protestation in the house, That he was ready to justify the truth of what he said in any course the house should think meet, or was fit for a gentleman of honour.

Hereupon the house resolved upon the question:

1. "That the earl of Suffolk, notwithstanding his denial, had laid a most unjust and scandalous imputation upon Mr. Selden, a member of the house, being employed in the service of the house, and therein upon the whole house of commons. 2. That this house, upon due examination, is fully satisfied that sir John Strangways (notwithstanding the earl of Suffolk's denial) hath affirmed nothing but what is most true and certain. 3. That these particulars and additions be again presented to the lords, and the earl of Suffolk be newly charged at the bar, and the lords desired to proceed in justice against the earl, and to inflict such punishment upon him as an offence of so high a nature, being against the house of commons, doth deserve."

Sir John Elliot was sent with a Message to the lords; who after a while returned this Answer, That they had taken the Message into consideration, and would further take it into due consultation, and in convenient time would return an answer by messengers of their own. But what was done in this affair does not appear.]

Mr. *Noye*, on the 16th of April, offered an Answer to the inconveniencies presented by Mr. Attorney, which were four in number.

First, where it was objected, that it was inconvenient to express the cause, for fear of divulging the 'Arcana imperii,' for hereby all may be discovered, and abundance of traitors never brought to justice. To this that learned man answered, That the Judges by the intention of the law are the king's counsel, and the secrets may safely be committed to all or some of them, who might advise whether they will bail him: and here is no danger to king, or subjects; for their oath will not permit

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them to reveal the secrets of the king, nor yet to detain the subject long, if by law he be to be bailed.

Secondly, For that objection of the children of Odonell, he laid this for a ground, that the king can do no wrong; but in cases of extreme necessity, we must yield sometimes for the preservation of the state, 'ubi unius damnum 'utilitate publica rependitur:' he said there was no trust in the children of traitors, no wrong done if they did 'tabefacere,' or 'marcescere in carcere.' It is the same case of necessity, as when to avoid the burning of a town, we are forced to pull down an honest man's house, or to compel a man to dwell by the sea-side for defence or fortitude. Yet the king can do no wrong, for 'potentia juris est 'non injuria:' *ergo* the act of the king, though to the wrong of another, is by the law made no wrong; as if he commanded a person to be kept in prison, yet he is responsible for his wrong: he quoted a book 42. 6. Ass. Port.

Thirdly, The instance made of Westminst. first, he said there was a great difference between those three, Mainprise, Bail, and Replevin. The Statute says, a man cannot be replevied: *ergo*, not bailed *non sequitur*. Mainprise is under pain; bail is body for body: but no pain is ever in court to be declared, unless the party appears. Replevin is neither by surety nor bail; and Replevin is never in court.

Fourthly, Where it is said that bail is *ex gratia*, he answers, That if the prisoner comes to Habeas Corpus, then it is not *ex gratia*, yet the court may advise, but mark the words 'ad 'subjiciendum et recipiendum prout curia con-'sideraverit.' Now it is impossible the Judges should do so, if no cause be expressed; for if they know no cause, he may bring the first, second, third, and fourth Habeas Corpus, and so infinite till he find himself a perpetual prisoner: so that no cause expressed, is worse for a man than the greatest cause or villainy that can be imagined. And thus far proceeded that learned gentleman.

Mr. *Glanvile* said, That by favour of the house of commons he had liberty to speak, if opportunity were offered. He applied his answer to one particular of Mr. Attorney, who assigned to the king four great trusts: 1. War, 2. Coins, 3. Denizens, 4. Pardons; it is assented to, that the king is trusted with all these four legal prerogatives, but the argument followeth not, the king is trusted with many prerogatives: *ergo*, in this 'non sequitur non 'est sufficiens enumeratio partium.' He said he could answer these particulars with two rules, whereof the first should wipe off the first and the second; and the other, the third and fourth.

The first rule is this: there is no fear of trusting the king with any thing, but the fear of ill counsel: the king may easily there be trusted, where ill counsel doth not engage both the king and subjects, as it doth in matter of war and coin. If he miscarry in the wars, it is not always 'plectuntur archivi,' but he smarts equally with the people; if he abase his coin, he loseth more than any of his people; *ergo*, he may safely be trusted with the flowers of the crown, war and coin.

The second rule he began was this, When the king is trusted to confer grace, it is one thing; but when he is trusted to infer an injury, it is another matter. The former power cannot, by miscounselling, be brought to prejudice another, the latter may; if the king pardoneth a guilty man, he punisheth not a good subject; if he denizen never so many strangers, it is but *damnum sine injuria*: we allow him a liberty to confer grace, but not without cause to infer punishment; and indeed he cannot do injury; for if he command to do a man wrong, the command is void, 'et actor fit author,' and the actor becomes the wrong doer. Therefore the king may safely be trusted with war, coin, denizens, and pardons, but not with a power to imprison without expression of cause, or limitation of time; as the poet tells us, because 'libertas potius auro.'

After these debates, the house of peers called upon the Judges to answer the Charge of the house of commons, for their Judgment on the Habeas Corpus, brought in Mich. term by the Gentlemen imprisoned for refusing to subscribe to the Loan.

The ANSWER of the Judges for matter of fact upon the Habeas Corpus, 21 April.

The *Chief-Justice* saith, They are prepared to obey our command, but they desire to be advised by us, whether they being sworn upon penalty of forfeiting body, lands, and goods, into the king's hands, to give an account to him, may without warrant do this.

The *Duke* said, He had acquainted the king with the business, and for aught he knew he is well content therewith; but for better assurance, he hath sent his brother of Anglesey to know his pleasure.

Devonshire. If a complaint be made by a mean man against the greatest officer in this place, he is to give an account of his doings to this house.

Bishop of *Lincoln*. This motion proceeded from him, and so took it for clear, that there was an appeal from the Chancery to a higher court than the King's-bench, and that court hath ever given an account of their doings.

The lord *Say*. He wondered there should be any question made of this business, because in his opinion, this being the highest court, did admit of no appeal.

The *President*. The Judges did not do this by way of appeal, but as the most common way for them, this being a matter concerning the king's prerogative.

Lord *Say*. If they will not declare themselves, we must take into consideration the point of our privilege.

The *Duke*. This was not done by the Judges, as fearing to answer, but respect to the king.

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And now his brother was come with answer from the king, that they might proceed.

Order was taken that this passage should not be entered into the Journal-Book.

And so Judge WHITLOCK spake.

My lords, we are by your appointment here ready to clear any aspersion of the house of commons in their late presentment upon the King's-bench, that the Subject was wounded in this judgment there lately given. If such a thing were, my lords, your lordships, not they, have the power to question and judge the same. But, my lords, I say there was no Judgment given, whereby either the prerogative might be enlarged, or the Right of the Subject trenched upon. It is true, my lords, in Michaelmas term last, four gentlemen petitioned for an Habeas Corpus, which they obtained, and counsel was assigned unto them; the return was 'per speciale mandatum domini regis,' which likewise was made unto us under the hands of 18 privy counsellors. Now, my lords, if we had delivered them presently upon this, it must have been, because the king did not shew the cause, wherein we should have judged the king had done wrong; and this is beyond our knowledge, for he might have committed them for other matters than we could have imagined. But they might say, thus they might have been kept in prison all their days; I answer no, but we did remit them, that we might better advise of the matter: and they the next day might have had a new writ, if they had pleased. But they say, we ought not to have denied bail. I answer, if we had done so, it must needs have reflected upon the king, that he had unjustly imprisoned them. And it appears in Dyer, 2 Eliz. that divers gentlemen being committed, and requiring Habeas Corpus, some were bailed, others remitted: whereby it appears, much is left to the discretion of the judges.

For that which troubled so much, 'remittitur quousque,' this, my lords, was only (as I said before) to take time what to do; and whereas they will have a difference betwixt 'remittitur' and 'remittitur quousque,' my lords, I confess I can find none; but these are new inventions to trouble old Records. And herein, my lords, we have dealt with knowledge and understanding; for had we given a Judgment, the party must thereupon have rested. Every judgment must come to an issue in matter of fact, or demur in point of law; here is neither, therefore no judgment.

As to endeavouring to have a Judgment entered; it is true, Mr. Attorney pressed the same for his master's service; but we being sworn to do right betwixt the king and his subjects, commanded the clerk to make no entry, but according to the old form; and the rule was given by the Chief-Justice alone. I have spent my time in this court, and I speak confidently, I did never see nor know by any record, that upon such a return as this, a man was bailed, the king not first consulted with in such a case as this.

The Commons House do not know what letters and commands we received, for these remain in our court, and were not viewed by them: for the rest of the matters presented by the house of commons, they were not in agitation before us, whether the king may commit, and how long he may detain a man committed. Therefore having answered so much as concerneth us, I desire your lordships good constructions of what hath been said.

Judge *Jones* said, He was here to deliver before us, what Judgment was given before them concerning the Habeas Corpus: he answered, No Judgment was given, and the matter of fact was such as my brother delivered unto you yesterday. These four gentlemen were committed to the Fleet, Gate-house, and marshal of the houshold. Four returns were made upon the writs, and every one of them had a counsellor appointed, who had copies of the returns. A rule was granted, their council heard, and exception taken to the return, because it did not shew cause of their caption.

These were of no force, in the opinion of the Judges. The next exception was, because no cause of their commitment was shewed, which the judges held to be all one in point of law. Then, my lords, they alledged many Precedents and Statutes of themselves, which the king's attorney answered, That persons committed by the king, or council, were never bailed, but his pleasure was first known.

We agreed at the Chamber of the Chief-Justice, that all the Statutes alledged are in force; but whether we should bail them or no, was the question, therefore we remitted them *quousque*. After which Mr. Attorney required a Judgment might be entered: I commanded the clerk, he should not suffer any such thing to be done, because we would be better advised.

But some will say, our act is otherwise: I answer, No; for we have done no more than we do upon an ordinary writ, when we purpose to be better advised, and that was only an interlocutory order. But, my lords, put the case a Habeas Corpus should be granted for one that is committed by the house of commons, would they (think you) take it well he should be bailed at his first coming to the court? I think they would not, and I think the king would have done so in this case. Now, my lords, there is a petition of right, and a petition of grace: to be bailed, is a matter of grace; therefore if a man be brought upon an Habeas Corpus, and not bailed, he cannot say the court hath done him any wrong. I have now served seven years a Judge in this court, and my conscience beareth me witness, that I have not wronged the same; I have been thought sometimes too forward for the Liberty of the Subject. I am myself *Liber Homo*, my ancestors gave their voice for Magna Charta. I enjoy that house still, which they did; I do not now mean to draw God's wrath upon my posterity; and therefore I will neither advance

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the king's prerogative, nor lessen the Liberty of the Subject, to the danger of either king or people. This is my profession before God and your lordships.

Judge *Dodderidge* said, It is no more fit for a Judge to decline to give an account of his doings, than for a Christian of his faith. God knoweth. I have endeavoured always to keep a good conscience; for a troubled one, who can bear? The kingdom holds of none but God, and Judgments do not pass privately in chambers, but publicly in court, where every one may hear, which causeth judgment to be given with maturity. Your lordships have heard the particulars delivered by my brethren, how that counsel being assigned to those four Gentlemen, in the latter end of Michaelmas Term their cause received hearing; and upon consideration of the Statutes and Records, we found some of them to be according to the good old law of Magna Charta: but we thought, that they did not come so close to this case, as that bail should be thereupon presently granted. My lords, the Habeas Corpus consists of three parts, the Writ, the Return upon the Writ or schedule, and the Entry or Rule reciting the Habeas Corpus; and the Return, together with the opinion of the court, either a 'remittitur,' or 'traditur in ballium.' In this case a remittitur was granted, which we did, that we might take better advisement upon the case, and upon the remittitur (my lords) they might have had a new writ the next day; and I wish they had, because it may be they had seen more, and we had been eased of a great labour. And, my lords, when the Attorney, upon the remittitur, pressed an entry, we all straitly charged the clerk, that he should make no other entry than such as our predecessors had usually made in like cases: for the difference (my lords) betwixt 'remittitur' and 'remittitur quosque,' I could never yet find any. I have now sat in this court fifteen years, and I should know something; surely, if I had gone in a mill so long, some dust would cleave to my cloaths. I am old, and have one foot in the grave, therefore I will look to the better part, as near as I can. But 'omnia habere in memoria, et in nullo 'errare, divinum potius est quam humanum.'

L. C. J. sir *Nicholas Hyde*, said, He should not speak with confidence, unless he might stand right in the opinion of the house; and protested what he spake the day before, was not said by him with any purpose to trench upon the privileges of this house, but out of that respect which by his place he thought he owed to the king. He said, concerning the point he was to speak of, that he would not trouble the lords with things formerly repeated, wherein he concurred with his brethren. He said, if it were true the king might not commit, they had done wrong in not partly delivering: for, my lords (saith he), these Statutes and good laws being all in force, we meant not to trench upon any of them; most of them being commentaries upon Magna Charta: but I know not any statute that goeth so far, that the king may not commit. Therefore justly we think, we delivered the interpretation thereof to that purpose: for, my lords, *lex terræ* is not to be found in this statute, they gave me no example, neither was there any cause shewed in the return. A precedent (my lords) that hath run in a storm, doth not much direct us in point of law, and records are the best testimonies. Those precedents they brought being read, we shewed them wherein they were mistaken; if we have erred, 'erramus cum patribus,' and they can shew no precedent, but that our predecessors have done as we have done, sometimes bailing, sometimes remitting, sometimes discharging. Yet we do never bail any committed by the king, or his council, till his pleasure be first known. Thus did the L. C. J. Coke in Rayner's case. They say, this would have been done if the king had not written; but why then was the letter read and published, and kept; and why was the town-clerk sent carefully to enquire (because the letter so directed) whether these men offered for bail were Subsidy men? The letter sheweth also, that Beckwith was committed for suspicion of being acquainted with the Gunpowder-Treason; but no proof being produced, the king left him to be bailed.

The Earl of WARWICK's * Speech, 21 April 1628.

My lords, I will observe something out of the law wherein this Liberty of the Subject's person is founded, and some things out of precedents which have been alledged. For the law of Magna Charta, and the rest concerning these points, they are acknowledged by all to be of force; and that they were to secure the subjects from wrongful imprisonment, as well, or rather more concerning the king, than the subject. Why then, besides the Grand Charter, and those six other acts of parliament, in the very point, we know that Magna Charta hath been at least thirty times confirmed; so that upon the matter we have six or seven-and-thirty acts of parliament to confirm this Liberty, although it was made matter of derision the other day in this house.

One is that of 36 E. 3, n. 9. and another in the same year, n. 20. not printed, but yet as good as those that are; and that of 42 E. 3. cap. 3. so express in the point, especially the Petition of the Commons, that year; which was read by Mr. Littleton with the king's answer so full, and free from all exception, to which I refer your lordships, that I know not how any thing in the world can be more plain. And therefore, if in parliament ye should make any doubt of that which is so fully confirmed in parliament, and in a case so clear go about by new glosses to alter the old and good law, we shall not only forsake the steps of our ancestors, who in cases of small importance would answer, 'nolumus mutare leges Angliæ;' but we shall yield up and betray our right in the

* This was Robert earl of Warwick, afterwards Admiral for the Long-Parliament.

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greatest inheritance the subjects of England have, and that is the laws of England. And truly I wonder how any man can admit of such a gloss upon the plain text, as should overthrow the force of the law: for whereas the law of Magna Charta is, that no freeman shall be imprisoned but by lawful Judgment of his peers, or the law of the land; therefore that the king hath power to commit without cause, is a sense not only expressly contrary to other acts of parliament, and those especially formerly cited, but against common sense. For Mr. Attorney confesseth this law concerns the king; why then, where the law saith the king shall not commit, but by the law of the land, the meaning must be, as Mr. Attorney would have it, that the king must not commit but at his own pleasure. And shall we think that our ancestors were so foolish, to hazard their persons and estates, and labour so much to get a law, and to have it thirty times confirmed, that the king might not commit his subjects but at his own pleasure? And if he did commit any of his subjects without a cause shewn, then he must lie during pleasure, than which nothing can be imagined more ridiculous, and contrary to true reason.

For the Precedents, I observe, that there hath been many shewn, by which it appears to me evidently, that such as have been committed by the king's council, they have been delivered upon Habeas Corpus, and that constantly. It is true, that some precedents were brought on the king's part, that when some of these persons desired to be delivered by Habeas Corpus, the king, or his council, signified his majesty's pleasure that they should be delivered, or the king's attorney hath come into the court, and related the king's command: but this seems to make for the subject; for it being in his majesty's power to deliver them, who by his special command were imprisoned, may not we well think, that his majesty would rather at that time have stayed their deliverance by law, than furthered it with his letters; and made the prisoners rather beholden to him for his grace and mercy, than to the judges for justice, had not his majesty known that at that time they ought to have been delivered by law? I think no man would imagine a wise king would have suffered his grace and prerogative, if any such prerogative were, to be so continually questioned; and his majesty and his council so far from commanding the judges not to proceed to deliver the prisoner by them committed, without cause shewn, as that on the other side, which is all the force of these precedents, the king and the council signified to the Judges, that they should proceed to deliver the parties. Certainly if the king had challenged any such prerogative, that a person committed, without any cause shewn, ought not to be delivered by the Judges without his consent, it would have appeared, by one precedent or other amongst all that have been produced, that his majesty would have made some claim to such a prerogative. But it appears to the contrary, that, in many of these cases, the king or his council did never interpose; and where they did, it was always in affirmation and encouragement to that court to proceed. And besides, the writing of letters from his majesty to the judges to do justice to his majesty's subjects, may with as good reason be interpreted, that without those letters they might not do justice: also the king signified his willingness, that such and such persons, which were committed by him, should be delivered; therefore they could not be delivered without it, which is a strange reason. So that finding the laws so full, so many, and so plain in the point, and finding, that whenever any were committed, without cause shewn, and brought their Habeas Corpus, they were delivered, and no command ever given to the contrary, or claim made on the king's part to any such prerogative: I may safely conclude, as the house of commons have done; and if any one precedent or two of late can be shewn, that the judges have not delivered the prisoners so committed, I think it is their fault, and to be inquired of. But contrary, it seems to me to be an undoubted Liberty of the Subject, that if he be committed without cause, or without cause shewn, yet he may have some speedy course to bring himself to trial, either to justify his own innocency, or to receive punishment according to his fault: for God forbid, that an innocent man, by the laws of England, should be put in worse case than the most grievous malefactors are; which must needs be, if this should be, that if a cause be shewed, he may have his trial; but if none, he must lie and pine in prison during pleasure. Mr. serjeant Ashley, the other day, told your lordships of the emblem of a king, but by his leave made wrong use of it. For a king bears in one hand the globe, and in the other the golden scepter, the types of sovereignty and mercy, but the sword of justice is ever carried before him by a minister of justice; which shews, subjects may have their remedies for injustice done, and appeals to higher powers: for the laws of England are so favourable to their princes, as they can do no injustice.

Therefore I will conclude, as all disputes I hold do, 'Magna est veritas et prævalebit; so I make no doubt, we living under so good a prince as we do, when this is represented unto him, he will answer us, 'Magna est Charta et 'prævalebit.'

From this time to the 25th of the same month, the House of Commons in a Grand Committee spent most of their time in debate about Martial Law, and part thereof in giving the lords a meeting at two conferences, concerning their resolves, in order to a Petition of Right, transmitted by the commons to their lordships.

Friday, 25th of April, 1628.

The Lords had a Conference with the Commons, where the Lord Archbishop of Canterbury, (Dr. George Abbot) spake as follows:

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Gentlemen of the House of Commons; The service of the king and safety of the kingdom do call on us, my lords, to give all convenient expedition, to dispatch some of these great and weighty businesses before us. For the better effecting whereof, my lords have thought fit to let you know, that they do in general agree with you, and doubt not, but you will agree with us, to the best of your power, to maintain and support the fundamental laws of the kingdom, and the fundamental Liberties of the Subject: for the particulars which may hereafter fall in debate, they have given me in charge to let you know, That what hath been presented by you unto their lordships, they have laid nothing of it by, they are not out of love with any thing that you have tendered unto them; they have voted nothing, neither are they in love with any thing proceeding from themselves: for that which we shall say and propose unto you, is out of an intendment to invite you to a mutual and free conference, that you with confidence may come to us, and we with confidence may speak with you; so that we may come to a conclusion of those things, which we both unanimously desire. We have resolved of nothing, designed or determined nothing, but desire to take you with us, praying help from you as you have done from us.—My lords have thought of some Propositions, which they have ordered to be read here, and then left with you in writing, that if it seem good to you, we may uniformly concur for the substance; and if you differ, that you would be pleased to put out, add, alter, or diminish, as you shall think fit, that so we may come the better to the end that we do both so desirously embrace.

Then the five PROPOSITIONS following were read by the Clerk of the Upper House.

1. "That his majesty would be pleased graciously to declare, That the good old law called Magna Charta, and the six statutes conceived to be declarations and explanations of that law, do still stand in force to all intents and purposes.

2. "That his majesty would be pleased graciously to declare, That according to Magna Charta, and the statutes afore-named, as also according to the most antient customs and laws of this land, every free subject of this realm hath a fundamental Propriety in his Goods, and a fundamental Liberty of his Person.

3. "That his majesty would be graciously pleased to declare, That it is his royal pleasure to ratify and confirm unto all and every his loyal and faithful subjects, all their ancient, several, just Liberties, Privileges, and Rights, in as ample and beneficial manner, to all intents and purposes, as their ancestors did enjoy the same, under the government of the best of his most noble progenitors.

4. "That his majesty would be pleased graciously to declare, for the good content of his loyal subjects, and for the securing them from future fear, That in all cases within the cognizance of the common law concerning the Liberties of the Subject, his majesty would proceed according to the common-law of this land, and according to the laws established in the kingdom, and in no other manner or wise.

5. "As touching his majesty's royal Prerogative, intrinsical to his sovereignty, and intrusted him withal from God, 'ad communem 'totius populi salutem, et non ad destructionem;' his majesty would resolve not to use or divert the same, to the prejudice of any of his loyal people, in the propriety of their goods, or liberty of their persons; and in case, for the security of his majesty's royal person, the common safety of his people, or the peaceable government of this kingdom, his majesty shall find just cause for reason of state to imprison or restrain any man's person, his majesty would graciously declare, That within a convenient time he shall, and will express the cause of the commitment or restraint, either general or special; and upon a cause so expressed will leave him immediately to be tried according to the common justice of the kingdom."

After the reading of the Propositions, the Archbishop said:

This is but a model to be added unto, altered, or diminished, as in your reasons and wisdoms ye shall think fit, after ye have communicated the same to the rest of the members of the house.

To this Speech, Sir DUDLEY DIGGS, it being at a Free Conference in behalf of the Commons, made this Reply;

My lords; it hath pleased Almighty God many ways to bless the knights, citizens and burgesses, now assembled in parliament, with great comfort, and strong hopes, that this will prove as happy a parliament as ever was in England. And in their consultations for the service of his majesty, and the safety of this kingdom, our special comfort and strong hopes have risen from the continued good respect, which your lordships so nobly have been pleased to shew unto them; particularly at this present, in your so honourable profession to agree with them in general, in desiring to maintain and support the fundamental laws and liberties of England.

The commons have commanded me in like sort, to assure your lordships they have been, are, and will be, as ready to propugn the just Prerogative of his majesty, of which in all their Arguments, Searches of Records, and Resolutions, they have been most careful, according to that which formerly was, and now again is, protested by them.

Another noble argument of your honourable disposition towards them is expressed in this, That you are pleased to expect no present answer from them, who are (as your lordships in your great wisdoms, they doubt not, have considered) a great body, that must advise upon all new Propositions, and resolve upon them be-

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fore they can give answer, according to the ancient order of their house. But it is manifest in general, God be thanked for it, there is a great concurrence of affection to the same end in both houses, and such good harmony, that I entreat your lordships leave to borrow a comparison from nature, or natural philosophy: As two lutes well strung and tuned brought together, if one be played on, little straws and sticks will stir upon the other, though it lie still; so though we have no power to reply, yet these things said and propounded cannot but work in our hearts, and we will faithfully report these passages to our house, from whence in due time (we hope) your lordships shall receive a contentful answer.

Mr. SELDEN's Speech, about the five Propositions sent from the Lords to the House of Commons, April 26, 1628.

Our debate is now, how we like of the Propositions. Ours were resolutions of law, and no man can make question of them. And as we are constant, so I hope they of other places that have weighed them, are of the same mind with us. But now their lordships laying them by, propound what they would have to be law. As they may speak to what comes from us, so may we to what comes from them, and they did invite us thereto. I think there is not one of the five fit to be desired and asked. The first three are not fit, for there is no use of them in these great questions. The fourth we have already, and the fifth is not fit to be had at all. The first is, to declare that Magna Charta and the six statutes, conceived to be declarations and explanations of that law, do still stand in force to all intents and purposes. Consider what it is we ask: Who doubts whether they stand in force or no? Indeed some have published that Magna Charta is but a charter and no law. But it is an act of parliament; and let men speak what they will, that was the fashion of statutes till printing came in. The statutes were sent down in the king's name to be proclaimed, and he prefixed his name, and this was till about Hen. 6. Also the body of Magna Charta is, that it is consented to by all the earls, &c. and for the assent there was a fifteenth granted, and clearly that cannot be without an act of parliament: and so constant it is, that all else in it is to this day put in execution. In former parliaments, by thirty at least, it was confirmed, but it was not of necessity, and yet they are surer than this declaration you will now add. For the second, that his majesty will declare that every subject hath a Propriety in his goods, and liberty of his person; they that drew this might mean somewhat more than I understand: I know not what we gain. Who doubts of our propriety! I never heard it denied, but in the pulpit, which is of no weight. For the third, that his majesty will confirm all just liberties; none can tell what this will produce. It is not fit we trouble his majesty with it. The fourth is not fit to be asked; That in all cases within the cognizance of the Common Law concerning the Liberties of his subjects, his majesty would proceed according to the Common Law. I conceive his majesty never proceeded but according to law. It may be there were commitments, yet the courts of justice were open for the parties to seek justice. And if any thing be done against the law, there, it is the fault of them that sit there. So we shall take it. But yet his majesty hath done nothing against the law. For the fifth, it is not fit to be had, and therefore not fit to be asked. If we ask it parliamentarily, we shall have a law to that sense, and so we shall destroy our fundamental liberties, which we have already resolved. Now a 'convenient time' must be set down. In former times there was no need of such innovations; for such law of state, in a 'convenient time' every man was to be delivered by law. If they were so wise then to hold it needless, why is it now necessary? And for 'convenient time;' what is convenient time? Who shall judge of it but the Judges? And so they now shall have the power of the lords, and of the council. Also now we desire in some cases the prerogative, &c. I would fain see if any person may not be committed at pleasure by this clause, and no man is exempted. At this little gap every man's liberty may in time go out.

The Commons were not satisfied with these Propositions, which were conceived to check the Petition of Right, then under consideration, but demurred upon them.

Monday, 28 April. The LORD KEEPER spake to both Houses of Parliament by the King's Command, who was then present.

My Lords, and ye the knights, citizens, and burgesses of the House of Commons, ye cannot but remember the great and important affairs, concerning the safety both of State and Religion, declared first from his majesty's own mouth, to be the causes of the assembling of this parliament; the sense whereof, as it doth daily increase with his majesty, so it ought to do, and his majesty doubts not but it doth so with you, since the danger increaseth every day, both by effluxion of time, and preparations of the enemy.

Yet his majesty doth well weigh, that this expence of time hath been occasioned by the Debate which hath arisen in both houses touching the Liberty of the Subject; in which, as his majesty takes in good part the purpose and intent of the houses, so clearly and frequently professed, that they would not diminish or blemish his royal and just prerogative, so he presumes, that ye will all confess it a point of extraordinary grace and justice in him, to suffer it to rest so long in dispute without interruption. But now his majesty considering the length of time which it hath already taken, and fearing nothing so much as any future loss of that, whereof every hour and minute is so precious: and foreseeing that the ordinary way of debate, though never so carefully husbanded, must, in regard of the

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form of both houses, necessarily take more time than the affairs of Christendom can permit; his majesty, out of his great princely care, hath thought of this expedient to shorten the business, by declaring the clearness of his own heart and intention: and therefore hath commanded me to let your know, 'That he holdeth 'the Statute of Magna Charta, and the other 'six Statutes insisted upon for the Subject's 'Liberty, to be all in force, and assures you, 'that he will maintain all his Subjects in the 'just Freedom of their Persons, and Safety of 'their Estates: and that he will govern accord-'ing to the laws and statutes of this realm; 'and that ye shall find as much Security in his 'majesty's royal word and promise, as in the 'strength of any law ye can make; so that 'hereafter ye shall never have cause to com-'plain.' The conclusion is, That his majesty prayeth God, who hath hitherto blessed this kingdom, and put into his heart to come to you this day, to make the success thereof happy, both to king and people: and therefore he desires, that no doubt or distrust may possess any man, but that ye will all proceed speedily and unanimously to the business.

The Commons being returned from the lords house, Mr. Secretary Cook persuaded them to comply with the king.

His majesty, said he, puts us in mind of the great important affairs of the state, and of his sense thereof, that by effluxion of time increaseth in him, and he doubts not but that it doth increase in us. Ye see his majesty's moderation in the interpretation of all our actions; he saith, that he hopes we have the same sense he hath, he is pleased to consider of the occasion of expence of time that grew from the Debates in both houses. We see how indulgent he is, that however the affairs of Christendom are great, yet he omits not this, nay, he takes in good part our Proceedings and our Declarations, that we will not impeach the Prerogative: also his majesty presumes, that we will confess, that he hath used extraordinary grace, in that he hath endured dispute so long, he acknowledgeth it justice to stand as we have done.

Further out of a princely care of the public, he is careful no more time be lost; and because he sees some extraordinary course to be taken to satisfy us, he observes, that in the form of the debate, such length is required as the nature of the business will not endure. It is to be presumed, that his government will be according to the law: we cannot but remember what his father said, 'He is no king, but a ty-'rant, that governs not by law:' but this kingdom is to be governed by the Common Law, and his majesty assures us so much; the interpretation is left to the Judges, and to his great Council, and all is to be regulated by the common law. I mean not Magna Charta only, for that Magna Charta was part of the common law, and the ancient law of this kingdom; all our difference is in the application of this law, and how this law, with difference, is derived into every court. I conceive there are two rules, the one of brass, that is rigid, and will not bend, and that is the law of the King's-Bench, this law will not bend; and when it lights on subjects fitting, if it do not bend, it is unjust; and there comes in the Law of Chancery and equity: this is application of law in private men's causes, when it comes to *meum et tuum*. And thus the general government of cases, with relation to the common state of the kingdom, is from the Council-board, and there they are to vary from the law of the kingdom; suppose it be in time of dearth, propriety of goods may in that time be forced, and be brought to the market: we saw the experience of it in coals in London, and the Council-Board caused them to be brought forth and sold. In a time of Pestilence men may be restrained: if a schism be like to grow in a Church, the State will enquire after the favourers of it: if there be fear of an Invasion, and it be encouraged by hope of a party among us, it is in the power of the government to restrain men to their houses.

In the composure of these things, there is great difference: what differences have been between the courts of Chancery and King's-Bench? It is hard to put true difference between the king's Prerogative and our Liberties. His majesty saw expence of time would be prejudicial; it pleased God to move his majesty by a divine hand to shew us a way to clear all our difficulties, let us attend to all the parts of it; there be five degrees, and there is more assurance than we could have by any law whatsoever. His majesty declares, that Magna Charta and the other Statutes are in force: this is not the first time that the Liberty of the Subject was infringed, or was in debate and confirmed; all times thought it safe, that when they came to a negative of power, it was hard to keep government and liberty together: but his majesty stopped not there; but according to the sense of these laws, that he will govern his subjects in their just Liberties, he assures us our liberties are just, they are not of grace, but of right; nay, he assures us, he will govern us according to the laws of the realm, and that we shall find as much security in his majesty's promise, as in any law we can make, and whatsoever law we shall make, it must come to his majesty's allowance; and if his majesty find cause in his government, he may not put life to it: we daily see all laws are broken, and all laws will be broke for the public good, and the king may pardon all offenders; his majesty did see, that the best way to settle all at unity, is to express his own heart: the king's heart is the best guider of his own promise, his promise is bound with his own heart. What prince can express more care and wisdom?

Lastly, he saith, That hereafter ye shall never have the like cause to complain: may we not think the Breach is made up? Is not his majesty engaged in his royal word? The conclusion is full of weight: and he prays God, that as God hath blessed this kingdom, and put it into

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his heart to come amongst us, so to make this day successful. 'The wrath of a king is like the 'roaring of a lion,' and all laws with his wrath are to no effect; but 'the king's favour is like 'the dew upon the grass,' there all will prosper; and God made the instruments to unite all hearts. His majesty having thus discharged himself, he prays us to proceed to the business that so much concerns him. As his majesty hath now shewed himself the best of kings, let us acknowledge his majesty's goodness, and return to that Union which we all desire.

But this motion was not received with general acceptation; and

Sir *Benjamin Rudyard* replied to it:

We are now upon a great Business, and the manner of handling it may be as great as the business itself. I need not tell you, that Liberty is a precious thing, for every man may set his own price upon it, and he that doth not value it deserves to be valued accordingly. For my own part, I am clear without scruple, that what we have resolved, is according to the law; and if any judge in England were of a contrary opinion, I am sure we should have heard of him ere now. Without all question, the very point, scope, and drift of Magna Charta was, to reduce the regal to a legal power, in matter of Imprisonment, or else it had not been worthy so much contending for.

But there have been Precedents brought to prove the practice and interpretation of the law. I confess I have heard many Precedents of nidity and respect, but none at all of truth, or of law: certainly there is no court of justice in England, that will discharge a prisoner committed by the king, *rege inconsulto*, without acquainting the king; yet this good manners was never made, or mentioned as a legal part of the delivery.

It is objected, That the king ought to have a trust left and deposited in him: God forbid but he should: and I say, that it is impossible to take it from him, for it lies not in the wit of man to devise such a law as should be able to comprehend all particulars, all accidents, but that extraordinary cases must happen, which, when they come, if they be disposed of for the common good, there will be no law against them, yet must the law be general, for otherwise admissions and exceptions will fret, and eat out the law to nothing. God himself has constituted a general law of nature, to govern the ordinary course of things, he hath made no law for miracles; yet there is this observation of them, that they are rather 'præter naturam,' than 'contra naturam,' and always 'propter bo-'nos fines:' for king's Prerogatives, are rather besides the law, than against it; and when they are directed to right ends for the public good, they are not only concurring laws, but even laws in singularity and excellency.

But to come nearer, Mr. Speaker, let us consider where we are now, what steps we have gone and gained; the king's learned Counsel have acknowledged all the laws to be still in force: the Judges have not allowed any judgment against these laws: the Lords also have confessed, that the laws are in full strength; they have further retained our Resolutions entire, and without prejudice.

All this hitherto is for our advantage; but above all, his majesty has this day, himself being publicly present, declared by the mouth of the Lord-Keeper, before both the houses, That Magna Charta, and the other six Statutes, are still in force; that he will maintain his subjects in the Liberties of their Persons, and Properties of their Goods: that he will govern them according to the Laws of the kingdom: this is a solemn and binding satisfaction, expressing his gracious readiness to comply with his people in all their reasonable and just desires. The king is a good man, and it is no diminution to a king to be called so; for whosoever is a good man, shall be greater than a king that is not so. The king certainly is very tender of his present honour, and of his fame hereafter: he will think it hard to have a worse mark set upon his government than upon any of his ancestors, by extraordinary restraints: his majesty hath already intimated unto us by a message, That he doth willingly give way to have the abuse of power reformed. By which I do verily believe, that he doth very well understand what a miserable power it is, which hath produced so much weakness to himself, and to the kingdom; and it is our happiness, that he is so ready to redress it.

For my own part, I shall be very glad to see that good old decrepid law of Magna Charta, which hath been kept so long, and lain bed-rid as it were; I shall be glad to see it walk abroad again with new vigour and lustre, attended and followed with the other six Statutes: questionless it will be a great heartening to all the people. I doubt not, but upon a debating Conference with the Lords, we shall happily fall upon a fair and fit accommodation, concerning the Liberty of our Persons and Propriety of our Goods. I hope we may have a Bill, to agree in the point, against imprisonment for Loans or Privy-Seals. As for intrinsical power and reason of state, they are matters in the clouds, where I desire we may leave them, and not meddle with them at all: lest by the way of admittance, we may lose somewhat of that which is our own already. Yet this by the way I will say of Reason of State, That, in the latitude by which it is used, it hath eaten out almost, not only the laws, but all the religion of Christendom.

Now, Mr. Speaker, I will only remember you of one precept, and that of the wisest man; 'Be not over wise, be not over just:' and he gives this reason, 'for why wilt thou be desolate?'—Sir, if justice and wisdom may be stretched to desolation, let us thereby learn, that moderation is the virtue of virtues, and the wisdom of wisdoms. Let it be our master-piece so to carry our business, that we may keep parliaments on foot: for as long as they are fre-

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quent, there will be no irregular power; which though it cannot be broken at once, yet in short time it will fade and moulder away: there can be no total or final loss of Liberties, but by loss of Parliaments. As long as they last, what we cannot get at one time, we may have at another.—Let no man think, that what I have said is the language of a private end, my aim is upon the good success of the whole; for, I thank God, my mind stands above any fortune that is to be got by base and unworthy means: no man is bound to be rich or great, no, nor to be wise; but every man is bound to be honest, out of which heart I have spoken.

The Bishop of Exeter's (Dr. Joseph Hall) Letter sent to the House of Commons, 28 April, 1628.

Gentlemen; For God's sake be wise in your well-meant zeal: why do you argue away precious time that can never be revoked, or repaired? Woe is me! while we dispute, our friends perish, and we must follow them. Where are we, if we break; and (I tremble to think) we cannot but break, if we hold so stiff. Our Liberties and Proprieties are sufficiently declared to be sure and legal, our Remedies are clear and irrefragable; what do we fear, every subject sees the way now chalked out for future justice, and who dares henceforth tread besides it? Certainly whilst Parliaments live, we need not mis-doubt the violations of our Freedoms and Rights; may we be but where the law found us, we shall sufficiently enjoy ourselves and ours; it is no season to search for more! O let us not, whilst we over-rigidly plead for an higher strain of safety, put ourselves into a necessity of ruin and utter despair of redress: let us not, in the suspicion of evils that may be, cast ourselves into a present confusion. If you love yourselves and your country, remit something of your own terms; and since the substance is yielded by your noble patriots, stand not too rigorously upon points of circumstance: fear not to trust a good king, who, after the strict laws made, must be trusted with the execution. Think that your country, nay Christendom, lies on the mercy of your present resolutions. Relent, or farewel welfare. From him whose faithful heart bleeds in a vowed sacrifice for his king and country, EXETER.

Upon this Debate it was ordered, That a Committee of Lawyers do draw a Bill, containing the substance of Magna Charta, and the other Statutes, that do concern the Liberty of the Subject; which business took up two whole days.

Mr. SELDEN'S SPEECH at the Committee about the Bill for Magna Charta, and the Liberties of the Subject. April 28, 1628.

I would have the violation tenderly mentioned. Let us set down the Statute of Magna Charta. 13 Hen. 4, it is adjudged in the Parliament Roll, that the Statute of Tallage is an Act of Parliament. It is not entered in the Statute Roll, and it was 34 Ed. 1. 19 Ed. 2, rot. claus. mem. 15. 'Les comens priont lou 'divers fuer' prise et imprison per accusement 'de persons malevolent lou ne fuer' indict acc' 'al ley del terre, ils priont que ils que sont 'prise sans indictment veignont en Chancery, 'et que droit serra fait. Et roy vult que nul 'serra prise.' But this is not in the Parliament Roll 5 Ed. 3, c. 9. 14 Ed. 3, c. 1, 'that there 'shall be no aid nor charge but by Parliament.' 25 Ed. 3, c. 4. 'None shall be attached by petition without presentment, or an original writ.' 25 Ed. 3, no. 16. 'Item, priont les comens 'que les loans soient release, et null serra com- 'pell de faire arrere encontre les franchises del 'terre. Le roy le ple st.' 28 Ed. 3, c. 3. 'Nul 'serra ouste de terre ou tenements sans due 'proces del ley.' 36 E. 3, no. 9. 'Que le grand 'Charter serra duly observe, et null serra im- 'prison sur special command.' 36 Ed. 3, no. 20. 'Que nul serra imprison per special com- 'mand.' 36 E. 3, no. 24. 'Si ascun home soit 'grieve contre les articles, avant dit veigne en 'Chancery et droit serra fait.' 37 Ed. 3, no. 10. 'Ils la desire que le grand Charter et especial- 'ment les articles darrein stat. soient execute.' 37 Ed. 3, c. 18. 'Il est conteine en le grand 'Charter que nul serra imprison, &c. ils que 'font tiel, &c.' 38 Ed. 3, no. 10. 'Les comens 'priont que le grand Charter et les autres sta- 'tuts soient execute et que breves serront 'grauntez al cestuy que sue pur ceo, et si ascun 'judgment soit fait, il serra void.'

Thursday the 1st of May, Mr. Secretary Cook delivered a Message from his majesty, viz. to know whether the house will rest on his Royal Word, or no, declared to them by the Lord Keeper; which if they do, he assures them it shall be royally performed.

Upon this there was a silence for a good space: then Mr. Secretary Cook proceeded: This silence invites me to a further speech, and further to address myself; now we see we must grow towards an issue. For my part, how confident I have been of the good issue of this parliament, I have certified in this place, and elsewhere, and I am still confident therein; I know his majesty is resolved to do as much as ever king did for his subjects: all this debate hath grown out of a sense of our sufferings, and a desire to make up again those breaches that have been made.

Since this parliament begun, hath there been any dispense made of that which hath formerly been done? When means were denied his majesty, being a young king, and newly come to his crown, which he found engaged in a war, what could we expect in such necessities? His majesty called this parliament to make up the breach: his majesty assures us we shall not have the like cause to complain; he assures, the laws shall be established, what can we desire more; all is, that we provide for posterity, and that we do prevent the like suffering for the future. Were not the same means provided by them before us? Can we do more? We are come to the Liberty of the Subjects,

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and the Prerogative of the King; I hope we shall not add any thing to ourselves, to depress him. I will not divine, I think we shall find difficulty with the king or with the lords; I shall not deliver my opinion as a counsellor to his majesty, which I will not justify and say here, or at the Council-board. Will we in this necessity strive to bring ourselves into a better condition and greater liberty than our fathers had, and the crown into a worse than ever? I dare not advise his majesty to admit of that: If this that we now desire be no innovation, it is all contained in those acts and statutes; and whatsoever else we would add more, is a diminution to the king's power, and an addition to our own. We deal with a wise and prudent prince, that hath a sword in his hand for our good, and this good is supported by power. Do not think, that by cases of law and debate we can make that not to be law, which in experience we every day find necessary.—Give me leave freely to tell you, that I know by experience, that by the place I hold under his majesty, if I will discharge the duty of my place and the oath I have taken to his majesty, I must commit, and neither express the cause to the gaoler, nor to the judges, nor to any counsellor in England, but to the king himself; yet do not think I go without ground of reason, or take this power committed to me to be unlimited; yea, rather it is to me a charge, burthen, and danger: for if I by this power shall commit the poorest porter, if I do it not upon a just cause, if it may appear, the burthen will fall upon me heavier than the law can inflict, for I shall lose my credit with his majesty, and my place. And I beseech you consider whether those that have been in the same place have not committed freely; and not any doubt made of it, nor any complaint made by the subject.

Sir *Robert Phillips* hereupon spake thus: That if the words of kings strike impressions in the hearts of subjects, then do these words upon this occasion strike an impression in the hearts of us all: to speak in a plain language, we are now come to the end of our journey, and the well disposing of an Answer to this Message, will give happiness or misery to this kingdom. Let us set the commonwealth of England before the eyes of his majesty, that we may justify ourselves, that we have demeaned ourselves dutifully to his majesty.

Mr. *Hackwell* of Lincoln's-Inn, 1 May, 1628, spake thus:

Sir; I chose rather to discover my weakness by speaking, than to betray my conscience by silence: my opinion is, that we shall do well totally to omit our Resolution out of this Bill, and rely only upon a confirmation of the laws.

The Objections made against this opinion are two. The first is, that we shall thereby recede from our own Resolution.

The second, that by a bare confirmation of the old laws, without inserting of our Resolution, by way of explanation, we shall be but in the same case as before.

For the first, that though we desire only a confirmation without adding of our Resolution, we do not thereby recede from our Resolution, I reason thus: Our Resolution was drawn out of the sense of those laws, which are now desired to be confirmed, so that no question can be made by any of us that have thus declared ourselves, but that our Resolution is virtually contained in these laws. If that be so, how can our acceptance of a confirmation of these laws be a departure from our Resolution?—Nay, rather we think the contrary is true; he that doubts, that by confirmation of these laws our Resolution is not hereby confirmed, doubts whether we have justly deduced our Resolutions out of those laws, and so calls our Resolutions into question.—This argument alone is, in my opinion, a full answer to that first Objection, that in desiring a bare confirmation of those laws, we depart from our Resolutions.

The second Objection is, that if we have nothing but a confirmation we are in no better case than we were before those late violations of the law. This I deny, and do confidently affirm, that although we have no more than a confirmation of those laws which are recited in the bill that is now before us, we shall depart hence in far better case than we came, and that in divers respects.

1. Some of the laws recited in this Bill, and desired to be confirmed, are not printed laws, and are known to few professors of the law, and much less to others, and, yet they are laws of as great consequence for the Liberty of the Subject, if not of greater, than any that are printed: as namely 25 Edw. 3, no. 1. 'That Loans against the will of the lender are against reason and the freedom of the realm.' 36 Ed. 3, no. 9, by which Imprisonments by special commandment without due process are forbidden. These two are not printed.—That excellent law *De Tallagio non concedendo* in print, hath in a public court been by a great counsellor said to be but a Charter, and no law.—The statute 1 Rich. 3, against Benevolences, is by some opinions in print an absolute law. If we can get all these good laws, besides those six other, which are expositions of Magna Charta, in the point of the freedom of our persons, to be confirmed and put in one law, to the easy view of all men, is not our case far better than when we came hither?

2. Will not the occasion of the making of this law of confirmation, so notoriously known, be transmitted to all posterity? Certainly it will never be forgotten, that the occasion thereof was the imprisonment of those worthy Gentlemen for not lending, and the Resolution in the King's-Bench in denying to bail them; and is not the occasion of the making of a law a good rule to expound it? If so, then by giving a confirmation upon this occasion, we have bettered our case very much.

3. Have not the Judges in the King's-Bench, in open parliament, upon our complaint, disclaimed to have given any Judgment in the point? Which generally before by the parlia-

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ment was otherwise conceived; for now they say, it was but an Award and no Judgment, will such a notorious act upon so important an occasion in so public a place be quickly forgotten? Nay, will not the memory of it for ever remain upon record? Is not our case then much better than when we came hither?

4. Will not the Resolution of this house, and all our arguments and reasons against imprisonment without a cause expressed (which no doubt by the course we have taken will be transferred to posterity) be a great means to stay any judge hereafter from declaring any judgment to the contrary, especially if there be likelihood of a parliament? Is not our case in this very much amended?

Lastly, Have we not received Propositions from the lords, wherein, amongst other things, they declared, that they are not out of love with our proceedings? Is not this a great strengthening to it? But after so long debate amongst them about it, they cannot take any just exception to it; and doth not this also much amend our case?

From all these reasons, I conclude that the second Objection, that by a confirmation we are in no better case than when we came together, is also a weak objection.

Now for Reasons to move us to proceed in this course of accepting a confirmation: 1. We have his majesty's gracious promise to yield to a confirmation of the old laws, from which we may rest most assured he will not depart; if we tender him, withal, our Proposition to be enacted, we have cause to doubt that we shall lose both the one and the other. 2. We are no less assured of the lords joining with us, for in their propositions sent to us they have delivered themselves to that purpose: this is then a secure way of getting somewhat of great advantage to us; as we have great hopes, and in a manner assurance on this side; so on the other side we have great doubts and fears, that by offering our Resolution to be enacted, we shall lose all.—For first we have had already experience of the lords, that they are not very forward to join with us in a declaration of our Proposition to be law; if they stumble at a declaration, much more will they, in yielding to make a law in the same point. And have we not much more cause to doubt that his majesty will not yield unto it, seeing it toucheth him so near? Is it not the notice of his pleasure that hath wrought thus with the lords?

If we should clog our Bill with our Proposition, and it should be rejected by the lords, or by the king, is not our Resolution much weakened by it; and are we not then in far worse case than before we made it? Our Resolution for the rejecting of our Proposition, will tend to a justification of all that hath been done against us in this great point of our liberty.—Let us then, like wise men, conform our desire to our hopes, and guide our hopes by probabilities; other desires and other hopes are but vain. This is my poor opinion in this weighty business.

And so the day following they had further debate upon that matter, the house being turned into a Grand Committee, and Mr. Herbert in the chair. Some said that the Subject has suffered more in the violation of ancient Liberties within these few years, than in 300 years before, and therefore care ought to be taken for the time to come.

Sir *Edward Coke* said, That that 'Royal Word,' had reference to some Message formerly sent; his majesty's word was, that they may secure themselves any way, by bill or otherwise, he promised to give way to it. And to the end that this might not touch his majesty's honour, it was proposed, that the Bill come not from the house, but from the king: We will and grant for us and our successors, and that we and our successors will do thus and thus; and it is the king's honour, he cannot speak but by record.

Others desired the house to consider, when and where the late promise was made; was it not in the face of both houses? Cruel kings have been careful to perform their promises, yea, though they have been unlawful, as Herod. Therefore if we rest upon his majesty's promise, we may assure ourselves of the performance of it; besides, we bind his majesty, by relying on his word: we have laws enough, it is the execution of them that is our life, and it is the king that gives life and execution.

Sir *Thomas Wentworth* concluded the debate, saying, That never house of parliament trusted more in the goodness of their king, for their own private account, than the present; but we are ambitious that his majesty's goodness may remain to posterity, and we are accountable to a public trust: and therefore seeing there hath been a public violation of the laws by his ministers, nothing will satisfy him but a public amends; and our desires to vindicate the Subjects Right by Bill, are no more than are laid down in former laws, with some modest provision for instruction, performance and execution.

Which so well agreed with the sense of the house, that they made it the subject of a Message to be delivered by the Speaker to his majesty.

Amidst those deliberations, another Message was delivered May 2, from his majesty, by Mr. Secretary Cook; "That howsoever we proceed in this business we have in hand, which his majesty will not doubt, but to be according to our constant profession, and so as he may have cause to give us thanks; yet his resolution is, that both his royal care, and hearty and tender affection towards all his loving subjects, shall appear to the whole kingdom, and all the world, that he will govern us according to the laws and customs of this realm; that he will maintain us in the Liberties of our Persons, and Proprieties of our Goods, so as we may enjoy as much happiness as our fore-fathers in their best times; and

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that he will rectify what hath been, or may be found amiss amongst us, so that hereafter there may be no just cause to complain. Wherein as his majesty will rank himself amongst the best of our kings, and shew he hath no intention to invade or impeach our lawful liberties, or right; so he will have us match ourselves with the best subjects, not by encroaching upon that sovereignty and prerogative, which God hath put into his hands for our good, but by containing ourselves within the bounds and laws of our fore-fathers, without restraining them, or enlarging them by new explanations, interpretations, expositions, or additions in any sort; which, he telleth us, he will not give way unto.—That the weight of the affairs of the kingdom, and Christendom, do press him more and more, and that the time is now grown to that point of maturity, that it cannot endure long debate or delay; so as this session of parliament must continue no longer than Tuesday come seven-night at furthest: in which time his majesty, for his part, will be ready to perform what he promised; and if the house be not ready to do that is fit for themselves, it shall be their own faults.—And upon assurance of our good dispatch and correspondence, his majesty declareth, that his royal intention is to have another session of parliament at Michaelmas next, for the perfecting of such things as cannot now be done."

This Message was debated the next day, being Saturday, May 3, whereupon

Sir *John Elliot* spake to this effect: The king, saith he, will rank himself with the best of kings, and therefore he would have us rank ourselves with the best subjects; we will not incroach upon that sovereignty that God hath put into his hands; this makes me fear his majesty is mis-informed in what we go about; let us make some enlargement, and put it before him, that we will not make any thing new. As for the time of this session, it is but short; and look how many messages we have, so many interruptions, and mis-reports, and mis-representations to his majesty produce those messages.

Sir *Miles Fleetwood* continued the debate, and said, That this business is of great importance, we are to accommodate this: the breach of this parliament will be the greatest misery that ever befell us: the eyes of Christendom are upon this parliament, the state of all our Protestant friends are ready to be swallowed up by the emperor's forces, and our own kingdom is in a miserable strait, for the defence of our religion that is invaded by the Roman Catholics, by the colour of a commission, which is intolerable; the defence of our realm by shippings is decayed, the king's revenue is sold and gone; where shall the relief be obtained but in parliament? Now we are in the way, let us proceed by way of bill, in pursuance of the king's message, to establish the fundamental laws in propriety of our goods, and liberty of our persons: It was declared to us, 'that 'courses by Loan and Imprisonment were not 'lawful;' let us touch them in our Bill, and that all precedents and judgments seeming to the contrary, be void; and that all commitments against the law be remedied, and that we be protected against the fear of commitments.

Mr. Mason's Speech.

I am of opinion with the gentleman that spake first, that, in our proceedings in the matter now in debate, we should have use of the title of the statute, called *circumspecte agatis*; for it concerns the Liberty of our persons, without which we do not enjoy our lives.

The Question is: Whether in this Bill for the explanation of Magna Charta, and the rest of the statutes, we shall provide that the cause of the commitment must be expressed upon the commitment, or upon return of the Habeas Corpus?

Before I speak to the question itself, I shall propose some observations, in my conceit, necessarily conducing to the debate of the matter.

1. That we ought to take care, and to provide for posterity, as our predecessors have done for us, and that this provident care cannot be expounded to be any distrust of the performance of his majesty's gracious declaration, this act providing for perpetuity, to which his highness's promise, unless it were by act of parliament, cannot extend.

2. That we having long debated and solemnly resolved our rights and privileges by virtue of these statutes, and if now we shall reduce those declarations and those resolutions into an act, we must ever hereafter expect to be confined within the bounds of that act, being made at our suit, and to be the limits of the prerogative in that respect, and it being an act of explanation, which shall receive no further explanation than itself contains.

3. That by this act we must provide a remedy against the persons which detain us in prison, for as to the commander, there can be no certainty.

Concerning the Question itself:

It hath been solemnly and clearly resolved by the house, that the commitment of a Freeman, without expressing the cause at the time of the commitment, is against the law: If by this act of explanation we shall provide only that the cause ought to be expressed upon the return of the H. Corpus, then out of the words of the statute, it will necessarily be inferred, that before the return of the H. Corpus the cause need not to be expressed, because the statute hath appointed the time of the expression of the cause; and it will be construed, that if the makers of the statutes had intended that the cause should have been sooner shewn, they would have provided for it by the act, and then the act, which we term an act of explanation, will be an act of the abridging of Magna Charta, and the rest of the statutes: or if this act do not make the commitment without expressing the cause to be lawful, yet it will clearly amount to a toleration of the commitment, without expressing the cause, until the

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H. Corpus, or to a general or perpetual dispensation, beginning with and continuing as long as the law itself. And in my understanding the words in this intended law, that no freeman can be committed without cause, can no ways advantage us, or satisfy this objection; for till the return of the H. Corpus, he that commits is Judge of the cause, or at least hath a licence by this law till that time to conceal the cause, and the gaoler is not subject to any action for the detaining of the prisoner upon such command. For if the prisoner demanded the cause of his imprisonment of the gaoler, it will be a safe answer for him to say that he detains a prisoner by warrant, and that it belongs not unto him to desire those which commit the prisoner to shew the cause until he returns the H. Corpus. And if the prisoner be a suitor to know the cause from those that committed him, it will be a sufficient answer for them to say, they will express the cause at the return of the H. Corpus. In this case there will be a wrong, because the commitment is without cause expressed, and one that suffers that wrong, viz. the party imprisoned; and yet no such wrong-doer but may excuse, if not justify himself by this law.

In making of laws, we must consider the inconveniences which may ensue, and provide for the prevention of them, 'lex caveat de 'futuris.' I have taken into my thoughts some inconveniences which I shall expose to your considerations, not imagining that they can happen in the time of our gracious sovereign; but in an act of parliament, we must provide for the prevention of all inconveniences in future times.

1. If a man be in danger to be imprisoned in the beginning of a long vacation for refusing to pay some small sum of money, and knows that by this act he can have no inlargement till the return of the H. Corpus in the term, and that the charge of his being in prison, and of his inlargement by H. Corpus, will amount to more than the sum, he will part with money to prevent his imprisonment, or to redeem himself thence, because he cannot say any man doth him wrong, until the return of the H. Corpus, and the law resolves. A man will pay a fine rather than be imprisoned, for the judgment which is given when one is fined, is *ideo capiatur*, and the execution for debt is a *capias ad satisfaciendum*; the law presuming any man will part with his money to gain his liberty. And if the prisoner procure an H. Corpus, and be brought into the King's-bench by virtue of it, yet the cause need not to be then expressed; the provision of this law being, that if no cause be then expressed, he shall be bailed, and no cause being shewn upon the return of the H. Corpus, yet it may be pretended, that at the time of his commitment there were strong presumptions of some great offence, but upon examination they are cleared: or it may be said, that the offence was of that nature, that the time of his imprisonment before the return was a sufficient punishment. And we may be frequently imprisoned in this manner, and never understand the cause, and have often such punishment, and have no means to justify ourselves; and for all these proceedings this law will be the justification, or colour.

2. If by this act there be a toleration of imprisonment without shewing cause, until the return of the H. Corpus; yet it is possible to accompany that imprisonment with such circumstances of close restraint, and other hardships, which I forbear to express, as may make an imprisonment for that short time, as great a punishment, as a perpetual imprisonment in an ordinary manner.

3. The party may be imprisoned a long time before he shall come to be delivered by this law; the place of his imprisonment may be in the furthest part of this kingdom; the judges always make the return of the H. Corpus answerable to the distance of the prison from Westminster; the gaoler may neglect the return of the first process, and then the party must procure an *Alias*, and the gaoler may be then in some other employment for the king, and excuse the not returning the body upon that process; and this may make the imprisonment for a year. And in the end no cause being returned, the party may be discharged; but in the mean time he shall have imprisonment, he shall never know the cause, he shall have no remedy for it, nor be able to question any for injustice, which have not a justification, or excuse by this law.

4. The party may be imprisoned during his life, and yet there shall be no cause ever shewn. I will instance in this manner: a man may be committed to the furthest part of the kingdom Westward; he obtains an H. Corpus; before the gaoler receives the H. Corpus, or before he returns it, the prisoner by warrant is removed from that prison to another, it may be the furthest Northern part of the realm. The first gaoler returns the special matter, which will be sufficient to free himself, and in like manner the prisoner may be translated from one prison to another, and his whole life shall be a peregrination, or wayfaring from one gaol to another, and he shall never know the cause, nor be able to complain of any, who cannot defend their actions by this bill.

5. If the prisoner be brought into the court by H. Corpus, and no cause expressed, and thereupon he be inlarged, he may be partly committed again, and then his enlargement shall only make way for his commitment: and this may continue during his life, and he shall never know the cause; and this not remedied, but rather permitted by this act.

And there are also some things remarkably considerable in this matter; the expence of the party in prison; his fees to the gaoler, his costs in obtaining and prosecuting an Habeas Corpus, and his charges in removing himself, attended with such as have the charge of his conduct: and that the prisoner must sustain all this without satisfaction, or knowing the cause.

The only reason given by those of the other

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opinion is, That it is requisite, the king and council should have power to command the detainer of a man in prison for some time, without expressing the cause; because it is supposed, that the manifestation of the cause at first may prevent the discovery of a treason. The reason is answered by the remedy proposed; by this act it being proposed, that it shall be provided by this bill, that upon our commitment, we may instantly have recourse to the Chancery for an H. Corpus, returnable in that court, which is always open; and that upon the receipt thereof, the writ must be returned, and the cause thereupon expressed. If then this remedy be really the cause of commitment, it must partly appear; which contradicts the former reason of state.

And in my own opinion, we ought not only to take care, that the subject should be delivered out of prison, but to prevent his imprisonment; the statute of Magna Charta, and the rest of the acts, providing that no man should be imprisoned, but by the law of the land. And although the king, or council, as it hath been objected, by force may commit us without cause, notwithstanding any laws we can make; yet I am sure without such an act of parliament, such commitment can have no legal colour, and I would be loth we should make a law to endanger ourselves. For which reasons I conceive, that there being so many ways to evade this act, we shall be in a worse case by it, than without it; as it provides no remedy to prevent our imprisonment without expressing the cause to be lawful, and administers excuses for continuing us in prison, as I have before declared. And thus for providing for one particular out of reason of state, which possibly may fall out in an age or two, we shall spring a leak, which may sink all our liberties, and open a gap, through which Magna Charta, and the rest of the Statutes, may issue out and vanish. I therefore conclude, that in my poor understanding (which I submit to better judgments), I had rather depend upon our former resolutions, and the king's gracious declarations, than to pass an act in such manner as hath been proposed.

In conclusion, the Commons agreed to an Answer to all the preceding Messages, and presented it to the king by the mouth of their Speaker.

The Speaker's (sir John Finch) SPEECH to the King, in answer to several Messages, in the Banqueting-House, May 5.

Most Gracious and Dread Sovereign; Your loyal and obedient subjects, the commons now assembled in parliament, by several Messages from your majesty, and especially by that your declaration delivered by the Lord-Keeper before both houses, have, to their exceeding great joy and comfort, received many ample expressions of your princely care and tender affections towards them, with a gracious promise and assurance, that your majesty will govern according to the laws of this realm, and so maintain all your subjects, in the just freedom of their persons, and safety of their estates, that all their rights and liberties may be by them enjoyed, with as much freedom and security in their time, as in any age heretofore by their ancestors, under the best of your progenitors: for this so great a favour, enlarged by a comfortable intimation of your majesty's confidence in the proceedings of this house, they do, by me, their Speaker, make a full return of most humble thanks to your majesty, with all dutiful acknowledgment of your grace and goodness herein extended unto them.—And whereas in one of those messages delivered from your majesty, there was an expression of your desire to know, whether this house would rest upon your royal word and promise, assuring them, that if they would, it should be royally and really performed; as they again present their humble thanks for the seconding and strengthening of your former royal expressions, so in all humbleness they assure your majesty, that their greatest confidence is, and ever must be, in your grace and goodness, without which, they well know, nothing they can frame or desire, will be of safety or value to them; therefore are all humble suitors to your majesty, that your royal heart will graciously accept and believe the truth of theirs, which they humbly present, as full of truth and confidence in your royal word and promise, as ever house of commons reposed in any of their best kings.—True it is, they cannot but remember the public trust, for which they are accountable to present and future times; and their desires are, That your majesty's goodness might, in fruit and memory, be the blessing and joy of posterity.—They say also, That of late, there hath been public violation of the Laws, and the Subjects Liberties, by some of your majesty's ministers; and thence conceive, that no less than a public remedy will raise the dejected hearts of your loving subjects to a cheerful supply of your majesty, or make them receive content in the proceedings of this house.—From these considerations, they most humbly beg your majesty's leave to lay hold of that gracious offer of yours, which gave them assurance, that if they thought fit to secure themselves in their Rights and Liberties, by way of Bill or otherwise, so it might be provided with due respect to God's honour, and the public good; you would be graciously pleased to give way unto it. Far from their intentions it is, any way to encroach upon your sovereignty or prerogative; nor have they the least thought of stretching or enlarging the laws in any sort, or by any new interpretations or additions; the bounds of their desires extend no further, than to some necessary explanation of that, which is truly comprehended within the just sense and meaning of those laws, with some moderate provision for execution and performance, as in times past, upon like occasion, hath been used. The way how to accomplish these their humble desires, is now in serious consideration with them,

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wherein they humbly assure your majesty, they will neither lose time, nor seek any thing of your majesty, but that they hope may be fit for dutiful and loyal subjects to ask, and for a gracious and just king to grant.

His Majesty's ANSWER was delivered by the Lord-Keeper, Thomas Lord Coventry:

Mr. Speaker, and you Gentlemen of the House of Commons, his majesty has commanded me to tell you, that he expected an answer by your actions, and not delay by discourse: ye acknowledge his trust and confidence in your proceedings, but his majesty sees not how you requite him by your confidence of his word and actions; for what need explanations, if ye doubted not the performance of the true meaning? for explanations will hazard an incroachment upon his prerogative. And it may well be said, What need a new law to confirm an old, if you repose confidence in the declaration his majesty made by me to both houses? And yourselves acknowledge, that your greatest trust and confidence must be in his majesty's grace and goodness, without which nothing that you can frame will be of safety, or available to you. Yet, to shew clearly the sincerity of his majesty's intentions, he is content that a Bill be drawn for a confirmation of Magna Charta and the six other statutes insisted upon for the Subjects Liberties, if ye shall chuse that to be the best way; but so, as it may be without additions, paraphrases, or explanations.—Thus, if you please, you may be secured from your needless fears, and this parliament may have a happy wished-for end; whereas by the contrary, if you seek to tie your king by new, and indeed impossible bonds, you must be accountable to God and your country for the ill success of this meeting: his majesty having given his royal word, that you shall have no cause to complain hereafter; less than which hath been enough to reconcile great princes, and therefore ought much more to prevail between a king and his subjects.—Lastly, I am commanded to tell you, that his majesty's pleasure is, That without further replies or messages, or other unnecessary delays, you do what you mean to do speedily, remembering the last Message, which his majesty sent you by secretary Cook, in point of time: his majesty always intending to perform his promise to his people.

Notwithstanding the intimation of his majesty's good pleasure for a Bill, Mr. Secretary Cook, Tuesday, May 6, again pressed the house to rely upon the king's word, saying, That he had rather follow others, than begin to enter into this business: loss of time hath been the greatest complaint; the matter fallen now into consideration, is, what way to take, whether to rely on his majesty's word, or on a Bill? If we will consider the advantage we have in taking his majesty's word, it will be of the largest extent, and we shall chuse that that hath most assurance; an act of parliament is by the consent of the king and parliament; but this assurance by word is, that he will govern us by the laws; the king promises that, and also that they shall be so executed, that we shall enjoy as much freedom as ever. This contains many laws, and a grant of all good laws; nay, it contains a confirmation of those very laws, assurance, which binds further than the law can: first, it binds his affection, which is the greatest bond between king and subject, and that binds his judgment also, nay, his honour, and that not at home, but abroad; the royal word of a king is the ground of all treaty; nay, it binds his conscience. This confirmation between both houses is in nature of a vow; for my part, I think it is the greatest advantage to rely on his majesty's word.—He further added, this debate was fitter to be done before the house, and not before the committee; and that it was a new course to go to a committee of the whole house.

Sir *John Elliot* replied, That the proceeding in a committee is more honourable and advantageous to the king and the house, for that way leads most to truth, and it is a more open way, and where every man may add his reason, and make answer upon the hearing of other men's reasons and arguments.

This being the general sense, the house was turned into a Committee, to take into consideration what was delivered to the King by the Speaker, and what was delivered to them by the Lord-Keeper, and all other Messages, and the Committee was not to be bounded by any order: the key was brought up, and none were to go out without leave first asked.

In the debate of this business at the committee, some were for letting the bill rest: but sir Edward Coke's reasons prevailed to the contrary. Was it ever known, said he, that general words were a sufficient satisfaction to particular grievances? Was ever a verbal declaration of the king *verbum regni*? When Grievances be, the parliament is to redress them. Did ever parliament rely on Messages? They put up Petitions of their Grievances, and the king ever answered them: the king's answer is very gracious, but what is the law of the realm, that is the question? I put no diffidence in his majesty, the king must speak by a Record, and in particulars, and not in general: did you ever know the king's message come into a Bill of Subsidies? All succeeding kings will say, Ye must trust me as you did my predecessors, and trust my Messages; but messages of love never came into a parliament. Let us put up a PETITION of RIGHT: not that I distrust the king, but that I cannot take his trust, but in a parliamentary way.

On Thursday, 8th May, the Petition of Right was finished, and the clause of Martial Law was added unto it, and it was delivered to the lords at a Conference in the Painted Chamber for their concurrence; which Conference was managed by sir Edward Coke, who thus expressed himself: I pray your lordships to excuse us, for we have been till one o'clock about

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the great business, and, blessed be God, we have dispatched it in some measure, and before this time we were not able to attend your lordships, but I hope that this will prove a great blessing to us. My lords, I am commanded from the House of Commons to express their singular care and affection they have of concurrence with your lordships, in these urging affairs and proceedings of this parliament; both for the good of the commonwealth, and principally for his majesty's. And this I may say in this particular, if we had hundreds of tongues, we were not able to express this desire which we have of that concurrence with your lordships: but I will leave it without any further expression. My lords, it is evident what necessity there is, both in respect of yourselves, and your posterities, to have good success in this business. We have acquainted your lordships with the Reasons and Arguments, and after we have had some Conference, we have received from your lordships five Propositions; and it behoves me to give your lordships some reasons why you have not heard from us before now; for in the mean time, as we were consulting of this weighty business, we have received divers Messages from our great sovereign the king, and they consisted of five parts:

1. That his majesty would maintain all his Subjects in their just freedom, both of their persons and estates.

2. That he will govern according to his Laws and Statutes.

3. That we should find much confidence in his Royal Word; I pray observe that.

4. That we shall enjoy all our Rights and Liberties, with as much freedom and liberty as ever any subjects have done in former times.

5. That whether we shall think it fit, either by way of Bill or otherwise, to go on in this great business, his majesty would be pleased to give way to it.

These gracious Messages did so work upon our affections, that we have taken them into consideration. My lords, when we had these Messages, (I deal plainly, for so I am commanded by the House of Commons) we did consider, what way we might go for our more secure way, nay, yours; we did think it the safest way to go in a parliamentary course, for we have a maxim in the house of commons, and written on the walls of our house, That old ways are the safest and surest ways: and at last we fell upon that which we did think, if that your lordships did consent with us, it is the most ancient way of all, and that is, my lords, *via fausta*, both to his majesty, to your lordships, and to ourselves. For, my lords, this is the greatest bond, that any subject can have in parliament, *verbum regis*, this is an high point of honour, but this shall be done by the lords and commons, and assented to by the king in parliament; this is the greatest obligation of all; and this is for the king's honour and our safety. Therefore, my lords, we have drawn a form of a Petition, desiring your lordships to concur with us therein; for we come with an unanimous consent of all the house of commons, and there is great reason your lordships should do so, for your lordships are involved in the same condition, *commune periculum*. So I have done with the first part: and now I shall be bold to read that which we have so agreed on, and I shall desire your lordships leave that I may read it.

Here the Petition of Right was read; but we forbear to insert it, as yet, because there were propositions for alteration; and it is not perfect, till the royal assent be given to it.

From the 8th to the 12th of May, all public business was laid aside. On Monday the 12th, the Lords had a Conference with the Commons, where the Lord Keeper made this Speech:

Gentlemen of the House of Commons; My Lords, having a most affectionate desire to maintain that good concurrence, that in this parliament and others have been of late between both houses, desired this Conference, to acquaint you, how, and in what manner, they have proceeded in the Petition of Right, that came from this house, and to let you know, that as soon as they had received it, they, with all care and expedition they possibly could, addressed themselves to consider thereof; and after good time spent in debate in the whole house, they made a committee to consider, whether retaining the substance of the Petition, there might not be some words altered, or put in to make it more sweet, to procure it a passable way to his majesty: we know this must be crowned by the king, and good must come to all the kingdom by this course now taken. The committee hath met, and hath propounded some small matters to be altered in some few words, to make it passable, and not in substance. And the lords having this reported from their committee, and heard it read in their house, resolved of nothing till they have your consent; yet they think it fitter to have it propounded to you, to consider, whether these should be any alteration or no, and how the propounded alterations may stand with your liking.—Concerning the commitment by the king and the council, without expressing the cause, it was resolved by the lords to debate it this morning, and as soon as they should have debated it, they purposed to have your concurrence with them before they resolved it; but at the instant when they thought to have debated it, they received a Letter from his majesty, which, they conceive, will give a satisfaction to both houses in the main point. My lords desiring to keep that good concurrence begun, desired to communicate that Letter unto you, that you might take the same into your considerations, as they mean to do themselves: This Letter is to be read unto you:

To our right trusty and well-beloved, the Lords Spiritual and Temporal of the higher house of parliament.

'C. R. We being desirous of nothing more 'than the advancement of the peace and pros-

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'perity of our people, have given leave to free 'debate upon the highest points of our prerogative royal, which in the time of our predecessors, kings and queens of this realm, were ever 'restrained as matters that they would not have 'discussed; and in other things we have been 'willing so far to descend to the desires of our 'good subjects, as might fully satisfy all moderate minds, and free from all just fears and 'jealousies, which those messages, which we 'have hitherto sent into the Commons house, 'will well demonstrate unto the world. Yet 'we find it still insisted upon, that in no case 'whatsoever, should it never so nearly concern 'matters of state or government, we, or our 'privy council, have no power to commit any 'man without the cause shewed; whereas it 'often happens, that should the cause be shewed, 'the service itself would thereby be destroyed 'and defeated; and the cause alledged must be 'such, as may be determined by our judges of 'our courts of Westminster, in a legal and ordinary way of justice; whereas the causes may 'be such, whereof the judges have no capacity 'of judicature, nor rules of law to direct and 'guide their judgment in cases of that transcendent nature; which happening so often, 'the very intermitting the constant rule of government, for so many ages, within this kingdom practised, would soon dissolve the very 'foundation and frame of our monarchy. 'Wherefore, as to our commons we have made 'fair propositions, which might equally preserve 'the just liberty of the subject; so, my lords, 'we have thought good to let you know that 'without the overthrow of sovereignty, we cannot suffer this power to be impeached; notwithstanding, to clear our conscience and just 'intentions, this we publish, That it is not in 'our heart, nor will we ever extend our royal 'power, lent unto us from God, beyond the just 'rule of moderation, in any thing which shall 'be contrary to our laws and customs, wherein 'the safety of our people shall be our only aim. 'And we do hereby declare our royal pleasure 'and resolution to be, which, God willing, we 'shall ever constantly continue and maintain, 'That neither we, nor our privy council, shall 'or will, at any time hereafter, commit or command to prison, or otherwise restrain the person of any for not lending money to us, nor 'for any cause, which in our conscience doth 'not concern the public good and safety of us 'and our people; we will not be drawn to pretend any cause, wherein our judgment and 'conscience is not satisfied with; which base 'thoughts, we hope, no man can imagine will 'fall into our royal breast; and that in all cases 'of this nature, which shall hereafter happen, 'we shall, upon the humble petition of the party, 'or address of our Judges unto us, readily and 'really express the true cause of their commitment or restraint, so soon as with conveniency 'and safety the same is fit to be disclosed and 'expressed. And that in all causes criminal of 'ordinary jurisdiction, our judges shall proceed 'to the deliverance or bailment of the prisoner, 'according to the known and ordinary rules of 'the laws of this land, and according to the Statutes of Magna Charta, and those other six Statutes insisted upon, which we do take knowledge 'stand in full force, and which we intend not to 'abrogate and weaken, against the true intention 'thereof. This we have thought fit to signify unto 'you, the rather to shorten any long Debate upon 'this great question, the season of the year being so far advanced, and our great occasions 'of state not lending us many more days for 'longer continuance of this session of parliament.' Given under our Signet at our Palace at Westminster, 12 Maii, the 4th year of our reign.

The same day the King's Letter was communicated to the house of commons, they laid it aside, and sir Thomas Wentworth said, It was a Letter of Grace; but the people will only like of that which is done in a parliamentary way: besides, the debate of it would spend much time, neither was it directed to the house of commons; and the Petition of Right would clear all mistakes: For, said he, some give it out, as if the house went about to pinch the king's prerogative. But the further debate of this matter took up several days.

May 17. The Lords propounded, at a Conference, an Addition to be made to the Petition of Right, which was delivered by the Lord-Keeper, to this purpose:

"You the knights, citizens, and burgesses of the house of commons, my lords have commanded me to present unto you the singular care and affection they have to preserve that correspondency and order, which the two houses (both in this and former parliaments, to the happiness of this kingdom) have heretofore enjoyed.

"They command me also to let you know, that they have no less care and affection to bring that great business, *the Liberty of the Subject*, to an happy issue. And whereas at the last Conference of both houses, there were some things propounded, that came from their lordships, out of a desire the Petition might have the easier passage with his majesty, not intending to alter in any manner the substance of the Petition; but it was then thought fit, that there was another part of the Petition, of as great importance and weight: my lords, since the time of that Conference, have employed themselves wholly to reduce the Petition to such a frame and order, that may give both to you and them hope of acceptance.

"And after many deliberations, and much advice taken, my lords have resolved to represent to you something which they have thought upon, yet not as a thing conclusive to them or you; and according to their desires (having mentioned it in the beginning) have held it fit to conclude of nothing, till that you be made acquainted with it, and that there may be a mature advisement between you and them, so that there may be the happier conclusion in all their business.

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"This being the determination of the lords, that nothing, that is now offered unto you, should be conclusive, yet they thought it convenient to present it unto you.

"This alteration (and not alteration, but addition) which they shall propound unto you, to be advised and conferred upon, which is no breach of the same, they think it meet, if it shall stand with your liking, to be put in the conclusion of the Petition which I shall now read unto you.

'We present this our humble Petition to 'your majesty, with the care not only of pre-'serving our own Liberties, but with due re-'gard to leave intire that Sovereign Power, 'wherewith your majesty is trusted for the 'protection, safety, and happiness of the people.'

"This is the thing the lords do present unto you, the subject of this Conference, concerning the adding of this in the conclusion of the Petition; and as they know, that this is no small thing, and that you cannot presently give an answer to it; therefore they desire you, that you do with some speed consider of it, and their lordships will be ready this afternoon."

This Addition produced several Speeches.

Mr. *Alford*. Let us look, said he, into the Records, and see what they are, what is "Sovereign Power?" Bodin saith, That it is free from any condition, by this we shall acknowledge a regal, as well as a legal power: Let us give that to the king, that the law gives him, and no more.

Mr. *Pymm*. I am not able to speak to this question, I know not what it is: All our Petition is for the Laws of England, and this power seems to be another distinct power from the power of the law. I know how to add sovereign to his person, but not to his power: And we cannot leave to him a sovereign power, when we never were possessed of it.

Mr. *Hackwell*. We cannot admit of those words with safety, they are applicable to all the parts of our Petition: It is in the nature of a Saving, and by it we shall imply, as if we had incroached on his prerogative; all the laws we cite are without a saving: and yet now after the violation of them we must add a saving: I have seen divers Petitions, and where the subject claimed a Right, there I never saw a saving of this nature.

Sir *Edward Coke*. This is *magnum in parvo*, this is propounded to be a conclusion of our Petition: It is a matter of great weight; and, to speak plainly, it will overthrow all our Petition; it trenches to all parts of it: It flies at Loans, and at the Oath, and at Imprisonment, and Billeting of Soldiers; this turns all about again. Look into all the Petitions of former times, they never petitioned, wherein there was a saving of the king's sovereignty: I know that prerogative is part of the law, but 'sovereign power' is no parliamentary word. In my opinion, it weakens Magna Charta, and all our statutes; for they are absolute, without any saving of sovereign power. And shall we now add it, we shall weaken the foundation of law, and then the building must needs fall; let us take heed what we yield unto; Magna Charta is such a fellow, that he will have no sovereign. I wonder this sovereign was not in Magna Charta, or in the confirmations of it: If we grant this, by implication we give a sovereign power above all these laws: power, in law, is taken for a power with force: The Sheriff shall take the power of the county, what it means here, God only knows. It is repugnant to our petition, that is a Petition of Right, grounded on acts of parliament. Our predecessors could never endure a *salvo jure suo*, no more than the kings of old could endure for the church, *salvo honore Dei et Ecclesiæ*. We must not admit of it, and to qualify it, is impossible. Let us hold our privileges according to the law; that power, that is above this, is not fit for the king and people to have it disputed further. I had rather, for my part, have the prerogative acted, and I myself to lie under it, than to have it disputed.

Sir *Thomas Wentworth*. If we do admit of this addition, we shall leave the Subject worse than we found him, and we shall have little thanks for our labour, when we come home. Let us leave all power to his majesty to punish malefactors; but our laws are not acquainted with sovereign power: we desire no new thing, nor do we offer to trench on his majesty's prerogative; we must not recede from this Petition, either in part or whole.

Mr. *Noye*. To add a Saving, is not safe; doubtful words may beget ill construction: and the words are not only doubtful words, but words unknown to us, and never used in any act or petition before.

Mr. *Selden*. Let us not go too hastily to the question. If there be any objections, let any propound them, and let others answer them as they think good. I will not touch the reasons already given. The sum of this addition is, that our right is not to be subject to Loans or Imprisonment without cause, or Martial Law, but by sovereign power. If it hath no reference to our Petition, what doth it here? I am sure all others will say it hath reference, and so must we. How far it doth exceed all examples of former times, no man can shew me the like. I have made that search that fully satisfies me, and I find not another besides 28 Ed. 1. We have a great many petitions and bills of parliament in all ages, in all which we are sure no such thing is added. That clause of the 28 Edw. 1, it was not in the petition, but in the king's answer.

In Magna Charta there were no such clauses; the articles themselves are to be seen in a library at Lambeth, in a book of that time, upon which the law was made. There was none in the Statutes in king John's time, for these I have seen, there is no saving. In the articles of *confirmatio chartarum*, is a saving, 'les ancients aids,' that is, for 'file maryer, et pur fair fitz 'chivalier,' and for ransom. And in the articles of king John, in the original Charter, which I can shew, there those three aids were named

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therein, and they were all known. In the 25 E. 3, there is a petition against Loans, there is no saving, and so in others. As for that addition in the 28 E. 1, do but observe the petitions after Magna Charta; as 5 E. 3, they put up a petition: 'whereas in Magna Charta it is contained that none be imprisoned but by due process of law;' those words are not in Magna Charta, and yet there is no saving. And so in the 28 E. 3, and 36, 37, and 42 of E. 3, all which pass by petition, and yet there is no saving in them. And there are in them other words that are not in Magna Charta, and yet no saving. For that that Mr. Speaker said to the king, it was our heart, and ever shall be; but we then spoke of the king's prerogative by itself, and we are bound to say so: but speaking of our rights, shall we say we are not to be imprisoned, saving but by the king's sovereign power? Say my lands, without any title, be seized in the king's hand, and I bring a Petition of Right, and I go to the king, and say, I do by no means seek your majesty's right and title; and after that I bring a petition or *monstrance de droit*, setting forth my own right and title, and with all set down a saving, that I leave intire his majesty's right, it would be improper. It was objected, that in the 28 of E. 1, in the end of Articuli super Chartas, which was a confirmation of Magna Charta, and Charta de Foresta, in the end there is a clause, 'savant le droit et signiory;' the words are extant, in that Roll that is now extant, but the original roll is not extant.

In the 25 E. 1, there was a confirmation of the Charter: in the 27 E. 1, the parliament was called, and much stir there was about the Charter, and renewing the Articles, but then little was done. In 28 E. 1, the commons by Petition or Bill, did obtain the liberties and articles at the end of the parliament; they were extracted out of the Roll, and proclaimed abroad. The addition was added in the Proclamation: In the bill there was no *savant*, but afterwards it was put in; and to prove this, it is true, there is no Parliament-roll of that year, yet we have histories of that time. In the library at Oxford, there is a journal of a parliament of that very year, which mentions so much; also in the public library at Cambridge there is a manuscript that belonged to an abbey, it was of the same year 28 Ed. 1, and it mentions the parliament and the petitions, and 'articulos quos petierunt sic confirmaverat rex 'ut in fine adderet, salvo jure coronæ regis;' and they came by proclamation in London. When the people heard this clause added in the end, they fell into execration for that addition, and the great earls that went away satisfied from the parliament, hearing of this, went to the king, and afterwards it was cleared at the next parliament. Now there is no Parliament-roll of this at that time, only in one roll in the end of Edw. 3, there is a roll, that recites not the Parliament bill, but the statute that was the effect of the roll that was proclaimed.

The Lords afterwards, at a Conference, tendered Reasons to fortify their Addition; which were briefly reported by the Lord-Keeper:

"That the lords were all agreed to defend and maintain the just liberties of the subject, and of the crown; and that the word, 'leave,' was debated amongst them; and thereby they meant to give no new, but what was before: for the words 'sovereign power,' as he is a king, he is a sovereign, and must have power; and he said, the words were easier than the 'Prerogative.' As for the word, 'that,' which is a relative, and referred to 'that power,' that is for the safety of the people; and this, said he, can never grieve any man. Being thus published, it is not sovereign power in general; but now in confutation of our reasons, Magna Charta was not with a saving; but, said he, you pursue not the words in Magna Charta, and therefore it needs an addition. As for the 28 of Edw. 3, he said, there was a saving; and an ill exposition cannot be made of this, and both houses have agreed it in substance already; the commons did it in a speech delivered by the Speaker, and that we say we have not a thought to incroach on the king's sovereignty; and why may you not add it in your Petition?"

Upon this report,

Mr. *Muson* spake his opinion in manner following:

In our Petition of Right to the king's majesty, we mention the laws and statutes, by which it appeared, That no tax, loan, or the like, ought to be levied by the king, but by common assent in parliament: that no freeman ought to be imprisoned but by the law of the land; that no freeman ought to be compelled to suffer soldiers in his house. In the Petition we have expressed the breach of these laws, and desire we may not suffer the like; all which we pray as our Rights and Liberties.

The lords have proposed an Addition to this Petition, in these words: 'We humbly pre-'sent this Petition to your majesty, not only 'with a care of our own Liberties, but with a 'due regard to leave entire that *Sovereign* '*Power* wherewith your majesty is intrusted 'for the protection, safety, and happiness of 'your people.'—And whether we shall consent unto this Addition, is the subject of this day's discourse: and because my Lord-Keeper, at the last conference, declared their lordships had taken the words of the Petition apart, I shall do so too. The word, 'leave,' in a petition, is of the same nature as 'saving' in a grant, or act of parliament; when a man grants but part of a thing, he saves the rest: when he petitions to be restored but to part, he leaveth the rest: then in the end of our Petition, the word, 'leave,' will imply, that something is to be left of that, or at least with a reference to what we desire.

The word 'intire,' is very considerable; a conqueror is bound by no law, but hath power *dare leges*, his will is a law; and although William the Conqueror, at first, to make his way to the crown of England the more easy,

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and the possession of it more sure, claimed it by title: but afterwards when there were no powerful pretenders to the crown, the title of conquest (to introduce that absolute power of a conqueror) was claimed, and that statute of Magna Charta, and other statutes mentioned in our Petition, do principally limit that power. I hope it is as lawful for me to cite a Jesuit, as it is for Dr. Manwaring to falsify him; Suares, in his first book, *de Legibus, cap.* 17. delivered his opinion in these words, 'Amplitudo et re-'strictio potestatis regum circa ea quæ per se 'mala vel injusta non sunt, pendet ex arbitrio 'hominum et ex ambigua conventione vel 'pacto inter reges et regnum.' And he farther expresseth his opinion, That the king of Spain was so absolute a monarch, that he might lawfully impose tribute without consent of his people, until about 200 years since, when it was concluded between him and his people, that without consent of his people by proxies, he should not impose any tribute. And Suares's opinion is, That by that agreement, the kings of Spain are bound to impose no tribute without consent.

And this agreement that author calls a restraining of that sovereign power; the Statutes then mentioned in our Petition, restraining that absolute power of a Conqueror; if we recite those statutes, and say, we leave the sovereign power intire, we do take away that restraint which is the virtue and strength of those statutes, and set at liberty the claim of the sovereign power of a conqueror, which is to be limited and restrained by no laws: this may be the danger of the word, 'intire.'

The next word delivered by the lords as observable, is the particle, 'that;' because it was said, that all sovereign power is not mentioned to be left, but only (that) with which the king is trusted for our protection, safety, and happiness: but I conceive this to be an exception of all sovereign power; for all sovereign power in a king, is for the protection, safety, and happiness of his people. If all sovereign power be excepted, you may easily judge the consequence, all loans and taxes being imposed by colour of that sovereign power.

The next word is, 'Trusted;' which is very ambiguous, whether it be meant, trusted by God only as a Conqueror, or by the people also, as King, which are to govern also according to laws, *ex pacto*. In this point I will not presume to adventure further; only I like it not, by reason of the doubtful exposition it admits. I have likewise considered the proposition itself, and therein I have fallen upon the dilemma, that this Addition shall be construed either to refer unto the Petition, or not; if it doth not refer unto the Petition, it is merely useless and unnecessary, and unbefitting the judgment of this grave and great assembly to add to a Petition of this weight. If it hath reference unto it, then it destroys not only the virtue and strength of our Petition of Right, but our rights themselves; for the Addition being referred to each part of the Petition, will necessarily receive this construction: that none ought to be compelled to make any gift, loan, or such like charge, without common consent, or act of parliament, unless it be by the sovereign power, with which the king is trusted for the protection, safety, and happiness of his people.

That none ought to be compelled to sojourn or billet soldiers, unless by the same sovereign power; and so of the rest of the Rights contained in the Petition: and then the most favourable construction will be, that the king hath an ordinary prerogative, and by that he cannot impose taxes, or imprison; that is, he cannot impose taxes at his will to employ them as he pleaseth: but that he hath an extraordinary and transcendant sovereign power for the protection and happiness of his people, and for such purpose he may impose taxes, or billet soldiers as he pleaseth; and we may assure ourselves, that hereafter all loans, taxes, and billetting of soldiers, will be said to be for the protection, safety, and happiness of the people. Certainly hereafter it will be conceived, that an house of parliament would not have made an unnecessary Addition to this Petition of Right; and therefore it will be resolved, that the Addition hath relation to the Petition, which will have such operation as I have formerly declared; and I the rather fear it, because the late loan and billetting have been declared to have been by sovereign power for the good of ourselves; and if it be doubtful whether this proposition hath reference to the Petition or not, I know not who shall judge whether loans or imprisonments hereafter be by that sovereign power or not?

A parliament, which is made a body of several writs, and may be dissolved by one commission, cannot be certain to decide this question. We cannot resolve that the Judges shall determine the words of the King's Letter read in this house, expressing the cause of commitment may be such, that the judges have not capacity of judicature, no rules of law to direct and juide their judgments in cases of that transcendant nature; the judges then, and the judgments, are easily conjectured. It hath been confessed by the king's counsel, that the statute of Magna Charta binds the king, and his sovereign power cannot be divided from himself. If then the statute of Magna Charta binds the king, it binds his sovereign power. If to the Petition these words be added, the exposition must be, that the statute of Magna Charta binds the king's sovereign power; saving the king's sovereign power, I shall endeavour to give some answer to the Reasons given by the lords.

The first is, That it is the intention of both houses, to maintain the just Liberty of the Subject, and not to diminish the just power of the king: and therefore the expression of that intention in this Petition, cannot prejudice us. To which I answer,

First, our intention was, and is, as we then professed, and no man can assign any particular

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in which we have done to the contrary; neither have we any way transgressed in that kind in this Petition: and if we make this Addition to the Petition, it would give some intimation, that we have given a cause or colour of offence therein; which we deny: and which if any man conceive so, let him assign the particular, that we may give answer thereunto.

By our Petition, we only desire our particular Rights and Liberties to be confirmed to us; and therefore it is not proper for us in it to mention sovereign power in general, being altogether impertinent to the matter of the Petition.—There is a great difference between the words of the Addition, and the words proposed therein, viz. between just power, which may be conceived to be limited by laws, and sovereign power, which is supposed to be transcendant and boundless.

The second Reason delivered by their lordships, was, That the king is sovereign: that as he is sovereign, he hath power, and that that sovereign power is to be left: for my part, I would leave it so, as not to mention it; but if it should be expressed to be left in this Petition, as it is proposed, it must admit something to be left in the king of what we pray, or at least admit some sovereign power in his majesty, in these privileges which we claim to be our right, which would frustrate our Petition, and destroy our right, as I have formerly shewed.

The third Reason given for this Addition, was, That in the statute of Articuli super Chartas, there is a saving of the Right and Seigniory of the crown.

To which I give these Answers: That Magna Charta was confirmed above thirty times, and a general saving was in none of these acts of confirmation, but in this only; and I see no cause we should follow one ill, and not thirty good precedents; and the rather, because that saving produced ill effects, that are well known. —That saving was by act of parliament; the conclusion of which act is, That in all those cases the king did will, and all those that were at the making of that ordinance did intend, that the Right and Seigniory of the crown should be saved: by which it appears that the saving was not in the Petition of the commons, but added by the king; for in the Petition, the king's will is not expressed.

In that act the king did grant, and part with, to his people, divers rights belonging to his prerogative, as in the first chapter he granted, That the people might chuse three men, which might have power to hear and determine complaints, made against those that offended in any point of Magna Charta, though they were the king's officers, and to fine and ransom them. And in the 8, 12, and 19 Chapters of that Statute, the king parted with other prerogatives, and therefore there might be some reason of the adding of that sovereign power, by the king's counsel: but in this Petition, we desire nothing of the king's prerogative, but pray the enjoying of our proper and undoubted rights and privileges; therefore there is no cause to add any words, which may imply a saving of that which concerns not the matter in the Petition.

The fourth Reason given by their lordships, was, That by the mouth of our Speaker, we have this parliament declared, That it was far from our intention to incroach upon his majesty's prerogative, and that therefore it could not prejudice us, to mention the same resolution in an addition to this Petition.

To which I answer, That that declaration was a general Answer to a Message from his majesty to us, by which his majesty expressed that he would not have his prerogative straitened by any new explanation of Magna Charta, or the rest of the statutes: and therefore that expression of our Speaker's was then proper, to make it have reference to this Petition, there being nothing therein contained, but particular Rights of the Subject, and nothing at all concerning his majesty's prerogative.—Secondly, That Answer was to give his majesty satisfaction of all our proceedings in general, and no man can assign any particular, in which we have broken it; and this Petition justifies itself, that in it we have not offended against the protestation: and I know no reason, but that this declaration should be added to all our laws we shall agree on this parliament, as well as to this Petition.

The last reason given, was, That we have varied in our Petition from the words of Magna Charta; and therefore it was very necessary that a saving should be added to this Petition.

I answer, that in the statute 5 E. 3, 25 E. 3, 28 E. 3, and other statutes, with which Magna Charta is confirmed: the words of the statute of explanation differ from the words of Magna Charta itself; the words of some of the statutes of explanation, being, 'That no man 'ought to be apprehended, unless by indict-'ment, or due process of law;' and the other statutes differing from the words of Magna Charta, in many other particulars, and yet there is no saving in those statutes, much less should there be any in a Petition of Right. These are the Answers I have conceived to the Reasons of their lordships, and the exposition, I apprehend, must be made of the proposed words, being added to our Petition. And therefore, I conclude, that, in my opinion, we may not consent to this Addition, which I submit to better judgments.

The Commons afterwards appointed Mr. Glanvile and sir Henry Martin to manage another Conference to be had with the Lords, concerning the said matter, and to clear the sense of the Commons in that point: The one argued the legal, the other the rational part.

Mr. GLANVILLE's Speech in a full Committee of both Houses of Parliament, May 23, in the Painted Chamber at Westminster.

My lords, I have in charge, from the Commons House of parliament (whereof I am a member) to express this day before your lordships some part of their clear sense, touching

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one point that hath occurred in the great debate, which hath so long depended in both houses.—I shall not need many words to induce or state the question, which I am to handle in this free conference. The subject matter of our meeting is well known to your lordships, I will therefore only look so far back upon it, and so far recollect summarily the proceedings it hath had, as may be requisite to present clearly to your lordships considerations, the nature and consequence of the particular wherein I must insist.

Your lordships may be pleased to remember, now that the Commons in this parliament have framed a Petition to be presented to his majesty, a Petition of Right rightly composed, relating nothing but truth, desiring nothing but justice; a petition justly occasioned, a petition necessary and fit for these times, a petition founded upon solid and substantial grounds, the laws and statutes of this realm, sure rocks to build upon; a petition bounded within due limits, and directed upon right ends, to vindicate some lawful and just liberties of the free subjects of this kingdom from the prejudice of violations past, and to secure them from future innovations.

And because my following discourse must reflect chiefly, if not wholly, upon the matter of this Petition, I shall here crave leave shortly to open to your lordships the distinct parts whereof it doth consist, and those are four.

The first concerns Levies of Monies, by way of Loans or otherwise, for his majesty's Supply; declaring, that no man ought, and praying that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament.

2. The second is concerning that Liberty of Person, which rightfully belongs to the free subjects of this realm, expressing it to be against the tenure of the laws and statutes of the land, that any freeman should be imprisoned without cause shewed; and then reciting how this liberty, amongst others, hath lately been infringed, it concludeth with a just and necessary desire, for the better clearing and allowance of this privilege for the future.

3. The third declareth the unlawfulness of billetting or placing Soldiers or Mariners to sojourn in free subjects houses against their wills, and prayeth remedy against that grievance.

4. The fourth and last aimeth at redress touching Commissions, to proceed to the trial and condemnation of offenders, and causing them to be executed and put to death by the Law Martial, in times and places, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by none other ought to be, adjudged and executed.

This Petition, the careful house of commons, not willing to omit any thing pertaining to their duties, or which might advance their moderate and just ends, did heretofore offer up unto your lordships' consideration, accompanied with an humble desire, That in your nobleness and justice, you would be pleased to join with them in presenting it to his majesty, that so coming from the whole body of the realm, the peers and people, to him that is the head of both, our gracious sovereign, who must crown the work, or else all our labour is in vain; it might, by your lordships concurrence and assistance, find the more easy passage, and obtain the better answer.

Your lordships, as your manner is in cases of so great importance, were pleased to debate and weigh it well, and thereupon you propounded to us some few Amendments (as you termed them) by way of alteration, alledging, that they were only in matters of form, and not of substance; and that they were intended to no other end, but to sweeten the Petition, and make it the more passable with his majesty.

In this the House of Commons cannot but observe that fair and good respect which your lordships have used in your proceedings with them, by your concluding or voting nothing in your house, until you had imparted it unto them; whereby our meetings about this business have been justly stiled free conferences, either party repairing hither disengaged to hear and weigh the other's reasons, and both houses coming with a full intention, upon due consideration of all that can be said on the other side, to join at last in resolving and acting that which shall be found most just and necessary for the honour and safety of his majesty and the whole kingdom.

And touching those propounded Alterations, which were not many, your lordships cannot but remember, that the house of commons have yielded to an accommodation, or change of their Petition in two particulars; whereby they hope your lordships have observed, as well as you may, they have not been affected unto words and phrases, nor overmuch abounding in their own sense; but rather willing to comply with your lordships in all indifferent things.

For the rest of your proposed Amendments, if we do not misconceive your lordships, as we are confident we do not, your lordships, of yourselves, have been pleased to relinquish them with a new overture, for one only clause to be added in the end or foot of the Petition, whereby the work of this day is reduced to one simple head, whether that clause shall be received or not?—This yielding of the commons in part unto your lordships, of other points by you somewhat insisted upon, giveth us great assurance, that our ends are one; and putteth us in hope, that, in conclusion, we shall concur, and proceed unanimously to seek the same ends, by the same means.

The Clause propounded by your lordships to be added to the Petition is this:

'We humbly present this Petition to your 'majesty, not only with a care for preservation 'of Liberties, but with a due regard to leave 'intire that Sovereign Power, wherewith your

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'majesty is intrusted for the protection, safety, 'and happiness of your people.'

A Clause specious in shew, and smooth in words, but in effect and consequence most dangerous, as I hope to make most evident: however, coming from your lordships, the house of commons took it into their considerations, as became them, and apprehending upon the first debate, that it threatened ruin to the whole Petition, they did heretofore deliver some Reasons to your lordships, for which they then desired to be spared from admitting it.

To these Reasons, your lordships offered some Answers at the last meeting; which having been faithfully reported to our house, and there debated as was requisite for a business of such weight and importance, I must say truly to your lordships, yet with due reverence to your opinions, the Commons are not satisfied with your arguments; and therefore they have commanded me to recollect your lordships reasons for this clause, and in a fair reply to let you see the causes why they differ from you in opinion.

But before I come to handle the particulars wherein we dissent from your lordships, I will in the first place take notice yet a little further, of that general wherein we all concur; which is, that we desire not, neither do your lordships, to augment or dilate the Liberties and Privileges of the Subjects beyond the just and due bounds, nor to encroach upon the limits of his majesty's Prerogative Royal. And as in this, your lordships at the last meeting expressed clearly your own senses, so were your lordships not mistaken in collecting the concurrent sense and meaning of the house of commons; they often have protested, they do, and ever must protest, That these have been, and shall be the bounds of their desires, to demand and seek nothing but that which may be fit for dutiful and loyal subjects to ask, and for a gracious and just king to grant: for as they claim by laws some liberties for themselves, so do they acknowledge a prerogative, a high and just prerogative belonging to the king, which they intend not to diminish. And now, my lords, being assured, not by strained inferences, or obscure collections, but by the express and clear declarations of both houses, that our ends are the same; it were a miserable unhappiness, if we should fail in finding out the means to accomplish our desires.

My lords, the heads of those particular Reasons which you insisted upon the last day, were only these:

1. You told us, that the word 'leave' was of such a nature, that it could give no new thing to his majesty.

2. That no just exception could be taken to the words 'Sovereign Power;' for that as his majesty is a king, so he is a sovereign; and as he is a sovereign, so he hath power.

3. That the sovereign power mentioned in this clause is not absolute, or indefinite, but limited and regulated by the particle 'that;' and the word 'subsequent' which restrains it to be applied only for protection, safety, and happiness of the people, whereby ye inferred, there could be no danger in the allowance of such power.

4. That this clause contained no more in substance, but the like expressions of our meanings in this Petition, which we had formerly signified unto his majesty by the mouth of Mr. Speaker, that we no way intended to encroach upon his majesty's sovereign power or prerogative.

5. That in our Petition we have used other words, and of larger extent, touching our Liberties, than are contained in the statutes whereon it is grounded: In respect of which enlargement, it was fit to have some express, or implied saving, or narrative declaratory for the king's sovereign power, of which narrative you alledge this clause to be.

Lastly, Whereas the commons, as a main argument against the clause, had much insisted upon this, that it was unprecedented, and unparliamentary in a petition from the Subject, to insert a saving for the crown; your lordships brought for instance to the contrary, the two statutes of the 25 Ed. 1, commonly called *confirmatio chartarum*, and 28 Ed. 1, known by this name of *Articuli super Chartas;* in both which Statutes there are savings for the king.

Having thus reduced to your lordships memories, the effects of your own Reasons; I will now, with your lordships favour, come to the points of our reply, wherein I most humbly beseech your lordships to weigh the reasons which I shall present, not as the sense of myself, the weakest member of our house, but as the genuine and true sense of the whole house of commons, conceived in a business there debated with the greatest gravity and solemnity, with the greatest concurrence of opinions, and unanimity, that ever was in any business maturely agitated in that house. I shall not, peradventure, follow the method of your lordships recollected Reasons in my answering to them, nor labour to urge many reasons. It is the desire of the commons, that the weight of their arguments should recompense, if need be, the smallness of their number. And, in conclusion, when you have heard me through, I hope your lordships shall be enabled to collect clearly, out of the frame of what I shall deliver, that in some part or other of my discourse there is a full and satisfactory answer given to every particular reason or objection of your lordships.

The Reasons that are now appointed to be presented to your lordships, are of two kinds, legal and rational, of which those of the former sort are allotted to my charge; and the first of them is thus:

The clause now under question, if it be added to the Petition, then either it must refer or relate unto it, or else not; if it have no such reference, is it not clear that it is needless and superfluous? And if it have such reference, is it not clear, that then it must needs

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have an operation upon the whole Petition, and upon all the parts of it? We cannot think that your lordships would offer us a vain thing; and therefore taking it for granted, that if it be added, it would refer to the Petition; let me beseech your lordships to observe with me, and with the house of commons, what alteration and qualification of the same it will introduce.

The Petition of itself, simply, and without this clause, declareth absolutely the rights and privileges of the subject, in divers points; and among the rest touching the levies of monies, by way of loans or otherwise, for his majesty's supply, That such loans and other charges of the like nature, by the laws and statutes of this land, ought not to be made or laid without common consent by act of parliament: But admit this clause to be annexed with reference (to the Petition), and it must necessarily conclude and have this exposition, That Loans and the like charges (true it is, ordinarily) are against the laws and statutes of the realm, 'unless they be warranted by sovereign power,' and that they cannot be commanded or raised without assent of parliament, 'unless it be by 'sovereign power:' What were this but to admit a sovereign power in the king above the laws and statutes of the kingdom?

Another part of this Petition is, That the free subjects of this realm ought not to be imprisoned without cause shewed: But by this clause a sovereign power will be admitted, and left entire to his majesty, sufficient to control the force of law, and to bring in this new and dangerous interpretation, That the free subjects of this realm ought not by law to be imprisoned without cause shewed, 'unless it be 'by sovereign power.'

In a word, this clause, if it should be admitted, would take away the effect of every part of the Petition, and become destructive to the whole: for thence will be the exposition touching the billetting of Soldiers and Mariners in freemen's houses against their wills; and thence will be the exposition touching the times and places for execution of the Law Martial, contrary to the laws and statutes of the realm.

The scope of this Petition, as I have before observed, is not to amend our case, but to restore us to the same state we were in before; whereas, if this clause be received, instead of mending the condition of the poor subjects, whose liberties of late have been miserably violated by some ministers, we shall leave them worse than we found them; instead of curing their wounds, we shall make them deeper. We have set bounds to our desires in this great business, whereof one is not to diminish the prerogative of the king, by mounting it too high; and if we bound ourselves on the other side with this limit, not to abridge the lawful privileges of the subject, by descending beneath that which is meet, no man, we hope, can blame us.

My lords, as there is mention made in the additional Clause of Sovereign Power, so is there likewise of a trust reposed in his majesty, touching the use of sovereign power.

The word 'Trust' is of great latitude and large extent, and therefore ought to be well and warily applied and restrained, especially in the case of a king: there is a trust inseparably reposed in the persons of the kings of England, but that trust is regulated by law. For example, when statutes are made to prohibit things not *mala in se*, but only *mala quia prohibita*, under certain forfeitures, and penalties, to accrue to the king, and to the informers that shall sue for the breach of them; the commons must and ever will acknowledge a regal and sovereign prerogative in the king, touching such statutes, that it is in his majesty's absolute and undoubted power, to grant dispensations to particular persons, with the clauses of *non obstante*, to do as they might have done before those statutes, wherein his majesty, conferring grace and favour upon some, doth not do wrong to others. But there is a difference between those statutes, and the laws and statutes whereupon the Petition is grounded: by those statutes the subject has no interest in the penalties, which are all the fruit such statutes can produce, until by suit or information commenced he become entitled to the particular forfeitures; whereas the laws and statutes mentioned in our Petition are of another nature; there shall your lordships find us rely upon the good old statute, called Magna Charta, which declareth and confirmeth the ancient common laws of the liberties of England: There shall your lordships also find us to insist upon divers other most material statutes, made in the time of king Edw. 3, and Edw. 4, and other famous kings, for explanation and ratification of the lawful rights and privileges belonging to the subjects of this realm: laws not inflicting penalties upon offenders, *in malis prohibitis*, but laws declarative or positive, conferring or confirming, *ipso facto*, an inherent right and interest of liberty and freedom in the subjects of this realm, as their birthrights and inheritance descendable to their heirs and posterity; Statutes incorporate into the body of the common law, over which (with reverence be it spoken) there is no trust reposed in the king's 'Sovereign Power,' or 'Prerogative Royal,' to enable him to dispense with them, or to take from his subjects that birthright or inheritance which they have in their liberties, by virtue of the common law and of these statutes.

But if this Clause be added to our Petition, we shall then make a dangerous overture to confound this good destination touching what statutes the king is trusted to controul by dispensations, and what not; and shall give an intimation to posterity, as if it were the opinion both of the lords and commons assembled in this parliament, that there is a trust reposed in the king, to lay aside by his 'sovereign power,' in some emergent cases, as well the Common-Law, and such statutes as declare or ratify the subjects liberty, or confer interest upon their

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persons, as those other penal statutes of such nature as I have mentioned before; which, as we can by no means admit, so we believe assuredly, that it is far from the desire of our most gracious sovereign, to affect so vast a trust, which being transmitted to a successor of a different temper, might enable him to alter the whole frame and fabric of the commonwealth, and to resolve that government whereby this kingdom hath flourished for so many years and ages, under his majesty's most royal ancestors and predecessors.

Our next Reason is, that we hold it contrary to all course of parliament, and absolutely repugnant to the very nature of a Petition of Right, consisting of particulars, as ours doth, to clog it with a general Saving or Declaration, to the weakening of the right demanded; and we are bold to renew with some confidence our allegation, that there can be no precedent shewed of any such clause in any such petitions in times past.

I shall insist the longer upon this particular, and labour the more carefully to clear it, because your lordships were pleased the last day to urge against us the statutes of 25 and 28 of Edw. 1, as arguments to prove the contrary, and seemed not to be satisfied with that which in this point we had affirmed. True it is, that in those statutes there are such savings as your lordships have observed; but I shall offer you a clear answer to them, and to all other savings of like nature that can be found in any statutes whatsoever.

First in the general, and then I shall apply particular answers to the particulars of those two Statutes; whereby it will be most evident, that those examples can no ways suit with the matter now in hand. To this end it will be necessary, that we consider duly what that question is, which indeed concerneth a petition, and not an act of parliament. This being well observed, by shewing unto your lordships the difference between a petition for the law, and the law ordained upon such a petition, and opening truly and perspicuously the course that was holden in framing of statutes before 2 Hen. 5, different from that which ever since then hath been used, and is still in use amongst us, and by noting the times wherein these statutes were made, which was about one hundred years before 2 Hen. 5, besides the differences between these savings and this clause; I doubt not but I shall give ample satisfaction to your lordships, that the commons, as well in this as in all their other reasons, have been most careful to rely upon nothing but that which is most true and pertinent.

Before the second year of king Henry 5, the course was thus: when the commons were suitors for a law, either the Speaker of their house by word of mouth from them, the lords house joining with them, or by some Bill in writing, which was usually called their Petition, moved the king, to ordain laws for the redress of such mischiefs or inconveniences, as were found grievous unto the people.

To these petitions the king made answer as he pleased, sometimes to part, sometimes to the whole, sometimes by denial, sometimes by assent, sometimes absolutely, and sometimes by qualification. Upon these motions and petitions, and the king's answers to them, was the law drawn up and ingrossed in the statute-roll to bind the kingdom; but this inconvenience was found in this course, that oftentimes the statutes thus framed, were against the sense and meaning of the commons, at whose desires they were ordained; and therefore in the 2 Hen. 5, finding that it tended to the violation of their liberty and freedom, whose right it was, and ever had been, that no law should be made without their assent; they then exhibited a petition to the king, declaring their right in this particular: praying, that from thenceforth no law might be made or ingrossed as statutes, by additions or diminutions to their motions or petitions, that should change their sense, or intent, without their assent; which was accordingly established by act of parliament. Ever since then, the right hath been, as the use was before, that the king taketh the whole, or leaveth the whole of all Bills or Petitions, exhibited for the obtaining of laws.

From this course, and from the time when first it became constant and settled, we conclude strongly, that it is no good argument, because ye find Savings in acts of parliaments before the second of Hen. 5, that those Savings were before in the petitions that begat those statutes: for if the petitions for the two Loans so much insisted upon, which petitions, for any thing we know, are not now extant, were never so absolute, yet might the king, according to the usage of those times, insert the Savings in his answers; which passing from thence into the Statute-Roll, do only give some little colour, but are not proof at all that the petitions also were with Savings.

Thus much for the general; to come now to the particular statute of 25 Edw. 1, which was a confirmation of Magna Charta, with some provision for the better execution of it, as Common Law, which words are worth the noting. It is true, that statute hath also a clause to this effect, That the king, or his heirs, from thenceforth should take no Aids, Taxes, or Prisage of his subjects, but by common assent of all the realm, saving the antient Aids and Prisage due and accustomed.

This Saving, if it were granted, (which is not, nor cannot be proved) that it was as well in the Petition as in the Act; yet can it no way imply, that it is either fit or safe, that the clause now in question should be added to our petition: for the nature and office of a Saving, or exception, is to exempt particulars out of a general, and to ratify the rule in things not exempted, but in no sort to weaken or destroy the general rule itself.

The body of that law was against all Aids, and Taxes, and Prisage in general, and was a confirmation of the common law, formerly declared by Magna Charta; the Saving was only

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of Aids and Prisage in particular, so well described and restrained by the words, 'ancient 'and accustomed,' that there could be no doubt what could be the clear meaning and extent of that exception; for the king's right to those ancient Aids, intended by that statute to be saved to him, was well known in those days, and is not yet forgotten.

These Aids were three; from the king's tenants by knights service, due by the common law, or general custom of the realm: Aid to ransom the king's royal person, if unhappily he should be taken prisoner in the wars: Aid to make the king's eldest son a knight, and Aid to marry the king's eldest daughter once, but no more: and that those were the only Aids intended to be saved to the crown by that statute, appeareth in some clearness by the Charter of king John, dated at Running-Mead the 15th of June, in the fifth year of his reign, wherein they are enumerated with an exclusion of all other Aids whatsoever. Of this Charter I have here one of the originals, whereon I beseech your lordships to cast your eyes, and give me leave to read the very words which concern this point. These words, my lords, are thus: 'Nullum scutagium vel auxilium ponatur in 'regno nostro, nisi per commune consilium 'regni nostri, nisi ad corpus nostrum redimendum, et primogenitum filium nostrum militem 'faciendum, et ad filiam nostram primogenitam 'semel maritandam, et ad hoc non fiat nisi rationabile auxilium.'

Touching Prisage, the other thing excepted by this Statute, it is also of a particular right to the crown so well known, that it needeth no description, the king being in possession of it by every day's usage. It is to take one tun of wine before the mast, and another behind the mast, of every ship bringing in above twenty tuns of wine, and here discharging them by way of merchandise.

But our Petition consisteth altogether in particulars, to which if any general Saving, or words amounting to one, should be annexed, it cannot work to confirm things not excepted, which are none, but to confound things included, which are all the parts of the Petition; and it must needs beget this dangerous exposition, that the Rights and Liberties of the subject, declared and demanded by this Petition, are not theirs absolutely, but *sub modo*; not to continue always, but only to take place, when the king is pleased not to exercise that 'sovereign 'power,' wherewith, this clause admitted, he is trusted for the protection, safety, and happiness of his people. And thus that birthright and inheritance, which we have in our liberties, shall by our own assents be turned into a mere tenancy at will and sufferance.

Touching the Statute of 28 Edw. 1. Articuli super Chartas, the scope of that Statute, among other things, being to provide for the better observing and maintaining of Magna Charta, hath in it nevertheless two Savings for the king; the one particular, as I take it, to preserve the antient prisage, due and accustomed, as of wines and other goods; the other general, seigniory of the crown in all things.

To these two Savings, besides the former answers, which may be for the most part applied to this statute as well as to the former, I add these further answers: the first of these two Savings, is of the same prisage of wines, which is excepted in the 25 Edw. 1, but in some more clearness; for that here the word, wines, is expressly annexed to the word, prisage, which I take for so much to be in exposition of the former law: and albeit these words, and of other goods, be added, yet do I take it to be but a particular Saving, or exception, which being qualified with the words, antient, due, and accustomed, is not very dangerous, nor can be understood of prisage or levies upon goods of all sorts at the king's will and pleasure; but only of the old and certain customs upon wool, woolfels, and leather, which were due to the crown, long before the making of this statute.

For the latter of the two savings in this act, which is of the more unusual nature, and subject to the more exception; it is indeed general, and if we may believe the concurrent relations of the Histories of those times, as well those that are now printed, as those that remain only in manuscripts, it gave distaste from the beginning, and wrought no good effect, but produced such distempers and troubles in the state, as we wish may be buried in perpetual oblivion; and that the like saving in these and future times may never breed the like disturbance: for from hence arose a jealousy, that Magna Charta, which declared the ancient right of the subject, and was an absolute law in itself, being now confirmed by a latter act, with this addition of a general saving; for the king's right in all things by the saving was weakened, and that made doubtful, which was clear before. But not to depart from our main ground, which is, that savings in old acts of parliament, before the 2 H. 5, are no proof that there were the like savings in the petitions for those acts; let me observe unto your lordships, and so leave this point, that albeit this petition, whereon this act of 28 Ed. 1, was grounded, be perished; yet hath it pleased God, that the very frame and context of the act itself, as it is drawn up, and entered upon the Statute-roll, and printed in our book, doth manifestly import, that this saving came in by the king's answer, and was not in the original petition of the lords and commons; for it cometh in at the end of the act after the words *(le roy le veut)* which commonly are the words of the royal assent to an act of parliament. And though they be affixed and followed with other words, as though the king's counsel, and the rest who were present at the making of this ordinance, did intend the same saving; yet is not that conclusive, so long as by the form of those times, the king's answer working upon the materials of the petition, might be conceived by some to make the law effectual, though varying from the frame of the petition.

The next Reason which the Commons have

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commanded me to use, for which they still desire to be spared from adding this clause to their Petition, is this: This offensive law of 28 E. 1, which confirmed Magna Charta, with a saving, rested not long in peace, for it gave not that satisfaction to the lords or people, as was requisite they should have in a case so nearly concerning them: and therefore about 33 or 34 of the same king's reign, a latter act of parliament was made, whereby it was enacted, that all men should have their laws, and liberties, and free customs, as largely and wholly as they had used to have at any time when they had them best; and if any statutes had been made, or any customs brought in to the contrary, that all such statutes and customs should be void:

This was the first law which I call now to mind, that restored Magna Charta to the original purity wherein it was first moulded, albeit it hath since been confirmed above twenty times more by several acts of parliament, in the reigns of divers most just and gracious kings, who were most apprehensive of their rights, and jealous of their honours, and always without savings; so as if between 22 and 34 Edw. 1, Magna Charta stood blemished with many savings of the king's rights or seigniory, which might be conceived to be above the law; that stain and blemish was long since taken away, and cleared by those many absolute declarations and confirmations of that excellent law which followed in after ages, and so it standeth at this day purged and exempted now from any such saving whatsoever.

I beseech your lordships therefore to observe the circumstance of time, wherein we offer this Petition to be presented to your lordships, and by us unto his majesty: Do we offer it when Magna Charta stands clogged with savings? No, my lords, but at this day, when latter and better confirmations have vindicated and set free that law from all exceptions; and shall we now annex another and worse saving to it, by an unnecessary clause in that Petition, which we expect should have the fruits and effects of a law? Shall we ourselves relinquish or adulterate that, which cost our ancestors such care and trouble to purchase and refine? No, my lords, but as we should hold ourselves unhappy, if we should not amend the wretched estate of the poor subject, so let us hold it a wickedness to impair it.

Whereas it was further urged by your lordships, That to insert this clause into our Petition, would be no more than to do that again at your lordship's motion and request, which we had formerly done by the mouth of our Speaker; and that there is no cause why we should recede from that which so solemnly we have professed: To this I answer and confess, it was then in our hearts, and it is now, and shall be ever, not to encroach on his majesty's sovereign power. But I beseech your lordships to observe the different occasion and reference of that protestation, and of this clause.

That was a general Answer to a general Message, which we received from his majesty, warning us not to encroach upon his Prerogative; to which, like dutiful and loving subjects, we answered at full, according to the integrity of our own hearts; nor was there any danger in making such an answer to such a message, nor could we answer more truly or more properly: but did that Answer extend to acknowledge 'a sovereign power' in the king, above the laws and statutes mentioned in our Petition, or controul the Liberties of the Subjects, therein declared and demanded? No, my lords, it hath no reference to any such particulars; and the same words which in some cases may be fit to be used, and were unmannerly to be omitted, cannot in other cases be spoken, but with impertinency at the least, if not with danger. I have formerly opened my reasons, proving the danger of this clause, and am commanded to illustrate the impertinency of adding it to the Petition, by a familiar case, which was put in our house by a learned gentleman, and of my own robe: the case is this, two manors or lordships lie adjoining together, and perchance intermixed, so as there is some difficulty to discern the true bounds of either; as it may be touching the confines where the Liberty of the Subject, and the Prerogative of the Crown do border each upon the other; to the one of the manors the king hath clear right, and is in actual possession of it, but the other is the subject's. The king being mis-informed, that the subject hath intruded upon his majesty's manor, asketh his subject, whether he doth enter upon his majesty's manor, or pretendeth any title to it, or any part of it. The Subject being now justly occasioned, maketh answer truly to the king, that he hath not intruded, nor will intrude upon his majesty's manor, nor doth make any claim or title to it, or any part of it. This answer is proper and fair; nay, it were unmannerly and ill done of the subject not to answer upon this occasion. Afterwards the king, upon colour of some double or single matter of record, seizeth into his highness's hands, upon a pretended title, the subject's manor: the subject then exhibiteth his Petition of Right to his majesty, to retain restitution of his own manor, and therein layeth down title to his own manor only: Were it not improper and absurd in this case for him to tell the king, that he did not intend to make any claim or title to his majesty's manor, which is not questioned? Doubtless it were. This case, rightly applied, will fit our purpose well, and notably explain the nature of our Petition.

Why should we speak of leaving entire the king's 'Sovereign Power,' whereon we encroach not, while we only seek to recover our own Liberties and Privileges, which have been seized upon by some of the king's ministers? If our Petition did trench actually upon his majesty's prerogative, would our saying, that we intended it not, make the thing otherwise than the truth?

My lords, there needeth no Protestation or Declaration to the contrary of that which we have not done; and to put in such a Clause, cannot argue less than a fear in us, as if we had invaded it: which we hold sacred, and are as-

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sured, that we have not touched either in our words or in our intentions. And touching your lordships observation upon the word (leave), if it be not a proper word to give any new thing to the king, sure we are, it is a word dangerous in another sense; for it may amount, without all question, to acknowledge an old right of 'sovereign power' in his majesty, above those laws and statutes whereon only our liberties are founded; a doctrine which we most humbly crave your lordships leave freely to protest against. And for your lordship's proffering, that some saving should be requisite for preservation of his majesty's 'sovereign power' in respect our Petition runneth in larger words than our laws and statutes whereon we ground it; what is this but a clear confession by your lordships, that this clause was intended by you to be that saving? For other saving than this we find not tendered by you: and if it be such a saving, how can it stand with your lordships other arguments, that it should be of no other effect than our former expression to his majesty by the mouth of our Speaker? But I will not insist upon collections of this kind; I will only shew you the reasons of the commons, why this Petition needeth no such saving, albeit the words of these statutes be exceeded in the declaratory part of our Petition: those things that are within the equity and true meaning of a statute, are as good laws as those which are contained in the express letter, and therefore the statutes of the 42 Ed. 3, 36 H. 3, Rot. Par. n. 13, and other the statutes made in this time of king Edw. 3, for the explanation of Magna Charta, which hath been so often vouched in this parliament, though they differ in words from Magna Charta, had no saving annexed to any of them, because they enacted more than was contained in effect in that good law, under the words, 'per legale 'judicium parium suorum, aut per legem terræ;' which by these latter laws are expounded to import, that none should be put to answer without presentment, or matter of record, or by due process, or writ original: and if otherwise, it should be void, and holden for error.

It hath not been yet shewn unto us from your lordships, that we have in any of our expressions or applications strained or misapplied any of the laws or statutes whereon we do insist; and we are very confident and well assured, that no such mistaking can be assigned in any point of our petition now under question: If therefore it do not exceed the true sense and construction of Magna Charta in the subsequent laws of explanation, whereon it is grounded, what reason is there to add a saving to this petition more than to those laws; since we desire to transmit the fruits of these our labours to posterity, not only for the justification of ourselves, in right of our present and their future liberties, but also for a brave expression and perpetual testimony of that grace and justice, which we assure ourselves we shall receive in his majesty's speedy and clear answer? This is the thing we seek for, and this is the thing we hoped for, and this is the thing only will settle such an unity and confidence betwixt his majesty and us, and raise such a chearfulness in the hearts of all his loving subjects, as will make us proceed unanimously, and with all expedition to supply him for his great occasions in such measure, and in such way, as may make him safe at home, and feared abroad.

Sir *Henry Martin*. My lords, the work of this day, wherein the house of commons hath employed the gentleman that spoke last, and myself, was to reply to the Answer, which it hath pleased the Lord-Keeper to make to those Reasons, which we had offered to your lordships consideration, in justification of our refusal, not to admit into our Petition the Addition commended by your lordships. Which Reasons of ours, since they have not given such satisfaction as we desired, and well hoped, as by the Lord-Keeper's Answer appeared; it was thought fit, for our better order and method in replying, to divide the Lord-Keeper's Answer into two parts, a legal and a rational: The reply to the legal your lordships have heard, myself comes intrusted to reply to the rational, which also consisted of two branches, the first deduced from the whole context of the additional clause, the second enforced out of some part.

In the first were these Reasons, That the same deserved our acceptance. 1. As satisfactory to the king; 2. To your lordships; 3. Agreeable to what ourselves had often protested, and professed expressly by the mouth of our Speaker.

I must confess these motives were weighty and of great force; and therefore, to avoid misunderstanding and misconceit, which otherwise might be taken against the house of commons upon the refusal of the propounded Addition, it is necessary to state the question rightly, and to set down the true difference between your lordships and us. Now, indeed, there is no difference or question between your lordships and us, concerning this additional clause in the nature and quality of a proposition. For so considered, we say it is most true, and to be received and embraced by us, 'in toto et qua-'libet parte et qualibet syllaba;' yea, and were that the question, we should add to the Addition, and instead of due regard, say we have had, have, and ever will have, a special and singular regard, where to leave entire Sovereign Power. But this were to intimate, as if we had first cropt, and then left it; but our regard was to acknowledge and confess it sincerely, and to maintain it constantly, even to the hazard of our goods and lives, if need be.

To which purpose your lordships may be pleased to remember that strict Oath every member of the house hath taken this very session, in these words: 'I (A. B.) do utterly 'testify and declare in my conscience, That 'the king's highness is the supreme sovereign 'governor of this realm in all causes, &c. and 'to my utmost power will assist and defend all 'jurisdictions, privileges, preheminences and 'authorities, granted or belonging to the king's

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'highness, or united or annexed to the imperial 'crown of this realm, &c.'

So that your lordships need not to borrow from our protestations any exhortations to us, to entertain a writing in assistance of the king's sovereign power, since we stand obliged by the most sacred bond of a solemn oath, to assist and defend the same, if cause or occasion so required. So that the only question between your lordships and us, is, whether this clause should be added to our petition, and received into it as part thereof? Which to do, your lordships reasons have not persuaded us, because so to admit it, were to overthrow the fabric and substance of our Petition of Right, and to annihilate the right pretended by us, and the Petition itself in effect: For these words being added to our Petition, viz. 'We humbly present 'this Petition, &c. with due regard to leave 'entire your sovereign power, &c.' do include manifestly an exception to our Petition; and an exception being of the nature of the thing whereunto it is an exception, 'exceptio est de 'regula,' must of necessity destroy the rule or petition, so far as to the case excepted; 'Ex-'ceptio firmat regulam in casibus non exceptis, 'in casibus exceptis destruit regulam.' Then this construction followeth upon our Petition thus enlarged, that after we have petitioned, that no freeman should be compelled by imprisonment to lend or contribute money to his majesty without his assent in parliament, nor receive, against his will, Soldiers into his house, or undergo a commission of Martial Law for life or member in time of peace; we should add, Except his majesty be pleased to require our moneys, and imprison us for not lending, and send soldiers into our houses, and execute us by martial law, in time of peace, by virtue of his sovereign power: which construction, as it followeth necessarily upon this enlargement, so it concludeth against our right in the premisses, and utterly frustrateth all our Petition; neither may it seem strange, if this clause additional (which of itself is in quality of a proposition we confess) being added to our Petition (which also is true) should overthrow the very frame and fabric of it, seeing the logicians take knowledge of such a fallacy, called by them, 'Fallacia à bene divisis ad mala con-'juncta.' Horace the poet giveth an instance to this purpose, in a painter, who when he had painted the head of a man according to art, would then join to it the neck of a horse, and so marr the one and the other; whereas each by itself might have been a piece of right good workmanship.

The second branch of my Lord-Keeper's rational part was enforced out of the last words of this Addition, by which his lordship said, that they did not leave intire all sovereign power, but that wherewith his majesty is trusted, for the protection, safety, and happiness of the people; as if his lordship would infer, that sovereign power wherewith, &c. in this place to be *terminum diminuentem*, a term of diminution or qualification, and in that consideration might induce us to accept it. But under his lordship's correction, we cannot so interpret it: for first we are assured, that there is no sovereign power wherewith his majesty is trusted, either by God, or man, but only that which is for the protection, safety, and happiness of his people; and therefore, that limitation can make no impression upon us: but we conceive it rather in this place to have the force *termini adaugentis*, to be a term of important advantage against our Petition, a term of restriction, and that wheresoever his majesty's sovereign power should be exercised upon us in all or any the particulars mentioned in the Petition, we should, without further enquiry, submit thereunto, as assuming and taking it *pro concesso*, it conduced to our safety and happiness, &c. Since therefore, (as the Petition is now conceived) it carrieth the form and face of a picture, which representeth to the life the pressures and grievances of the people, with the easy remedies; and therefore we hope that his majesty, casting upon it a gracious eye, will compassionate his poor loyal subjects, and afford a comfortable answer.

I do humbly praise your lordships not to marr or blemish the grace and face of this picture, with this unnecessary addition; and unnecessary I prove it to be, according to that rule, 'Expressio ejus quod tacite inest nihil ope-'ratur.' And sovereign power, in cases where it hath place, and ought to be used, is always necessarily understood, and though not expressed, yet supplied by reasonable intendment, or by the opinion of all learned men.

And therefore it neither is nor can be by us expressly included, especially in this Petition, where the Addition thereof would make such a confusion of the whole sense and substance.

The King's Sovereign Power and Prerogative is always able to save itself; and if it were not, we must, without this Addition, save it to our utmost powers, if we will save our oath, and save ourselves. The true state of the cause thus standing between your lordships and us, the house of commons doth not a little marvel upon what grounds your lordships are so earnest to urge upon them this Addition to be inserted into their Petition; they nothing doubt, but the same proceeded out of a solicitude and fear, which your lordships have, lest otherwise the simple and absolute passage of this Petition might be construed hereafter in prejudice of his majesty's sovereign power: and this your lordships solicitude and fear proceedeth from your love, as the poet saith. 'Res est solliciti 'plena timoris amor.' But I humbly pray your lordships to examine with us, the grounds of this your solicitude and fear; which grounds must needs be laid either upon the words of the Petition, or the intention of the petitioners.

Upon the words there is no possibility to lay them, for therein is no mention made of the Sovereign Power; and were the words doubtful, as thus, We pray the like things be not done hereafter, under pretext of your majesty's sovereign power; yet in respect of the protes-

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tations preceding, concomitant and subsequent to the Petition, such doubtful words ought reasonably to be interpreted only of such sovereign power as was applicable to the cases wherein it was exercised; and of such sovereign power as should be justly practised. But there are no such doubtful words, and therefore it followeth, that your lordships fear and solicitude must be grounded upon the intention of the petitioners. Now your lordships will know, that the house of commons is not ignorant, that in a session of parliament, though it continue so many weeks, as this hath done days, yet there is nothing *prius et posterius*, but all things are held and taken as done at one time. If so, what a strange collection was this, that at the same time the house of commons should oblige themselves, by a fearful abjuration, to assist and defend all privileges and prerogatives belonging to the king, and at the same time by a Petition (cautiously conveyed) endeavour or intend to divest and deprive the king of some prerogatives belonging to his crown? If therefore such fear and solicitude can neither be grounded upon the words of the Petition, nor intention of the petitioners, I humbly pray your lordships to lay them aside. As we do believe that the proposition of this Addition from your lordships was not only excusable, but commendable, as proceeding from your love; so now having heard our reasons, your lordships would rest satisfied, that our refusal to admit them into our Petition, proceedeth from the conscience of the integrity and uprightness of our own hearts, that we in all this Petition have no such end to abate or diminish the king's just prerogative. And so much in reply to that rational part, whereby my lord-keeper laboured to persuade the entertainment of this Addition.

This being done, it pleased the House of Commons to instruct and furnish me with certain Reasons, which I shall use to your lordships, to procure your absolute conjunction with us in presenting this Petition; which albeit I cannot set forth according to their worth, and the instructions given me by the house, yet, I hope, their own weight will so press down into your lordships consciences and judgments, that without farther scruple, you will chearfully vouchsafe to accompany this Petition with your right noble presence.

A personis. The first argument wherewith I was commanded to move your lordships, was drawn from the consideration of the persons, which are petitioners, the House of Commons; a house, whose temper, mildness, and moderation in this parliament hath been such, as we should be unthankful and injurious to Almighty God, if we should not acknowledge his good hand upon us, upon our tongues, upon our hearts, procured, no doubt, by our late solemn and public humiliation and prayers.

This moderation will the better appear, if, in the first place, it may be remembered, in what passion and distemper many members of this house arrived thither, what bosoms, what pockets full of complaints and lamentable grievances the most part brought thither, and those every day renewed by letters and packets from all parts and quarters: you know the old proverb, 'Ubi dolor ibi digitus, ubi amor ibi 'oculus:' it is hard to keep our fingers from often handling the parts ill affected; but yet our moderation overcame our passion, our discretion overcame our affection.

This moderation also will the better appear, if in the second place it be not forgotten, how our ancestors and predecessors carried themselves in parliaments, when upon lighter provocations, less would not serve their turns, but new severe commissions to hear and determine offences against their liberties, public ecclesiastical curses, or excommunications against the authors or actors of such violations, accusations, condemnations, executions, banishments. But what have we said all this parliament? We only look forward, not backward: we desire amendment hereafter, no man's punishment for aught done heretofore; nothing written by us in blood, nay, not one word spoken against any man's person in displeasure. The conclusion of our Petition is, that we may be better intreated in time to come: and doth not this moderate Petition deserve your lordships chearful conjunction, 'ex congruo et condigno?' If a worm being trodden upon could speak, a worm would say, Tread upon me no more, I pray you: Higher we rise not, lower we cannot descend; and thus much we think in modesty may well be spoken in our own commendation thence to move your lordships to vouchsafe us your noble company in this Petition without surcharging it with this Addition.

A tempore. Our next argument is drawn *a tempore*, from the unseasonableness of the time. The Wiseman saith, 'There is a time for all 'things under the sun; *Tempus suum.*' And if, in the Wiseman's judgment, a word spoken in its due time be precious as gold and silver, then an unseasonable time detracts as much from the thing or word done or spoken: we hold (under your favours) that the time is not seasonable now for this Addition. It is true, that of itself, sovereign power is a thing always so sacred, that to handle it otherwise than tenderly, is a kind of sacrilege, and to speak of it otherwise than reverently, is a kind of blasphemy. But every vulgar capacity is not so affected; the most part of men, nay almost all men, judge, and esteem all things, not according to their own intrinsic virtue and quality, but according to their immediate effects and operations, which the same things have upon them. Hence it is, that Religion itself receiveth more or less credit or approbation, as the teachers or professors are worse or better; yea, if God himself send a very wet harvest or seed-time, men are apt enough to censure divine power. The sovereign power hath not now, for the present, the ancient amiable aspect, in respect of some late sad influences; but by God's grace it will soon recover.

To intermix with this Petition any mention of Sovereign Power, *rebus sic stantibus*,

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when angry men say, sovereign power hath been abused, and the most moderate wish it had not been so used; we hold it not seasonable, under your lordships correction.

A loco Our next argument is drawn *à loco*: we think the place where your lordships would have this Addition inserted, viz. in the Petition, no convenient or seasonable place. Your lordships will easily believe, that this Petition will run through many hands, every man will be desirous to see and to read what their knights and burgesses have done in parliament upon their complaints, what they have brought home for their five Subsidies: If, in perusing of this Petition, they fall upon the mention of sovereign power, they presently fall to arguing, and reasoning, and descanting, what sovereign power is, what is the latitude, whence the original, and where the bounds? with many such curious and captious questions; by which course, sovereign power is little advanced or advantaged: for I have ever been of opinion, that it is then best with sovereign power, when it is had in tacit veneration, not when it is profaned by public hearings or examinations.

Our last Argument is drawn from our duty and loyalty to his majesty, in consideration whereof, we are fearful at this time to take this Addition into our Petition, lest we should do his majesty herein some disservice: with your lordships, we make the great council of the king and kingdom; and though your lordships, having the happiness to be near his majesty, know other things better, yet certainly the state and condition of the several parts for which we serve, their dispositions and inclinations, their apprehensions, their fears and jealousies, are best known unto us. And here I pray your lordships to give me leave to use the figure called *Reticentia*, that is, to insinuate and intimate more than I mean to speak. Our chief and principal end in this parliament, is, to make up all rents and breaches between the king and his subjects, to draw them, and knit them together, from that distance, whereof the world abroad takes too much notice, to work a perfect union and reconciliation. How unproperly and unapt at this time this Addition will be in respect of this end, we cannot but foresee, and therefore shun it; and do resolve, that it is neither agreeable to the persons of such counsellors, of whom we are, nor answerable to that love and duty which we owe to his majesty, to hazard an end of such unspeakable consequence, upon the admittance of this Addition into our Petition, whereof, as we have shewed, the omission at this time can by no means harm the king's prerogative, the expression may produce manifold inconveniences. And therefore, since the admittance of your lordships Addition into our Petition is incoherent and incompatible with the body of the same; since there is no necessary use of it for the saving of the king's Prerogative; since the moderation of our Petition deserveth your lordships chearful conjunction with us; since this Addition is unseasonable for the time, and inconvenient in respect of the place where your lordships would have it inserted; and lastly, may prove a disservice to his majesty; I conclude with a most affectionate prayer to your lordships, to join with the house of commons, in presenting this Petition unto his sacred majesty, as it is, without this Addition.

Monday, 26th of May, the *Lord Keeper* made this Speech at a Conference.

Gentlemen; Ye that are knights, citizens and burgesses of the house of commons, I have many times this parliament, by command from my lords, declared the great zeal and affection which my lords have to maintain and nourish the good concurrence and correspondency which hath hitherto continued between both houses, that there might be a happy issue in this great business, for the common good of the king and kingdom. Now that which I have to say this day from my lords, is, to let you know, this fair proceeding is not a profession of words only, but really and indeed concerning the Petition, which hath been long in agitation, as the weight of the cause required. Since the last conference, my lords have taken it into their serious and instant consideration, and at length are fallen upon a resolution, which I am to acquaint you with.

The lords have unanimously agreed with you *in omnibus*, and have voted, that they will join with you in your Petition, with the only alteration of the word 'means' to be put instead of the word 'pretext;' and for the word 'unlawful' to be put out, and in place thereof to add 'not warrantable by the laws and statutes of the realm.' Which two alterations yourselves consented unto. So that concerning this business there remains nothing now, but that having the Petition in your hands, ye will, if ye have not already, vote it as they have done, and so prepare it for his majesty; and my lords will take order, that the king be moved for a speedy access to present the same to his majesty.

And, after some pause, he said, There rests one thing which my lords have commanded me to add, That in regard this Petition toucheth upon certain charges raised by the lords lieutenants, and other persons, many times for good use, for the service and safety of the kingdom; that ye take it into your care and consideration, and to provide a law for assessing of such charges, as the occasion of the time shall require.

The Lords and Commons being thus happily accorded, the Petition, with the aforesaid Amendments, was read in the house two several times together: then it was voted upon the question, and that it should be ingrossed, and read the third time, and the house to sit in the afternoon till it was ingrossed, and read, and ordered to be presented to the king; to which there was not a negative vote.

Wednesday, 28 May, the Lords and Com-

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mons had a Conference about the manner of delivery of the Petition; and sir Ed. Coke reported, that their lordships were agreed, That no addition or preface be used to the king, but that the Petition be preferred to his majesty by command of the lords and commons; and his majesty be desired, that to content his people, he would be pleased to give his gracious Answer in full parliament.

Monday, 2d June, the King came to the Parliament, and spake thus in brief to both Houses:

Gentlemen; I am come hither to perform my duty; I think no man can think it long, since I have not taken so many days in answering the Petition, as you spent weeks in framing it: and I am come hither to shew you, that as well in formal things as in essential, I desire to give you as much content as in me lies.

After this, the Lord Keeper spake as followeth:

My lords, and you the knights, citizens, and burgesses of the house of commons, his majesty hath commanded me to say unto you, that he takes it in good part, that in consideration of settling your own Liberties, you have generally professed in both houses, that you have no intention to lessen or diminish his majesty's prerogative; wherein as you have cleared your own intentions, so now his majesty comes to clear his, and to subscribe a firm league with his people, which is ever likely to be most constant and perpetual, when the conditions are equal, and known to be so: these cannot be in a more happy estate, than when your Liberties shall be an ornament and a strength to his majesty's Prerogative, and his Prerogative a defence of your Liberties; in this his majesty doubts not, but both he and you shall take a mutual comfort hereafter; and, for his part, he is resolved to give an example, in the using of his power for the preservation of your Liberties, that hereafter ye shall have no cause to complain. This is the sum of that which I am to say to you from his majesty: and that which farther remains, is, that you here read your own Petition, and his majesty's gracious Answer.

THE PETITION OF RIGHT.

The PETITION exhibited to his majesty by the lords spiritual and temporal, and commons in this present parliament assembled, concerning divers Rights and Liberties of the Subjects.

To the King's most excellent majesty.

I. "Humbly shew unto our sovereign lord the king, the lords spiritual and temporal, and commons in parliament assembled, that whereas it is declared and enacted by a statute made in the time of the reign of king Edward 1, commonly called, 'statutum de tallagio non concedendo *,' that no tallage or aid shall be laid or levied, by the king or his heirs, in this realm, without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other the freemen of the commonalty of this realm: and by authority of parliament holden in the 25th year of the reign of king Edward 3*, it is declared and enacted, That from thenceforth no person shall be compelled to make any Loans to the king against his will, because such Loans were against reason, and the franchise of the land; and by other †laws of this realm it is provided, that none should be charged by any charge or imposition, called a Benevolence, nor by such like charge; by which the statutes before-mentioned, and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge, not set by common consent in parliament.

II. "Yet nevertheless, of late, divers Commissions, directed to sundry commissioners in several counties, with instructions, have issued; by means whereof your people have been in divers places assembled, and required to lend certain sums of money unto your majesty, and many of them, upon their refusal so to do, have had an oath administered unto them, not warrantable by the laws or statutes of this realm, and have been constrained to become bound to make appearance, and give attendance before your privy-council, and in other places; and others of them have been therefore imprisoned, confined, and sundry other ways molested and disquieted. And divers other charges have have been laid and levied upon your people in several counties, by lords lieutenants, deputy lieutenants, commissioners for musters, justices of peace, and others, by command and direction from your majesty, or your privy-council, against the laws and free customs of this realm.

III. "And whereas also by the statute called ‡, 'The Great Charter of the Liberties of 'England,' it is declared and enacted, That no Freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

IV. "And in the 28th year of the reign of king Edward 3 §, it was declared and enacted by authority of parliament, That no man, of what estate or condition he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answer by due process of law.

V. "Nevertheless, against the tenor of the said statutes ||, and other the good laws and statutes of your realm, to that end provided,

* 34 Edw. 1.

* 25 Edw. 3, Rot. Parl.

† 1 Edw. 3, 6. 11 R. 2, 9. 1 R. 3, 2.

‡ 9 Hen. 3, 29. § 28 Edw. 3, 3.

|| 37 Edw. 3, 18. 38 Edw. 3, 9. 42 Edw. 3, 3. 17 Ric. 2, 6.

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divers of your subjects have of late been imprisoned, without any cause shewed; and when for their deliverance they were brought before your justices, by your majesty's Writs of Habeas Corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer; no cause was certified, but that they were detained by your majesty's special command, signified by the lords of your privy-council, and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to the law.

VI. "And whereas of late, great companies of Soldiers and Mariners have been dispersed into divers counties of the realm, and the inhabitants, against their wills, have been compelled to receive them into their houses, and there to suffer them to sojourn against the laws and customs of this realm, and to the great grievance and vexation of the people.

VII. "And whereas, also, by authority of parliament, in the 25th year of the reign of king Edw. 3, it is declared and enacted, That no man shall be fore-judged of life or limb against the form of the Great Charter and other the laws and statutes of this realm: and by the said Great Charter, and other the laws and statutes of this your realm, no man ought to be adjudged to death, but by the laws established in this your realm, either by the customs of the same realm, or by acts of parliament: and, whereas no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm: nevertheless, of late, divers commissions, under your majesty's great seal, have issued forth, by which, certain persons have been assigned and appointed commissioners with power and authority to proceed, within the land, according to the justice of martial law, against such soldiers and mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanor whatsoever; and by such summary course and orders as is agreeable to martial law, and is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death, according to the martial law.

VIII. "By pretext whereof some of your majesty's subjects have been, by some of the said commissioners, put to death; when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might and by no other ought to have been adjudged and executed.

IX. "And, also, sundry grievous offenders by colour thereof, claiming an exemption, have escaped the punishment due to them by the laws and statutes of this your realm, by reason that divers of your officers and ministers of justice have unjustly refused, or forborn to proceed against such offenders, according to the same laws and statutes, upon pretence that the said offenders were punishable only by martial law, and by authority of such commissions, as aforesaid; which commissions, and all others of like nature, are wholly and directly contrary to the said laws and statutes of this your realm.

X. "They do therefore humbly pray your most excellent majesty,* 1. That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament; 2. and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof: 3. and that no freeman in any such manner as is before mentioned, be imprisoned or detained.

XI. "All which they most humbly pray of your most excellent majesty, as their rights and liberties, according to the laws and statutes of this realm: and that your majesty would also vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people, in any of the premisses, shall not be drawn hereafter into consequence or example: and that your majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, that in the things aforesaid, all your officers and ministers shall serve you, according to the laws and statutes of this realm, as they tender the honour of your majesty, and the prosperity of this kingdom." [See Statutes at large, 3, 4 Car. 1.]

The King's ANSWER.

Which Petition being read the 2d of June, the king's Answer was thus delivered by the lord keeper:

"The king willeth that right be done according to the laws and customs of the realm; and that the statutes be put in due execution, that his subjects may have no cause to complain of any wrong or oppressions, contrary to their just Rights and Liberties: to the preservation whereof, he holds himself in conscience as well obliged, as of his prerogative."

On Tuesday, June 3, the king's Answer was read in the House of Commons, and seemed not full enough, in regard of so much expence of time and labour, as had been employed in contriving the Petition.

June 3. A Message was brought from the King by the Speaker,

"That his majesty having, upon the Petition exhibited by both houses, given an Answer full of justice and grace, for which we and our posterity have just cause to bless his majesty, it is now time to grow to a conclusion of the session; and therefore his majesty thinks fit to let you know, that as he doth resolve to abide by that Answer, without further change or alteration, so he will royally and really perform unto you what he hath thereby promised: and further, that he resolves to end this session upon Wednesday the 11th of this month. And therefore wisheth, that the house will seriously at-

* 25 Edw. 1, 6.

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tend those businesses, which may best bring the session to a happy conclusion, without entertaining new matters; and so husband the time, that his majesty may with the more comfort bring us speedily together again: at which time, if there be any further grievances not contained, or expressed in the Petition, they may be more maturely considered than the time will now permit."

Another Message was brought from his Majesty by the Speaker, Thursday 5th of June.

"His majesty wished them to remember the Message he last sent them, by which he set a day for the end of this session, and he commanded the Speaker to let them know, that he will certainly hold that day prefixed without alteration; and because that cannot be, if the house entertain more business of length, he requires them, that they enter not into, or proceed with any new business, which may spend greater time, or which may lay any scandal or aspersion upon the state-government or ministers thereof."

Sir *Robert Philips*, upon this occasion, expressed himself thus: I perceive, that towards God, and towards man, there is little hope, after our humble and careful endeavours, seeing our sins are many and so great: I consider my own infirmities, and if ever my passions were wrought upon, that now this message stirs me up especially; when I remember with what moderation we have proceeded, I cannot but wonder to see the miserable straight we are now in: what have we not done, to have merited? Former times have given wounds enough to the people's liberty, we came hither full of wounds, and we have cured what we could; and what is the return of all but misery and desolation? What did we aim at, but to have served his majesty, and to have done that which would have made him great and glorious? If this be a fault, then we are all criminous. What shall we do, since our humble purposes are thus prevented, which were not to have laid any aspersion on the government, since it tended to no other end, but to give his majesty true information of his and our danger? And to this we are enforced out of a necessity of duty to the king, our country, and to posterity; but we being stopped, and stopped in such manner, as we are enjoined, so we must now leave to be a council. I hear this with that grief, as the saddest message of the greatest loss in the world. But let us still be wise, be humble; let us make a fair declaration to the king.

Sir *John Elliot*. Our sins are so exceeding great, that unless we speedily return to God, God will remove himself further from us: ye know with what affection and integrity we have proceeded hitherto, to have gained his majesty's heart, and out of a necessity of our duty, were brought to that course we were in: I doubt, a misrepresentation to his majesty hath drawn this mark of his displeasure upon us: I observe in the Message, amongst other sad particulars, it is conceived, that we were about to lay some aspersions on the government; give me leave to protest, that so clear were our intentions, that we desire only to vindicate those dishonours to our king and country, &c. It is said also, as if we cast some aspersions on his majesty's ministers; I am confident no minister, how dear soever, can—

Here the Speaker started up from the seat of the chair, apprehending sir John Elliot intended to fall upon the Duke, and some of the ministers of state; and said, There is a command laid upon me, that I must command you not to proceed.—Whereupon sir John Elliot sate down.

Sir *Dudley Diggs*. I am as much grieved as ever. Must we not proceed? Let us sit in silence, we are miserable, we know not what to do.

Hereupon there was a silence in the house for a while, which was broken by sir Nathaniel Rich, in these words:

Sir *Nathaniel Rich*. We must now speak or for ever hold our peace; for us to be silent when king and kingdom are in this calamity, is not fit. The question is, Whether we shall secure ourselves by silence, yea or no? I know it is more for our own security, but it is not for the security of those for whom we serve; let us think on them: some instruments desire a change, we fear his majesty's safety, and the safety of the kingdom, I do not say we now see it; and shall we now sit still and do nothing, and so be scattered? Let us go together to the lords, and shew our dangers, that we may then go to the king together.

Others said, that the Speech lately spoken by sir John Elliot had given offence (as they feared) to his majesty.

Whereupon the House declared, 'That every 'member of the house is free from any undu- 'tiful Speech, from the beginning of the parlia- 'ment to that day;' and ordered, 'That the 'house be turned into a Committee to consider 'what is fit to be done for the safety of the 'kingdom; and that no man go out upon pain 'of going to the Tower.' But before the Speaker left the chair, he desired leave to go forth; and the house ordered that he may go forth, if he please. And the house was hereupon turned into a Grand Committee: Mr. Whitby in the chair.

Mr. *Wandesford*. I am full of grief as others, let us recollect our English hearts, and not sit still, but do our duties: two ways are propounded, to go to the lords, or to the king; I think it is fit we go to the king, for this doth concern our Liberties, and let us not fear to make a Remonstrance of our Rights; we are his counsellors. There are some men which call evil good, and good evil, and bitter sweet; justice is now called popularity and faction.

Sir *Edward Coke*. We have dealt with that duty and moderation that never was the like, *rebus sic stantibus*, after such a violation of the Liberties of the Subject: let us take this to heart. In 30 Ed. 3, were they then in doubt

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in parliament to name men that misled the king? They accused John de Gaunt, the king's son, and lord Latimer, and lord Nevil, for misadvising the king, and they went to the Tower for it; now when there is such a downfal of the state, shall we hold our tongues? How shall we answer our duties to God and men? 7 H. 4, Parl. Rot. n. 31, & 32, 11 H. 4, n. 13, there the Council are complained of, and are removed from the king; they mewed up the king, and dissuaded him from the common good; and why are we now retired from that way we were in? Why may we not name those that are the cause of all our evils? In 4 H. 3, & 27 E. 3, & 13 R. 2, the parliament moderated the king's prerogative; and nothing grows to abuse, but this house hath power to treat of it. What shall we do? Let us palliate no longer; if we do, God will not prosper us. I think the duke of Buckingham is the cause of all our miseries; and till the king be informed thereof, we shall never go out with honour, or sit with honour here: that man is the grievance of grievances: let us set down the causes of all our disasters, and all will reflect upon him. As for going to the lords, that is not *via regia*; our liberties are now impeached, we are concerned; it is not *via regia*, the lords are not participant with our liberties.

Mr. *Selden* advised, That a Declaration be drawn under four heads: 1. To express the house's dutiful carriage towards his majesty. 2. To tender their Liberties that are violated. 3. To present what the purpose of the house was to have dealt in. 4. That that great person, viz. the Duke, fearing himself to be questioned, did interpose and cause this distraction. All this time, (said he) we have cast a mantle on what was done last parliament; but now being driven again to look on that man, let us proceed, with that which was then well begun, and let the charge be renewed that was last parliament against him, to which he made an answer, but the particulars were sufficient, that we might demand judgment on that answer only.

In conclusion, the house agreed upon several Heads for a Remonstrance. But the Speaker, who after he had leave to go forth, went privately to the King, brought this Message:

"That his majesty commands for the present they adjourn the house till to-morrow morning, and that all committees cease in the mean time."—And the house was accordingly adjourned.

At the same time the king sent for the Lord-Keeper to attend him presently; the house of lords was adjourned *ad libitum*. The Lord-Keeper being returned, and the house resumed, his lordship signified his majesty's desire, that the house and all committees be adjourned till to-morrow morning.

Friday, 6th of June, Mr. Speaker brought another Message from the King, and said:—In my service to this house I have had many undeserved favours from you, which I shall ever with all humbleness acknowledge, but none can be greater than that testimony of your confidence yesterday shewed unto me, whereby I hope I have done nothing, or made any representation to his majesty, but what is for the honour and service of this house; and I will have my tongue cleave to my mouth, before I will speak to the disadvantage of any member thereof: I have now a Message to deliver unto you;

"Whereas his majesty understanding, that you did conceive his last Message to restrain you in your just privileges, these are to declare his intentions, That he had no meaning of barring you from what hath been your right, but only to avoid all scandals on his council and actions past, and that his ministers might not be, nor himself, under their names, taxed for their counsel unto his majesty, and that no such particulars should be taken in hand, as would ask a longer time of consideration than what he hath already prefixed, and still resolves to hold; that so, for this time, Christendom might take notice of a sweet parting between him and his people: which if it fall out, his majesty will not be long from another meeting, when such grievances, if there be any, at their leisure and convenience may be considered."

Mr. Speaker proceeded:

I will observe somewhat out of this Message; ye may observe a great inclination in his majesty to meet in this house. I was bold yesterday to take notice of that liberty ye gave me to go to his majesty: I know there are none here but did imagine whither I went, and but that I knew you were desirous and content that I should leave you, I would not have desired it: give me leave to say, This Message bars you not of your right in matter, nay, not in manner; but it reacheth to his counsels past, and for giving him counsel in those things which he commanded.

The House of Lords likewise received this Message by the Lord-Keeper.

"My Lords, his majesty takes notice, to your great advantage, of the proceedings of this house upon the hearing of his majesty's Message yesterday; he accounts it a fair respect, that ye would neither agree on any committee, or send any Message to his majesty, though it were in your own hearts, but yield yourselves to his majesty's Message, and defer your own resolutions till you meet again at the time appointed by his majesty. Yet his majesty takes it in extreme good part to hear what was in your heart, and especially that you were so sensible of the inconvenience that might ensue upon the breach of this parliament: which if it had happened or shall hereafter happen, his majesty assures himself, that he shall stand clear before God and men of the occasion.—But his majesty saith, Ye had just cause to be sensible of the danger of considering how the state of Christendom now stands in respect of the multitude and strength of our enemies, and weakness on our part. All which his majesty knows very exactly, and in respect thereof,

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called this parliament; the particulars his majesty holds it needless to recite, especially to your lordships, since they are apparent to all men: neither will it be needful to reiterate them to his majesty, whose cares are most attentive upon them, and the best remedy that can be thought on therein, is, if his subjects do their parts. Therefore his majesty gives you hearty thanks, and bid me tell you, that nothing hath been more acceptable to him all the time of this parliament, than this dutiful and discreet carriage of your lordships, which he professeth hath been a chief motive to his majesty, to suspend those intentions that were not far from a resolution."

Sir *Robert Philips* assumed the debate, upon the Message delivered by the Speaker, and said; I rise up with a disposition, somewhat in more hope of comfort than yesterday; yet, in regard of the uncertainty of counsels, I shall not change much. In the first place, I must be bold without flattering, a thing not incident to me, to tell you Mr. Speaker, you have not only at all times discharged the duty of a good Speaker, but of a good man; for which I render you many thanks.—Another respect touching his majesty's Answer to our Petition; first, if that answer fall out to be short, I free his majesty, and I believe his resolution was to give that which we all expected: but in that, as in others, we have suffered, by reason of interposed persons between his majesty and us. But this day is by intervenient accidents diverted from that, but so, as in time we go to his majesty; therefore let us remove those jealousies in his majesty of our proceedings, that by some men overgrown have been misrepresented. We have proceeded with temper, in confidence of his majesty's goodness to us, and our fidelity to him; and if any have construed, that what we have done hath been out of fear; let him know we came hither freemen, and will ever resolve to endure the worst; and they are poor men that make such interpretations of parliaments. In this way and method we proceeded, and if any thing fall out unhappily, it is not king Charles that advised himself, but king Charles misadvised by others, and misled by misordered counsel; it becomes us to consider what we were doing, and now to advise what is fit to be done. We were taking consideration of the state of the kingdom, and to present to his majesty the danger he and we are in, if since any man hath been named in particular, (though I love to speak of my betters with humility) let him thank himself and his counsels, but those necessary jealousies give us occasion to name him; I assure myself we shall proceed with temper, and give his majesty satisfaction, if we proceed in that way. His majesty's message is now explanatory in point of our liberties, that he intends not to bar us of our rights, and that he would not have any aspersion cast on the counsels past; let us present to his majesty shortly and faithfully, and declare our intentions, that we intend not to lay any aspersions upon him, but out of a necessity to prevent the imminent dangers we are surrounded with, and to present to him the affairs at home and abroad, and to desire his majesty, that no interposition or mis-information of men in fault may prevail, but to expect the issue that shall be full of duty and loyalty.

The Commons sent a Message to the Lords, that they would join in an humble request to the king, that a clear and satisfactory Answer be given by his majesty in full parliament to the Petition of Right; whereunto the lords did agree.

June 7, the King came to the Lords House, and the house of commons were sent for. And the Lord-Keeper presented the humble Petition of both houses, and said,

"May it please your most excellent majesty, the lords spiritual and temporal, and commons in parliament assembled, taking into consideration that the good intelligence between your majesty and your people doth much depend upon your majesty's Answer unto their Petition of Right formerly presented; with unanimous consent do now become most humble suitors unto your majesty, that you would be graciously pleased to give a clear and satisfactory Answer thereunto in full parliament."

Whereunto the King replied,

"The Answer I have already given you was made with so good deliberation, and approved by the judgments of so many wise men, that I could not have imagined but it should have given you full satisfaction; but to avoid all ambiguous interpretations, and to shew you that there is no doubleness in my meaning, I am willing to please you as well in words as in substance; read your Petition, and you shall have an Answer that I am sure will please you."

The Petition was read, and this Answer was returned:

Soit droit fait comme il est desiré par la Petition.
C. R.

"This I am sure (said his majesty) is full, yet no more than I granted you in my first Answer; for the meaning of that was to confirm all your Liberties, knowing, according to your own protestations, that you neither mean nor can hurt my Prerogative. And I assure you, my maxim is, that the people's Liberties strengthen the king's Prerogative, and the king's Prerogative is to defend the people's Liberties. You see how ready I have shewed myself to satisfy your demands, so that I have done my part; wherefore, if this parliament have not a happy conclusion, the sin is yours, I am free from it."

Whereupon the Commons returned to their own house with unspeakable joy, and resolved so to proceed as to express their thankfulness.

The King's Message to the Lower House by sir Humfrey May, 10th of June 1628.

His majesty is well pleased that your Petition of Right, and his Answer, be not only re-

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corded in both houses of parliament, but also in all the courts of Westminster; and that his pleasure is, it be put in print for his honour, and the content and the satisfaction of his people, and that you proceed cheerfully to settle businesses for the good and reformation of the commonwealth.

June 26. The Speaker being sent for to the king at Whitehall, came not into the house till about nine o'clock. And after prayers, the Remonstrance concerning Tunnage and Poundage being ingrossed, was a reading in the house; and while it was a reading, the king sent for the Speaker and the whole house, and the king made a Speech as followeth:

"It may seem strange, that I came so suddenly to end this session; before I give my assent to the bills. I will tell you the cause, though I must avow, that I owe the account of my actions to God alone. It is known to every one, that a while ago the house of commons gave me a Remonstrance; how acceptable, every man may judge; and for the merit of it, I will not call that in question, for I am sure no wise man can justify it.—Now, since I am truly informed that a second Remonstrance is preparing for me to take away the profit of my Tunnage and Poundage, one of the chief maintenances of my crown, by alledging I have given away my right thereto by my Answer to your Petition:—This is so prejudicial unto me, that I am forced to end this session some few hours before I meant, being not willing to receive any more Remonstrances, to which I must give a harsh Answer. And since I see, that even the house of commons begins already to make false constructions of what I granted in your Petition, lest it be worse interpreted in the country, I will now make a Declaration concerning the true intent thereof:—The profession of both houses in the time of hammering this Petition, was no way to trench upon my Prerogative, saying, they had neither intention or power to hurt it. Therefore it must needs be conceived, that I have granted no new, but only confirmed the antient Liberties of my Subjects. Yet to shew the clearness of my intentions, that I neither repent nor mean to recede from any thing I have promised you, I do here declare myself, That those things which have been done, whereby many have had some cause to suspect the Liberties of the Subjects to be trenched upon, which indeed was the first and true ground of the Petition, shall not hereafter be drawn into example for your prejudice; and from time to time, in the word of a king, ye shall not have the like cause to complain. But as for Tunnage and Poundage, it is a thing I cannot want, and was never intended by you to ask, nor meant by me, I am sure, to grant.—To conclude, I command you all that are here to take notice of what I have spoken at this time, to be the true intent and meaning of what I granted you in your Petition; but especially you, my lords the Judges, for to you only, under me, belongs the interpretation of laws: for none of the houses of parliament, either joint or separate, (what new doctrine soever may be raised) have any power either to make or declare a law without my consent."

Then the Lord Keeper said, It is his majesty's pleasure that this session now end, and that the parliament be prorogued till the 20th of October next.

In the following sessions, viz. Wednesday, January 21st, it was ordered that Mr. Selden and others should see if the Petition of Right and his majesty's Answer thereunto were inrolled in the Parliament Rolls, and the Courts at Westminster, as his majesty sent them word the last session they should be; and also in what manner they were entered; which was done accordingly, and Mr. Selden made report to the house, that his majesty's Speech made the last day of the session in the upper house is also entered by his majesty's command.—Hereupon Mr. Pym moved, that the debate hereof should be deferred till Tuesday next, by reason of the fewness of the house.

Sir *John Elliot*. This which is now mentioned, concerns the honour of the house, and the liberty of the kingdom; it is true, it deserves to be deferred till there be a full house, but it is good to prepare things. I find it is a great point; I desire a select Committee may enter into consideration thereof, and also how other Liberties of the kingdom be invaded. I find in the country the Petition of Right printed indeed, but with an Answer that never gave any satisfaction: I desire a committee may consider thereof, and present it to the house, and that the printer be sent for to give satisfaction to the house, by what warrant it was printed. Which was ordered.

Mr. *Selden*. For this Petition of Right, it is known how lately it hath been violated since our last meeting; the Liberties for life, person and freehold, how they have been invaded; and have not some been committed, contrary to that? Now we, knowing these invasions, must take notice of it. For Liberties, for State, we know of an order made in the Exchequer, that a sheriff was commanded not to execute a replevin, and men's goods are taken and must not be restored. Whereas no man ought to lose life, or limb, but by law; hath not one lately lost his ears (meaning Savage) that was censured in the Star-Chamber by an arbitrary sentence and judgment? Next, they will take away our arms, and then our lives. Let all see we are sensible of these customs creeping upon us: let us make a just presentation hereof to his majesty.

Norton the King's Printer was brought to the bar, and asked by what warrant the Additions to the Petition were printed? He answered, that there was a warrant (as he thought) from the king himself. And being asked whether there were not some copies printed without additions, he answered, there were some, but they were suppressed by warrant.

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Sir *John Elliot* desired some clearer satisfaction might be made, and that he might answer directly by what warrant.—Whereupon he was called in again: who said, he did not remember the particular, but sure he was there was a warrant.

Mr. *Selden* reported from the Committee concerning the printing of the Petition of Right, that there were printed 1500 without any Addition at all, which were published in the time of the last parliament: but since the parliament, other copies have been printed, and these suppress and made waste paper; which the Printer did, as he said, by command from Mr. Attorney, which he received from his majesty. And the Printer further said, That the Attorney was with the Lord Privy-Seal at Whitehall, and there delivered unto the Printer sundry papers, with divers hands to them, and on the backside was endorsed thus, 'We will 'and command you, that these Copies be 'printed.'

Which put an end to this Grand Affair.

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128. Case of WALTER LONG, esq. Sheriff of Wilts, and one of the Burgesses for Bath, for absenting himself from his Bailiwick to attend his duty in Parliament: 4 CHARLES I. A. D. 1629. [1 Rushworth, 684. 2 Cobb. Parl. Hist. 518.]

IN Hilary Term, 1629, the Case of Walter Long, esq. one of the imprisoned Gentlemen, came to hearing in the Star-Chamber, which was as followeth:

An Information was exhibited into the Star-Chamber, by sir Robert Heath, knight, his majesty's Attorney-General, plaintiff, against the said Walter Long, defendant, for a great and presumptuous Contempt against his majesty, for breach of duty and trust of his office, and for manifest and wilful breach of his oath taken as High Sheriff of the county of Wilts, and not residing and dwelling in his own person in the said county, according to the said oath; but being chosen one of the citizens for the city of Bath, in the county of Somerset, to serve for the said city in the last parliament, by colour thereof he remained at London or Westminster, during the time of that parliament by the space of three months and above, in neglect of his duty, and in manifest contempt of the laws of this kingdom: which cause was now, by his majesty's said Attorney-General, brought to hearing upon the defendant's own confession.

And upon opening the Answer, and reading the Examination of the said defendant, it appeared to this Court, 'That the said defend-'ant Long was by his now majesty made High 'Sheriff of the county of Wilts in or about 'November, in the third year of his majesty's 'reign, and received his patent of sheriffwick 'for the said county about ten days after; and 'that he took an oath before one of the masters 'of the Chancery, for the due execution of the 'said office of Sheriff of the said county.' In which oath, as appeared by the same there read in court, he did swear, That he would in his own person remain within his Bailiffwick during all the time of his Sheriffwick, unless he had the king's license to the contrary; and that at an election of citizens for the said city of Bath, the said defendant Long was chosen one of the citizens to serve for the said city of Bath in the parliament then summoned, to be holden and commence upon the 17th day of March in the said 3d year of his majesty's reign; and being so chosen, and returned by the Sheriff of the county of Somerset, notwithstanding his said oath taken to remain in his proper person, within his bailiffwick, unless he were licensed by his majesty, he the said defendant did make his personal appearance in the commons house of parliament, at the city of Westminster, in the county of Middlesex, and did, during the most part of the said parliament, continue in and about the city of London and Westminster, and did attend in the parliament as a citizen for the said city of Bath: during all which time he likewise was and continued High Sheriff for the said county of Wilts, and had no particular license from his majesty to the contrary. Upon consideration whereof, as also of the particular causes and reasons of the defendant's demurrer and plea formerly exhibited unto the said Information, the benefit whereof was by order of the court reserved unto the defendant to be debated and considered of at the hearing of this cause, and of divers other matters now urged for the defendant, both to have justified his the said defendant's attendance in parliament, and his not residence in person in the county whereof he was then Sheriff; and amongst other things, that it properly belonged to the house of parliament to judge of the justness or unjustness of the said election; and upon grave and mature consideration thereof, had and taken by the court, their lordships did not only conceive the said demurrer and plea, and other the arguments and reasons used by the defendant and his counsel to be of no weight or strength, but also to be in opposition and derogation of the jurisdiction of the court; the reasons moved and urged for the defendant's excuse or justification being clearly answered, and the charges of the Information made good by Mr. Attorney-General, and others of his majesty's counsel learned. And therefore the whole court were clear of opinion, and did so declare, 'That the said defendant, who at that 'time, as High Sheriff, had the custody and

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'charge of the county of Wilts committed unto 'him by his majesty, and had taken his oath 'according to the law to abide in his proper 'person within his bailiffwick during all the 'time of his sheriffwick as aforesaid, and whose 'trust and employment did require his personal 'attendance in the said county, had not only 'committed a great offence in violating the 'said oath so by him taken, but also a great 'misdemeanor in breach of the trust committed 'unto him by his majesty, and in contempt of 'his majesty's pleasure signified unto him by 'and under his highness's great seal, when he 'granted unto him the said office of sheriffwick 'aforesaid.'

For which said several great offences in breach of his said oath, neglect of the trust and duty of his office, and the great and high contempt of his majesty, their lordships did hold the same defendant worthy the sentence of the court; the rather, to the end that by this example the sheriffs of all other counties may be deterred from committing the like offences hereafter, and may take notice, that their personal residence and attendance is required within their bailiffwicks during the time of their sheriffwick. The court therefore thought fit, ordered, adjudged, and decreed, That the said Defendant should stand and be committed to the Prison of the Tower, there to remain during his majesty's pleasure, and also to pay a fine of 2,000 marks to his majesty's use; and further, make his humble submission and acknowledgment of his offence both in the court of Star-Chamber, and to his majesty, before his thence enlargement.

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129. Proceedings against WILLIAM STROUD, esq. WALTER LONG, esq. JOHN SELDEN, esq. and others, on an Habeas Corpus, in Banco Regis: 5 CHARLES I. A. D. 1629.*

ON February 23rd, the house of commons being upon the debate of the business of the Customers, who had seized Goods belonging to Mr. Rolls, a member of the house, dissolved themselves into a grand committee, and at last resolved, "That Mr. Rolls, a member of the house, ought to have privilege of person and goods; but the command of the king is so great, that they leave it to the house."

After which, the king's Message, in justification of the Farmers and Officers of the Customs, was taken into consideration; which occasioned warm debates, and the Speaker (Finch) being moved to put the question then proposed, refused to do it, and said, 'That he was otherwise 'commanded by the king.'

Then said Mr. *Selden*, Dare not you, Mr. Speaker, put the question when we command you? If you will not put it, we must sit still; thus we shall never be able to do any thing. They that come after you, may say, They have the king's command not to do it. We sit here by the command of the king under the Great Seal, and you are, by his majesty, sitting in this royal chair, before both houses, appointed for our Speaker: and now you refuse to perform your office.

Hereupon the house, in some heat, adjourned till Wednesday the 25th, when both houses, by his majesty's command, were adjourned until Monday the 2nd of March.

March 2. The commons met, and urged the Speaker to put the question; who said, 'I have 'a command from the king to adjourn till March 'the 10th; and put no question.' And endeavouring to go out of the Chair, was notwithstanding held by some members (the house foreseeing a dissolution) till a Protestation was published in the house; 1. "Against Popery and Arminianism. 2. Against Tunnage and Poundage not granted by parliament. 3. If any merchant yield or pay Tunnage and Poundage not granted by parliament, he should be reputed a betrayer of the liberties of England."

Hereupon the king sent for the Serjeant of the house; but he was detained, the door being locked: Then he sent the Gentleman Usher of the Lords house, with a Message; and he was refused admittance, till the said Votes were read. And then in much confusion the house was adjourned to the 10th of March. Nevertheless his majesty, by proclamation, dated the 2nd of March, declares the parliament to be dissolved. (Though the proclamation was not published till the 10th) and the day following, (the 3rd) warrants were directed from the council to Denzil Hollis, esq.; sir Miles Hobart, sir John Elliot, sir Peter Hayman, John Selden, William Coriton, Walter Long, William Stroud, Benjamin Valentine, esqrs.; commanding their personal appearance on the morrow. At which time, Mr. Hollis, sir John Elliot, Mr. Coriton, Mr. Valentine, appearing, and refusing to answer out of parliament what was said and done in parliament, were committed close prisoners to the Tower; and Warrants were given (the parliament being still in being) for the sealing up of the studies of Mr. Hollis, Mr. Selden, and sir John Elliot. But Mr. Long and Mr. Stroud not then, nor for some time after, appearing, a Proclamation issued forth for the apprehending of them.

The king purposing to proceed against the members of the house of commons, who were committed to prison by him in the Star Chamber, caused certain Questions to be proposed to the Judges upon the 25th of April. Whereupon all the Judges met at Serjeants-Inn by command from his majesty, where Mr. Attor-

* See Proceedings against Lord Fordwich, 16 C. 1. 1640.

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ney proposed certain Questions concerning the Offences of some of the parliament men committed to the Tower, and other prisons: At which time, one question was proposed and resolved, viz. 'That the statute of 4 H. 8, intitled, 'An Act concerning Richard Strode,' was 'a particular act of parliament, and extended 'only to Richard Strode, and to those persons 'that had joined with him to prefer a Bill to 'the house of commons concerning Tinners: 'And although the act be private, and extendeth to them alone, yet it was no more than all 'other parliament men, by privilege of the 'house, ought to have, viz. Freedom of speech 'concerning those matters debated in parliament by a parliamentary course.'

The rest of the Questions Mr. Attorney was wished to set down in writing against another day.

Upon Monday following, all the Judges met again, and then Mr. Attorney proposed these Questions:

1. Whether if any Subject hath received probable information of any Treason or treacherous attempt or intention against the king or state, that Subject ought not to make known to the king, or his majesty's commissioners, when thereunto he shall be required, what information he hath received, and the grounds thereof; to the end the king being truly informed, may prevent the danger? And if the said subject in such case shall refuse to be examined, or to answer the questions which shall be demanded of him for further inquiry and discovery of the truth, whether it be not a high contempt in him, punishable in the Star Chamber, as an offence against the general justice and government of the kingdom?

Sol. The resolution and answer of all the Justices, That it is an offence punishable as aforesaid, so that this do not concern himself, but another, nor draw him to danger of treason or contempt by his answer.

2. Whether it be a good answer or excuse, being thus interrogated, and refusing to answer, to say, That he was a parliament man when he received the information, and that he spake thereof in the parliament house: and therefore the parliament being now ended, he refused to answer to any such questions but in the parliament house, and not in any other place?

Sol. To this the Judges, by advice privately to Mr. Attorney, gave this Answer, That this excuse being in nature of a plea, and an error in judgment, was not punishable, until he were over-ruled in an orderly manner to make another answer; and whether the party were brought in *ore tenus*, or by information, for this plea he was not to be punished.

3. Whether a parliament man, committing an offence against the king or council not in a parliament way, might, after the parliament ended, be punished or not?

Sol. All the Judges, *una voce*, answered, he might, if he be not punished for it in parliament; for the parliament shall not give privilege to any 'contra morem parliamentarium,' to exceed the bounds and limits of his place and duty. And all agreed, That regularly he cannot be compelled out of parliament to answer things done in parliament in a parliamentary course; but it is otherwise where things are done exorbitantly, for those are not the acts of a court.

4. Whether if one parliament man alone shall resolve, or two or three shall covertly conspire to raise false slanders and rumours against the lords of the council and judges, not with intent to question them in a legal course, or in a parliamentary way, but to blast them, and to bring them to hatred of the people, and the government in contempt, be punishable in the Star Chamber after the parliament is ended?

Sol. The Judges resolve, That the same was punishable out of parliament, as an offence exorbitant committed in parliament, beyond the office, and besides the duty of a parliament man.

There was another question put by Mr. Attorney, viz.

Whether if a man in parliament, by way of digression, and not upon any occasion arising concerning the same in parliament, shall say, The Lords of the Council and the Judges had agreed to trample upon the Liberty of the Subject, and the Privileges of Parliament, he were punishable or not?

The Judges desired to be spared to make any Answer thereunto, because it concerned themselves in particular.*

* Nalson in his Collections, vol. 2. p. 374, says, There were several Questions proposed to the three Chief-Judges about matters in Parliament, to which they gave these answers; which being something different from what is above, are here inserted: *Quære* 1. Whether a Parliament-man, offending the king criminally or contemptuously in the parliament-house (and not then punished), may not be punished out of parliament? *Answer.* We conceive, that if a parliament-man, exceeding the privilege of parliament, do criminally or contemptuously offend the king in the parliament-house (and not there punished) may be punished out of parliament.—2. Whether the king, as he hath the power of calling and dissolving a Parliament, have not also an absolute power to cause it to be adjourned at his pleasure? *Ans.* We conceive, that the king hath the power of commanding of adjournments of parliaments, as well as of calling, proroguing and dissolving of parliaments: But for the manner thereof, or the more particular answer to this, and the next subsequent question, we refer ourselves to the precedents of both houses.—3. Whether, if the king do command an adjournment to be made, he hath not also power to command all further proceedings in parliament to cease at that time? 4. Whether it be not a high contempt in a member of the house, contrary to the king's express commandment, contemptuously to oppose the adjournment? *Ans.* The king's express commandment being signified for an adjournment, if any after that shall contemptuously oppose it, further, or otherwise than the privilege of the house will warrant; this we

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The next day Mr. Attorney put the Judges another case.

It is demanded of a parliament-man, being called *ore tenus*, before the court of Star-Chamber, being charged, that he did not submit himself to examination for such things as did concern the king and the government of the state, and were affirmed to be done by a third person, and not by himself; if he confesses his hand to that refusal, and make his excuse, and plead because he had privilege of parliament;

Whether the Court will not over-rule this Plea as erroneous, and that he ought to make a further answer?

Ans. It is the justest way for the king and the party not to proceed *ore tenus*, because it being a point in law, it is fit to hear counsel before it be over-ruled; and upon an *ore tenus*, by the rules of Star-Chamber, counsel ought not to be admitted; and that it would not be for the honour of the king, nor the safety of the subject, to proceed in that manner. [But the king dropped the Proceedings against them in the Star-Chamber.]

Pasch. 5 Car. upon an Habeas Corpus of this court to bring the body of William Stroud, esq. with the cause of his imprisonment, to the marshal of the King's-bench; it was returned in this manner:

'That Mr. William Stroud was committed 'under my custody by virtue of a certain War-'rant under the hands of twelve the lords of 'the privy-council of the king.' The tenour of 'which Warrant followeth in these words:

'You are to take knowledge, that it is his 'majesty's pleasure and commandment, that 'you take into your custody the body of Wil-'liam Stroud, esq.; and keep him close prisoner 'till you shall receive other order, either from 'his majesty, or this board: for so doing, this 'shall be your Warrant. Dated this 2d of 'April, 1629.' And the direction of the War-rant was, 'To the marshal of the King's-'bench, or his deputy.'

He is also detained in prison by virtue of a Warrant under his majesty's hand; the tenour of which Warrant followeth in these words:

C. R.; 'Whereas you have in your custody 'the body of William Stroud, esq. by Warrant 'of our lords of our privy-council, by our spe-'cial command, you are to take notice, that 'this commitment was for notable contempts by 'him committed against our self and our go-'vernment, and for stirring up sedition against 'us; for which you are to detain him in your 'custody, and to keep him close prisoner, 'until our pleasure be further known concern-'ing his deliverance. Given at Greenwich,

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conceive to be a great contempt.—5. Whether, if a few parliament-men do conspire together, to stir up ill affections in the people against the king, and the government, and to leave the parliament with such a loose, and by words or writings put it in execution, and this not punished in parliament, it be an offence punishable out of parliament? *Ans.* We conceive this offence to be punishable out of parliament.—6. Whether, if some parliament-men shall conspire together to publish papers containing false and scandalous rumours against the lords of the Privy-Council, or any one or more of them, not to the end to question them in a legal or parliamentary way, but to bring them into hatred of the people, and the government into contempt, and to make discord between the lords and commons; is not this an offence punishable out of parliament? *Ans.* We conceive this also to be an offence punishable out of parliament.—7. If two or three or more of the parliament shall conspire to defame the king's government, and to deter his subjects from obeying or assisting the king; of what nature this offence is? *Ans.* The nature and quality of this offence will be greater or lesser, as the circumstances shall fall out, upon the truth of the fact.—8. Can any privilege of the house warrant a tumultuous proceeding? *Ans.* We humbly conceive, that an earnest, though a disorderly and confused proceeding in such a multitude, may be called tumultuous, and yet the privilege of the house may warrant it.—We in all humbleness are willing to satisfy your majesty's command, but until the particulars of the fact do appear, we can give no direct Answers than before. And particularly as to the second Quære, about the king's power of adjourning as well as calling and dissolving of Parliaments, these following parliamentary precedents were given in. 4 Aprilis, 1 Jac. Sess. 1. Mr. Speaker pronounceth his majesty's pleasure of adjourning the house till the 11th of April (and it was so done.)—18 Dec. 1606. The lords by their messengers signified the king's pleasure, that the session should be adjourned till the 10th of Feb. following.—Upon this Message Mr. Speaker adjourned the house according to his majesty's said pleasure.—31 Martii 1607. The Speaker delivered the king's pleasure, that the house should be adjourned till Monday the 20th of April following.—20 Maii 1607. Mr. Speaker signified the king's pleasure about nine o'clock to adjourn the house till the 27th of the same month.—And the 27th of May, he being challenged for adjourning without the privity of the house, he excuseth it, and saith, as the house had power to adjourn themselves, so the king had a superior power, and by his command he did it.—30 Martii 1610. His majesty's pleasure to adjourn from Tuesday till Monday sevennight.—11 July. The king by commission adjourneth the lords house. Messengers sent to the commons. They send by messengers of their own to the lords, that they use to adjourn themselves. The commission is sent down, Mr. Speaker adjourneth the house till the 1st of August.—26 Febr. 4 Car. Mr. Speaker signifieth his majesty's pleasure, that the house be presently adjourned till Monday next, and in the mean time all committees and other proceedings to cease. And thereupon Mr. Speaker in the name of the house adjourned the same accordingly.

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'the 7th of May, 1629, in the 5th year of our 'reign.'

The direction being, 'To the marshal of our 'bench for the time being, et hæ sunt causæ 'captionis et detentionis prædicti Gulielmi 'Stroud.'

And upon another Habeas Corpus to the Marshal of the Houshold, to have the body of Walter Long, esq. in court, it was returned according as the return of Mr. Stroud was.

Mr. Ask, of the Inner-Temple, of counsel for Mr. Stroud; and Mr. Mason of Lincoln's-Inn, of counsel for Mr. Long; argued against the insufficiency of the Return.

Mr. *Ask*. That the Return was insufficient. The Return consists upon two Warrants, bearing several dates, which are the causes of the taking and detaining of the prisoner. For the first warrant, which is of the lords of the council, that is insufficient: because no cause is shewn of his commitment, which is expresly against the resolution of the parliament, and their Petition of Right, in the time of this king; which now is, to which he had likewise given his assent; so his taking by virtue of the said warrant is wrongful. And for the second warrant, it is insufficient also, and that notwithstanding it be the king's own; for the king himself cannot imprison any man, as our books are, to wit, 16 H. 6, F. Monstrance de faits. 1 H. 7, 4. Hussey reports it to be the opinion of Markham, in the time of Edw. 4, and Fortescue in his book, 'De laudibus Legum Angliæ,' c. 18. And the reason given, is, because no action of false imprisonment lies against the king, if the imprisonment be wrongful; and the king cannot be a wrong doer. The statute of Magna Charta is, That no freeman be imprisoned but by the law of the land. And it appears by these books, that it is against the law of the land that the king should imprison any one.

2. Admit that this be only a signification and notification given by the king himself, of the commitment of the prisoner; yet it seems that that signification is of no force, 1. Because the words are general and uncertain—'for no-'table contempts.'—There are in the law many contempts of several natures; there are contempts against the Common Law, against the Statute Law; contempts in words, gestures, or actions. And it appears not to the court of what nature these contempts were.—'Notable' —Every contempt which is made to the king is notable.—'Against our government'—Contempt which is committed in the Court of Record or Chancery, is a contempt against the government of the king, to wit, because they disobey the king when he commands them by his writs, Coke 8, 60, a. Beecher's Case. The last words of the Return are,—'For stirring up 'of sedition against us'—which words likewise are indefinite and general. I find not the word 'Sedition' in our books, but taken adjectively, as seditious books, seditious news, &c. In the Statute of the 1st and 2d Phil. and Mary, cap. 3, the words are, 'If any person shall be con-'victed,' &c. for speaking, &c. any false, sedi-'tious, or slanderous news, saying of tales of 'the queen, &c. he shall lose his ears, or pay '100*l*.' There the penalty imposed upon such sedition is but a fine. Coke 4. Lord Cromwel's Case, p. 13, where sedition is defined to be *seorsum itio*, when a man takes a course of his own, and there it is said, that the words —'maintain sedition against the queen's 'proceedings'—shall be expounded according to the coherence of all the words, and the intent of the parties. So that it is plain, that there is a sedition that is only fineable, and which is no cause of imprisonment without bail: And what the sedition is that is here intended, cannot be gathered out of the words, they are so general.—'Against us'—those words are redundant, for every sedition is against the king.

Upon the generality and incertainty of all the words in the Return, he put these Cases; 18 E. 3. A man was indicted, 'quia furatus 'est equum,' and doth not say, *felonicè*, and therefore ill. 29 Ass. 45. A man was indicted that he was 'communis latro,' and the indictment held vicious, because too general. So here the offences are returned generally. But there ought to be something individual, Coke 5, 57. Specot's case, 'quia schismaticus inve-'teratus,' is no good cause for the bishop to refuse a clerk, for it is too general, and there are schisms of divers kinds. 38 E. 3, 2. Because the clerk is *criminosus*, it is no good cause for the bishop to refuse him. 8 and 9 Eliz. Dy. 254. The bishop of N. refuseth one, because he was a haunter of taverns, &c. for which, and divers other crimes, he was unfit; held that the last words are too general and incertain. 40 E. 3, 6. In the tender of a marriage, and refusal of the heir, he ought to alledge a certain cause of refusal, whereupon issue may be taken. Coke 8, 68. Trollop's case, to say, That the plaintiff is excommunicated for divers contumacies, shall not disable him, without shewing some cause in special of the excommunication, upon which the court may judge whether it were just or no: so here. And he concluded with a Case that was resolved, Hill. 33 Eliz. Peak and Paul the defendants said of the plaintiff, Thou art a mutinous and seditious man, and maintainest sedition against the queen; and the words adjudged not actionable.

Mr. *Mason* (afterwards recorder of London) moved also, that the Return was insufficient. For the first Warrant, That he was committed by command of the king, signified by the privy-council, I will not argue that, because it was claimed as an ancient right pertaining to the subject in the Petition of Right, whereto the king himself hath given his consent. For the second Warrant, the Return is,——'for stirr-'ing up sedition against us and our govern-'ment.' Sedition is not any determined offence within our law; our law gives definitions or descriptions of other offences, to wit, of treason, murder, felony, &c. but there is no crime in our law called Sedition. It is defined by a civilian to be 'Seditio,' or 'Secessio, cum

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'pars reipublicæ contra partem insurgit;' so that sedition is nothing but division. Bracton and Glanvile have the word Seditio generally. Before the statute of 25 E. 3, cap. 2, it was not clear enough what thing was Treason, what not; by which statute it is declared what shall be called Treason, and that the Judges shall not declare any thing to be Treason, that is not contained within the said statute, but it shall be declared only by parliament. And that statute speaks not of sedition, nor the statute of 1 H. 4, c. 10, which makes some things treason, which are not contained with the said statute of 25 E. 3. The statute of 1 E. 6, c. 12, takes away all intervenient statutes, which declared new treasons; and the said act declares other things to be treason, but mentions not sedition. Sedition is the quality of an offence, and is oftentimes taken adverbially, or adjectively. To raise tumults or trespasses is sedition, Trin. 21 E. 3, rot. 23, B. R. Garbart's case; a man was indicted, because in the high-street he took J. S. there being in hostile manner, and usurped over him royal power, which is manifest sedition; and there it was but an indictment of trespass. Mich. 20 E. 1, rot. 27. One that was surveyor of the wood-work for the king, was indicted for stealing of timber, and detaining wages (ridding carpenters wages) by one that was but a boy; and this is there termed sedition, and yet it was but a petty felony. Mich. 42 E. 3, rot. 65. B. R. R. Pope was appealed by the wife of J. S. because he feloniously and seditiously murdered J. S. and 'seditiously' was there put in, because it was done privily. By which cases it appears, that Sedition is not taken as a substantive, so that it may be applied to treason, trespass, or other offences. By the statute of 2 H. 4, c. 15, there is a punishment inflicted for the raising of seditious doctrine, and yet no punishment could have been inflicted for it until the said statute; and yet it was seditious, as well before the said statute as after. And this appears also by the statute of 1st and 2d of Philip and Mary, c. 3, which hath been cited. The statute 13 Eliz. c. 2. recites, that divers seditious and evil-disposed persons, &c. obtained bulls of reconciliation from the pope, which offence was made treason by the said statute, (for it was not before, and yet there was sedition) and by the said statute, the aiders and abettors are but in the case of Premunire. By the statute of 13 Eliz. c. 1, for the avoiding of contentious and seditious titles to the crown, it is enacted by the said statute, That he that shall declare the successor of the king, shall forfeit the moiety of his goods, &c. so that the said offence, although it be seditious, is not treason by the common law, nor is it made treason by the statute of 25 E. 3, nor by the statute of 13 Eliz. By the statute of 23 Eliz. c. 2, he that speaks seditious or slanderous news of the queen shall lose his ears, or pay 200*l.* and the second offence is made felony. The statute of 35 Eliz. c. 1. is against seditious sectaries, which absent themselves from the church; they are to be punished 10*l.* by the month. Out of all which statutes it may be collected, that the word 'sedition' is taken variously, according to the subject in hand. And Coke 4, 13. Lord Cromwel's case, 'seditious' is referred to doctrine. There are offences more high in their nature than sedition, which were not treason, unless so declared by act of parliament. Every rebellious act is sedition, yet if such acts be not within the statute of 25 E. 3, they are not treason. 17 R. 2, c. 8, insurrection of villeins and others is made treason; which proves, that before this act it was not treason. And this act of 17 R. 2, is repealed by the statute of 1 H. 4. By the statute of 3 and 4 E. 6, c. 5, to assemble people to alter the laws, is made treason, if they continue together an hour after proclamation made. This assembly of people was sedition at the common law; and the very assembly, if they after dissolve upon proclamation made, is not treason by the said statute. By the statute of 14 Eliz. c. 1. it is made felony, maliciously and rebelliously to hold from the queen any castles, &c. but because this relates not to the statute of 25 E. 3, it is not treason. 2. It seems clearly, that this case is within the Petition of Right, in which Magna Charta, and the statutes of 25 and 28 E. 3, are recited. The grievance there was, that divers have been imprisoned without any cause shewed, to which they might make answer according to the law. And upon this return, nothing appears to be objected to which he might answer. It appears not what that act, which is called Sedition, was. This is the very grief intended to be remedied by this statute; to this he cannot answer according to law. It appears not whether this were a seditious act, trespass, or slander, or what it was at all. The words are, 'Sedition against the king;' this helps not, for every offence is against the king, against his crown and dignity; that which disturbs the commonwealth is against the king; seditious doctrine is sedition against the king, as is beforesaid. In 28 H. 6, *vide prostrat.* fol. 19. the lords and commons desire the king, that William de la Pool may be committed for divers treasons, and sundry other heinous crimes; and the petition held not good, because too general: whereupon they exhibit particular Articles against him.—And therefore upon the whole matter, prayed, that Mr. Long might be discharged from his imprisonment.

On another day, Berkley and Davenport, the king's Serjeants, argued for the king, that this Return was sufficient in law to detain them in prison.

Berkley began, and said, That the case is new, and of great weight and consequence; and yet, under favour, the prerogative of the king, and the liberty of the subject, are not mainly touched therein; for the case is not so general as it hath been made, but particular upon this particular return. The Liberty of the Subject is a tender point, the right whereof is great, just, and inviolable. The Prerogative

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of the King is an high point, to which every subject ought to submit. I intend not to make any discourse of the one or the other, I will only remember what the king hath determined upon them both, in his speech which he made upon the Petition of Right; to wit, that the people's Liberties strengthen the king's Prerogative, and that the king's Prerogative is to defend the people's Liberties. This may settle the hearts of the people concerning their liberty. The way which I intend to treat in my argument, is, to answer the Objections and Reasons which have been made, and to give some Reasons, whereby this return shall be sufficient.

The Objections which have been made are reducible to four heads: 1. By what the prisoner here shall be said to be committed and detained. 2. That this commitment is against the Petition of Right. 3. That the cause which is here returned is general and incertain. 4. That the offences mentioned in the Return are but fineable; and therefore, notwithstanding them, the party is bailable.

For the first, it hath been objected, That the commitment here was by the lords of the privy-council, and the signification of this cause is by the king himself. But I say, that there is a further matter in the return; for the lords of the council do it by the command of the king, and they only pursue this command. I will not dispute whether the Lords of the Council have power to commit an offender or no, it is common in experience, 33 H. 6, 28. Poigne's Case is express in it. And in the Petition of Right it is admitted, that they may commit. And this is not alledged there for a grievance, but the grievance there was, because the particular charge of commitment was not shewed. Some books have been objected to prove, that the king, though in person, cannot commit any person; 16 H. 6, F. Monstrance de faits 182. But the authority of that book vanisheth, if the case be put at large, which was in trespass for cutting of trees. The defendant said, That the place where, &c. is parcel of the manor of D. whereof the king is seized in fee, and the king commands us to cut. And the opinion of the court was, that this is no plea, without shewing a speciality of the command of the king. And there the whole court says, That if the king command me to arrest a man, whereby I arrest him, he shall have trespass or imprisonment against me, although it be done in the presence of the king. That the following words are to be understood, that the principal case was of one command of the king by word, and then such command by word to arrest a man is void. And 1 H. 7, 4. was objected; Hussey says, that Markham said to king Edw. 4, that he cannot arrest a man for suspicion of treason or felony, because if he do wrong, the party cannot have his action. To this I say, That the book there is to be understood of a wrongful arrest, for there it is spoken of an action of false imprisonment; and a wrongful arrest cannot be made by the king.

2. It stands not with the dignity of the king to arrest any man. Coke, 4. 73. The king makes a lease for years, rendering rent, with condition of re-entry for non-payment; he shall take advantage of the condition without any demand; and the reason there given, is, that a decorum and conveniency might be observed. So it is not befitting for the king in person to arrest any man, but the king may command another to do it. Bracton, lib. 2. 'De acquirendo rerum dominio,' fol. 55. says, That the crown of the king is to do justice and judgment, and *facere pacem*, without which the crown itself cannot subsist. Several constructions are to be made upon those several words; and the last words 'facere pacem' imply, that the king hath a coercive power. Britton f. 1. amongst the Errata. The king said, Because we are not sufficient in person to do every thing, we divide the charge into many parts. We are the people's justice, and a justice implies one that hath power to do justice in every kind, to wit, by imprisonment, or otherwise, 20 H. 7, 7 Coke 11, 85. it is said, That the king is the Chief-Justice. And Lambert, in his Justice of Peace, fol. 3. says, That in ancient histories, the Chief-Justice of England is called 'Capitalis Justiciarius et Prima Justicia,' after the king in England. So that the king hath the same power of justice, as he chief-justice had. This imprisonment here, which is before conviction for any offence, is not used toward the subject as imprisonment for any fault, but is rather an arrest or restraint to avoid further inconveniences, 14 H. 7, 8. A justice of peace may arrest men riotously assembled, for prevention of further mischief. And the Book also says, That he may leave his servants there to arrest men, for safeguard of the peace. It is a case well known, that if a house be set on fire, every man may pull down the next house, for prevention of a greater mischief; so it seems concerning the incendiaries of state, they ought to be restrained and supprest, lest others should be stirred up by them to the same combustion, 22. Ass. 56. and 22 E. 4, 45. in false imprisonment the defendant justifies, because the plaintiff was mad and out of his wits, and that he had done some harm, and that he had bound and beat him to avoid further harm, which might have happened by his madness; and the justification was held good. So is it in matter of government; to avoid commotions, the king ought to use his coercive power against those that are enraged. The objection was, that this course was against the Petition of Right. But I answer, That this case is out of the words of that Petition; the words of the Petition were "Whereas by the statute called the Great Charter, and by the statute of 28 E. 3, no freeman may be taken or imprisoned;—yet against the tenour of the said statute, &c. divers of your subjects have of late been imprisoned, without any cause shewed; and when for their deliverance, &c. they were brought before the justices by writs of Habeas Corpus, there to undergo and receive as the court should order, and their keepers commanded to certify

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the cause of their detainer, and no cause was certified, but that they were detained by your majesty's special command, signified by the lords of your council; and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to law." These last words are observable, 'without being charged with any thing 'to which they might make answer;' these words do not refer to the return of the Habeas Corpus; for the cause returned therein cannot be traversed, 9 H. 6, 54. but the court took it as true. But the setting forth of the cause, and the answer to the same cause, is to be upon other proceedings, to wit, upon the indictment for the offence, or otherwise. And there is a great difference between the return of a writ to which a man may answer, and the return of an Habeas Corpus, 10 E. 4, and 3 H. 7, 11. are, that if the sheriff return *Rescous*, all certainties of every circumstance ought to be shewed; because it is fitting, that a thing certain be brought into judgment. And upon shewing of the grievance, as above, the petition is, that no freeman, in any such manner as before is mentioned be imprisoned or detained; such, and it hath relation to such imprisonment, which is mentioned in the premises. And imprisonment mentioned in the premises of the petition, is, where no cause at all was mentioned; then where any cause is shewed, is out of the petition, and that such is the word relative, appears by Coke 11. 62. where many cases are put to the same purpose, which see.

The third Objection was, That the Return was general and uncertain. The counsel on the other side had divided the words of the return, but that is to offer violence thereto; for an exposition shall not be made by fractions, but upon the whole matter. For the first words,—'notable contempts'—it hath been said, that the addition of the word notable is but to make a flourish: But I say, That *notable* is not the emphasis of the return, but it only expresseth the nature of the offence; and yet 'notable' is a word observable by itself in the law, and implies, that the thing is known and noted. By 27 E. 1, sheriffs shall be punished, that let notorious offenders to bail; and by the statute of 4 H. 4, cap. 3. a notorious or common thief shall not make his purgation: and 26 E. 3, 71. in a trespass for false imprisonment, the defendant said, That the plaintiff came into the town of Huntington, and because he was seen in the company of R. de Thorby, who was a notorious thief, he, as bailiff of Huntington, took him upon suspicion. I confess, that —'for contempts'— is general, yea, it is *genus generalissimum*, and within the Petition of Right; but the words are,——'against our-'self.' It hath been said, that this might be by irreverent words or gestures.——'And our 'Government'——it hath been said, that this might be by contempt to the king's writ, or by *Retraxit*, as Beecher's case is. To this I answer, that those words which are spoken to one purpose, ought not to be wrested to another; and this is against the common meaning of the words. Coke 4. Thou art a murderer, the defendant shall not afterwards explain it to be a murderer of hares, for the highest murder is intended. So here, the highest government is intended.

4. It hath been objected that——'for stir-'ring up of sedition against us'——may perhaps be but an offence fineable: but those words joined with the former words, shew this to be an offence of the highest nature; sedition is a special contempt. And although sedition in itself may be but a general offence, yet here it is,——'sedition against us and our govern-'ment'——which makes it particular. It hath been confessed by one, that argued on the other side, that there is a general in a particular. Coke 4. p. 75. Holland's case, there is the most general, and there is a general in particular, as the state ecclesiastical. Thirdly, There is more particular, as the colleges, deans, and chapters. This being in a case of return upon Habeas Corpus, no precise certainty is required. In an indictment, a certainty of all circumstances is requisite; in pleading, a certainty is required; in counts, a more precise certainty; in bars, a certainty to a common intent is enough. There is not such precise certainty required here as in indictment or count, because the party ought to answer unto them; nor so much certainty required in this as in a bar. And the return is not incertain; for, as it is said in Plowden 202. and 193. a thing is incertain, where it may be taken indifferently one way or the other. But where the intendment the one way exceeds the intendment the other way, it is not uncertain, as it is here. The words are,——'for notable 'contempts against us and our Government, 'and for stirring up of sedition against us.'—— Here is a certainty of intendment one way. There are many writs which are more uncertain than this return here is, and yet good. The Writ concerning the taking of an Apostate is general, 'quod spreto habitu ordinis;' and yet there are more sorts of apostacies. In the writ concerning the amoving of a leper, the words are general, and yet it appears by F. N. B. that there are two kinds of lepers, one outward, and the other inward; and for the latter, the writ concerning amoving a leper. So the writs concerning the burning of an heretic, and concerning the burning of an ideot, are general; and yet there are sundry kinds of heretics and ideots also. But it hath been objected, that Sedition is not a law-term, nor known in the law, of which the judges can take no notice; but the words to express offences of this nature, are murder, treason, felony, &c. and that no indictment of sedition generally was ever seen. To this I answer, perhaps it is true, that no indictment was ever seen made, because the form of an indictment is precise; words of art are required therein, as appears in Dyer 69, 261. Coke 4. p. 39. Vaux's case; yet in 5 E. 6, Dyer 69. it is said, that *furatus* implies *felonice cepit*, although the contrary hath been objected. In a return, words by periphrasis are sufficient.

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The warrant of a justice of peace to apprehend J. S. because of prepense malice, *interfecit* J. D. is good enough, although there wants the word *murdravit*. In 5 R. 2. F. Trial 54. Belknap says, That a miscreant shall forfeit his land. Out of which it may be gathered, that a man may be indicted for miscreancy. And it seems likewise, that an indictment of sedition may be good, for in some cases it is treason. I agree, Peake's case, which hath been objected, that for these words 'seditious fellow' no action lies, and so is Coke 4. 19. because those words do not import an act to be done, but only an inclination to do it; but if a man say such words of another, which import that he hath made sedition, they are actionable, as it was resolved in Phillips's and Badby's case, 24 Eliz. Coke 4. 19 'Thou hast made a seditious Ser-'mon, and moved the people to sedition this 'day,' adjudged actionable. So in the lord Cromwel's, Coke 4. 12, 13. the action would have lain for those words, 'You like of those 'that maintain sedition against the queen's pro-'ceedings,' if there had not been another matter in the case. I agree, the case of 21 E. 3. Sir John Garbyol's case, and 42 E. 3, for in those cases, sedition was only taken adjectively, and shews an inclination only to do a seditious act; and in such sense, sedition may be applied to other offences than treason. In 31 E. 1. f. Gard. 157. Gardein in Socage made feoffment of land which he had in ward, this is forfeiture, says the book, for the treason which he did to the ward; so there, one thing is called treason, which is only a breach of trust. In an appeal of Mayhem, it is *felonicè*, and yet 6 H. 7. 1. it is not felony; but felony is there only put to express the heinousness of the offence; it is, as it were, a felony. The statute of 2 H. 4. 1 Mar. 13 Eliz. 35 Eliz. 17 R. 2. 3 & 4 E. 6. 14 Eliz. which have been objected, have the word sedition, but not applicable to this case. Bracton in his book *de Corona*, says, 'si quis,' &c. If any by rash attempt, plotting the king's death, should act, or cause any to act, to the sedition of the lord the king, or of his army, it is treason. And Glanvile, in as many words, says, That to do any thing in sedition of the kingdom, or of the army, is high-treason. And Britton, fol. 16. it is high-treason to disinherit the king of the realm, and sedition tendeth to the disinheritance of the king; for, as it hath been said, 'Seditio est quasi seorsum itio,' when the people are severed from the king: or it is, 'Separans à ditione,' when the people are severed from the power of the king. And in this sense sedition is no stranger in our law; and such sedition which severs the people from the king, is treason.

But it hath been objected, That by the statute of 25 E. 3, the parliament ought only to determine what is treason, what not. To this I answer, That upon the said statute, the positive law had always made explication and exposition. Br. Treason 24, the words are 'Compass 'or imagine the death of the king;' and there it is taken, that he that maliciously deviseth how the king may come to death, by words or otherwise, and does not act to explain it: as, in assaying harness, this is treason. 13 El. Dy. 298. Doctor Story's case, he being beyond sea, practised with a foreign prince to invade the realm, and held treason, because invasion is to the peril of the prince, and so within the statute of 24 E. 3, Mar. Dy. 144. The taking of the castle of Scarborough was treason in Stafford, by 30 Ass. p. 19, which was presently after the making of the statute of 25 E. 3. A man ought to have been hanged and drawn, that brought letters of excommengement from the pope, and published them in England; and it is to be noted, that at the same time there was no statute to make it treason, but upon construction of the said statute of 25 E. 3, though now it be made treason by the statute of 13 Eliz. if it be with intention to advance foreign power. Perhaps the sedition mentioned in this return is high treason; and yet the king may make it an offence finable, for he may prosecute the offender in what course he pleaseth; and if it be treason, then the prisoners are not bailable by the statute of Westminster. But, suppose that it is but a finable offence, yet by the said statute, those who are imprisoned for open and notorious naughtiness, shall not be bailed; the same naughtiness is there intended high and exorbitant offence.

2. It is fit to restrain the prisoners of their liberty, that the common-wealth be not damnified. It is lawful to pull down a house to prevent the spreading mischief of fire; it is lawful to restrain a furious man. And by the 14 H. 7, a justice of peace may restrain a rout. Then the restraint of dangerous men in the common-wealth is justifiable and necessary. 24 E. 3, 38. p. 25. sir Thomas Figet went armed in the palace, which was shewed to the king's council: wherefore he was taken and disarmed before the chief-justice, and committed to the prison, and he could not be bailed till the king sent his pleasure; and yet it was shewed, that the lord of T. threatened him. Out of which case I observe two things: 1. That the judge of this court did cause a man to be apprehended, upon complaint made to the council, that is, to the lords of the privy-council. 2. That although he did nothing, he is not mainpernable until the king sent his pleasure, because he was armed and furiously disposed. So here. Wherefore I pray, that the prisoners may be sent back again.

Davenport argued to the same intent and purpose, and therefore I will report his argument briefly.

1. He said, That the return here is sufficient. The counsel on the other side have made fractions of this return, and divided it into several parts, whereas the genuine construction ought to have been made upon the entire return; for no violence ought to be offered to the text. 7 E. 4, 20. In false imprisonment, the defendant did justify, and alledged several reasons of his justification; to wit, because a man was killed,

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and that this was in the county of S. and that the common voice and fame was that the plaintiff was culpable. And this was held a good plea, although Bryan did there object, That the plea was double or treble; and the reason was, because twenty causes of suspicion make but one entire cause; and indivisible unity in this ought not to be divided: so Coke 8, 66. Crogate's case. In an action of trespass, the defendant justifies for several causes, and held good, because upon the matter, all of them make but one cause. Coke 8. 1. 17, It is said, That it is an unjust thing, unless the whole law be looked into, to judge and answer, by propounding any one particular thereof; and if it be unjust in the exposition of a law, it is uncivil in a return to make fractions of it; in the construction thereof especially, it being a return for information, and not for accusation.

2. Although the counsel on the other side have taken this case to be within the Petition of Right, yet this is *Petitio principii*, to take that for granted which is the question in debate. He said, That he would not offer violence to the Petition of Right, to which the king had assented, and which shall really be performed. But the question here is, whether this return be within it? And the Judges are keepers, not masters of this pledge; and it seems, that this return is out of the letter and meaning of the said statute.

3. He said, That this was the actual commitment of the lords of the privy-council, and the habitual or virtual commitment of the king. [But because upon these two matters he put no case, nor gave any reason, but what had been put or given in the argument of the grand Habeas Corpus, Mich. 3 Caroli, and afterwards in the house of commons, (vide page 59, &c. ante) which was reported to the lords in the painted chamber, I have here omitted them.] And for the great respect which the law gives to the commands of the king, he put these cases: 7 H. 3, attachment of waste against the tenant in dower, and the waste was assigned in the taking of fish out of a pond, and the carrying them away. And the defendant pleaded, That her second husband, by the command of the lord the king, took all the fish out of the said pond to the use of the lord the king, and held a good justification; which proves, that the command of the king there to her husband, excused her of the said waste. And yet it is clear, that a tenant in dower is liable to an action of waste, for waste done in the time of her second husband: but contrary is it, where a woman is tenant for life, and took a husband, who made waste and died, no action lies against the wife for that waste. And F. N. B. 17 A. If the tenant is *præcipi* at the *grand cape* makes default, the king may send a writ to the justices, rehearsing that he was in his service, &c. commanding them, that that default be not prejudicial to him; and this command of the king excuseth his default, be the cause true or no.

4. For the particulars of the return, it is—'for notable contempts against the government;'—but as to that, it hath been said, that the king hath sundry governments, to wit, ecclesiastical, political, &c. and it is not shewn against which of them. This is but a cavilling exception; they might as well have excepted to this return, because it is not shewn, that these contempts were after the last general pardon; that had been a better exception. The last words of the return are,—'raising sedition against us;'—but as to this, it has been said, that *seditio* is not a word known in the law, and is always taken either adverbially, or adjectively, and is not a substantive. To this he said, that although it is not a substantive for the preservation, yet it is a substantive for the destruction of a kingdom. And he said, that he found the word *seditio* in the law, and the consequent of it likewise, which is *seductio populi*. But it is not ever found to be taken in a good sense, it is always ranked and coupled with treason, rebellion, insurrection, or such like, as it appears by all those statutes which have been remembered on the other side. Therefore he prayed that the Prisoners might be sent back.

Trin. 5 Car. I. B. R.

The first day of the Term, upon Habeas Corpus to sir Allen Apsley, the Lieutenant of the Tower, to bring here the body of John Selden, esq. with the cause of detention; he returned the same cause as in Mr. Stroud's case: and Mr. Littleton (afterwards sir Edward, and Chief Justice of the Common Pleas, and Keeper of the Great Seal) of counsel with him moved, That the Return was insufficient in substance; therefore he prayed that he might be bailed. It is true, that it is of great consequence, both to the crown of the king, and to the Liberty of the Subject. But, under favour, for the difficulty of law contained in it, the case cannot be called grand. In my argument, I will offer nothing to the court, but that which I have seen with these eyes, and that which in my understanding (which is much subject to mistakes) can receive no sufficient answer.

I will divide my argument into four several Heads:

1. To point out those matters which I think unnecessary, and not conducible to the matter in question.

2. I will consider the Warrant of the Privy Council in this case.

3. The Warrant of the king himself.

4. The Objections which have been made by the contrary side, the strength of them, and give answer to them.

For the first of these heads, 1. I will admit, that the king may commit a man. 2. That a man committed by the king is not replevisable by the sheriff, but he is bailable by this court, notwithstanding the statute of Westm. 1, c. 15. And that he shall not be bailable, is against the Petition of Right; I will not dispute it, for it is established by the Answer of the king to the said Petition. And the arguments made to this purpose in the said parliament, and in the Painted Chamber before both the houses, are recorded

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in parliament, to which every one may resort. But I will lay as a ground of my following argument, that as offences are of two natures, capital, or as trespasses; so they are punished in two manners, to wit, capitally, or by fine, or imprisonment. For the offences of the first nature, as Treasons, and the like, imprisonment is imposed upon the offender, only for custody; but for misdemeanors of the second nature, imprisonment is imposed upon him for a punishment. Then this is my ground, That no Freeman that is imprisoned, only for misdemeanors before conviction, may be detained in prison without bail, if it be offered, unless it be in some particular cases, in which the contrary is ordained by any particular statute.

2. For the Warrant of the Privy Council, which signifies the pleasure of the king to commit the prisoner; perhaps this was a good ground of the commitment, but it is no ground for the detaining of the prisoner without bail; and this the king himself hath acknowledged, as the ancient right of the subject, in the Petition of Right; wherefore it is not now to be disputed.

3. For the Warrant of the king, as it is certified by this Return, there is not any sufficient cause contained within it, for the detaining of the prisoner in prison; for the law being, as I have declared above, that for a misdemeanor before conviction, no freeman may be imprisoned before conviction, without bail or mainprize, the sole question now is, if this return contain within it any capital offence; or if only a trespass or misdemeanor, and then the party is bailable: and for the disquisition hereof, I will consider the Return, 1. As it is divided in several parts: 2. I will consider all those parts of it together. 1. As it is severed in parts. The first part of it, 'for notable contempts by 'him committed against ourself and our govern-'ment.' For 'contempts,' all contempts are against the king, mediately, or immediately, and against his government. 'Notable,' this is all one with notorious and manifest, as appears by the statute of Westm. 1, c. 15, and 26 E. 3, 71, which hath been remembered. And 'notable' is but an emphatical expression of the nature of the thing, and alters it not. 'Against us,' all riots, routs, batteries, and trespasses, are against us, and against our crown and dignity; contempt against our court of justice is a contempt against us. But if the Return were made here, that he was committed for a contempt made in Chancery, the party shall be bailed, as it was resolved in this Court in Michael Apsley's case, and in Ruswell's case, 13 Jacobi, for the return is too general. In it the nature of the offence ought to be expressed, that the court may judge thereof. And 'contempts' here is *individuum vagum*: therefore for them, before conviction, the party cannot be imprisoned without bail or mainprize.

The second part of the Return is 'and for 'stirring up of Sedition against us:' the other side said, That *seditio* is ever taken in the worse sense: that is true. But hence it follows not, that the party that commits it is not bailable. Every small offence is taken in the worst sense, as the stealing of an apple, and the like; but such kind of offenders shall not be committed without bail. To examine the nature of this offence, which is called 'sedition,' it ought to be understood, as this Return is, either as trespass, or as High Treason; for it cannot be intended to be Petty Treason, for Petty Treason is so called in respect of the offence done to any particular subject; but in respect of the king, it is but as a Felony, therefore the Indictments for the same are feloniously and traitorously. And here the words are, 'sedition against us;' so of necessity it ought to be intended of an offence, that more immediately concerns the same king. For the discussing of this matter,

1. I will consider in what sense and signification this word *seditio* is used.

2. How it shall be expounded here by relation thereof to the king.

3. What sense these words 'against us,' shall have here.

1. For Sedition; it is not found in the division of offences in our law, but as it is mingled and coupled with other offences. No indictment of sedition only was ever seen, nor can be shewn; routs, riots, and unlawful assemblies, are much of the same nature with it, and do well express the nature of sedition. The English word is drawn from the word *seditio* in Latin, and the derivation of it is, as hath been observed, *se-itio*, or *seorsum itio*; and the seditious, as one says, take a diversion and draw others: it is used in the Bible, in poets, histories, and orators, for tumult, or hurly-burly, or uproar, or confused noise,—'Seditio-'que recens dubioque susurro,' in Liv. lib. 2. cap. 44. And in Tacitus it is taken for mutiny in an army, when the army is always repining at the captain. In the Italian language, which is the elder son of Latin, sedition and discord is all one. Numb. cap. 20, 3, the Latin translation is, 'Versi in seditione;' the English is, 'chode,' or 'murmured.' Numb. 26, 9, the Latin is, 'In seditione Corah;' the English is, 'In the Company of Corah.' Numb. 27, 3, the Latin is, 'Nec fuit in seditione eorum;' the English is, 'in the company or assembly of them.' Judg. 12. 1, the Latin translation is, 'Facta est ergo seditio in Ephraim;' the English translation is, 'The men of Ephraim gathered themselves together.' In the New Testament, Acts 19, 40. Seditio in the Latin is translated 'uproar' or 'meeting.' Acts 15, 2. 'Facta est ergo seditio,' &c. and it is translated 'dissension' and 'disputa-'tion.' Acts 24. 5, Tertullus the Orator accuseth Paul for moving sedition; and the subsequent words are, 'A ring-leader of the sect of the Pharisees;' so that his sedition there was but a schism: and the words there are in a manner the very same with our's here; there it was, 'for moving:' here, 'for stirring of Sedition.' *Seditio*, as an approved author says,

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imports *discordiam*, to-wit, when the members of one body fight against another. The lord of St. Albans, who was lately the Lord-Chancellor of England, and was a lawyer and great statesman likewise, and well knew the acceptation of this word 'sedition' in our law, hath made an essay of sedition, and the title of the essay is, 'Of Seditions and Tumults:' the whole essay deserves the reading. (See 3 Bacon's Works, 320.) And there is a Prayer in the Litany,—'from Sedition and Heresy, &c.' So that here sedition is taken as a kind of sect.

This being the natural signification of the word, then the next labour shall be to see, if any thing in our Law cross this exposition. And it seems clearly, that there is not, 2 H. 4, c. 15. And it is in the Parliament-roll, n. 48, against Lollards, who at that time were taken as heretics, and says, That such preachers which excite and stir up to sedition, shall be convented before the Ordinary, &c. There, sedition is taken for dissension and division in doctrine. And this is not made Treason by the said statute, although the said statute be now repealed by the statute of 25 H. 8, c. 4, 1 and 2 Phil. & Mar. c. 3, which is in Rastal, News 4, which is an act against seditious words and news of the king and queen, which is a great misdemeanor; and yet the punishment appointed to be inflicted by the said statute, is but the pillory, or a fine of 100*l*. And the said statute by the statute of 1 Eliz. c. 16, was extended to her also, which statute now by her death is expired: which I pray may be observed, 13 Eliz. cap. 1, against those who seditiously publish who are the true heirs of the crown, that they shall be imprisoned for a year, &c. And 13 Eliz. c. 2, the seditious bringing in of the pope's bulls is made treason, which implies, that it was not so at the common law. 23 Eliz. c. 2. If any person shall devise, write, or print any book, containing any false, seditious and slanderous matter, to the stirring up or moving of any rebellion, &c. every such offence shall be judged felony. And in an Indictment upon the said statute (which see Coke's Entries, f. 352, 353.) there are the words—'rebellionem et seditionem movere;' and yet it is but felony, 35 Eliz. c. 1, made against seditious sectaries. Also there are certain Books and Authorities in law, which express the nature of the word sedition, Coke's 4 Rep. p. 13, the lord Cromwell's Case. In an action for those words ['you like 'of those that maintain seditions against the 'queen's proceedings'] the defendant pleaded, That he intended the maintenance of a seditious sermon; and this was adjudged a good plea and justification. From which it follows, that the seditious sermon mentioned in the declaration, and the maintaining of sedition against the queen, is all of one signification; for if they might have been taken in a different sense, the justification had not been good. Philips and Badby's case, which is in Coke's 4 Rep. p. 19, a, which was objected by serjeant Berkley, makes strongly for me; for there an action upon the case was brought by a person for those words, 'Thou hast made a seditious ser-'mon, and moved the people to sedition this 'day.' And although it were there adjudged, that the action lay, yet the reason of the Judgment is observable, which was, because the words scandalize the plaintiff in his profession; which imply, that if they had not scandalized him in his profession, no action would have lain. And ordinary words, if they scandalize a man in his profession, are actionable; as to say to a Judge, that he is a corrupt man; or to a Merchant, that he is a bankrupt; although if they were spoken to another man, they would not bear an action. And although the Book say, that no act followed there; yet if the matter objected had been treason, the very will had been punishable, and, by consequence, a great slander. But it is observed, that words which imply an inclination only to sedition, are not actionable, as 'seditious knave;' but inclination to treason is treason, therefore words which imply it are actionable. And also for divers words an action upon the case will lie, which induce not treason or felony; as for calling a woman whore, by which she loseth her marriage, and such like. Then sedition is no offence in itself, but the aggravation of an offence; and no indictment, as I have said afore, was ever seen of this singly by itself. Trin. 21 E. 3, rot. 23. Sir John Garbut's case, which was put before by Mr. Mason; the indictment was in prejudice of his crown, and in manifest sedition; and yet the offence there was but a robbery. It is true, that upon his arraignment he stood mute, therefore the Roll is, that he was put to penance, that is, to strong and hard pain; and this proves, that it was not Treason; for if a man arraigned of treason stand mute, yet the usual judgment of treason shall be given on him. And it is true also, that he cannot have his clergy, because *insidiator viarum* was in the indictment; which if it was, outs the party of its clergy, until the Statute of 4 H. 4, c. 2, as is observed in Coke's 11 Rep. p. 29. Alexander Poulter's Case. And upon the same Roll of 21 E. 3, there are four other indictments of the same nature, where *seditiose* is contained in them. Anno 1585. Queen Elizabeth sent a Letter, which I have seen, by the hands of the noble antiquary sir Robert Cotton, to the mayor of London, for the suppressing of divers seditious Libels which were published against her princely government; and yet in the conclusion of the Letter it appears, that they were only against the earl of Leicester, and this was to be published only by proclamation in London.

5 H. 4, m. 11. and 13, the earl of Northumberland preferred a Petition to the king in parliament, in which he confesseth, that he had not kept his majesty's laws as a liege subject; and also confesseth the gathering of power, and the giving of liberties: wherefore he petitioned the worship of the king (for so are the words) for his grace. The king, upon this Petition, demanded the opinion of the lords of parliament, and of the judges assistant, if any thing

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contained within the said Petition were treason, or no; and it was resolved by them all, that nothing, as it is mentioned in the said Petition, was Treason, but great Misdemeanors; and yet truly, though not fully there mentioned, it was a great rebellion and insurrection. But they adjudged according to the said petition, as you are now to judge upon the Return as it is made here. In Mich. 33 Eliz. Cawdry's Case, Coke's fifth Report, p. 1. Sedition and Schism were described; as Schism is a separation from the unity of the Church, so Sedition is a separation from the unity of the Commonwealth. And an Author says, That a seditious person differs from a schismatic, because the one opposeth the spiritual truth, the other the temporal: and as Schism of itself is not Heresy, so Sedition without other adjuncts is not Treason. Bracton, f. 112, 113, 118. hath been objected, that he makes sedition treason: I will grant to them, Hengham also, who is to the same purpose: for in those Books it is called, 'Seditio 'regis et regni.' To them I answer, 1. That they are obscure. For what signified 'seditio 'regis,' or 'tumultus regis?' Shall it be the same thing in sense with 'seditio contra re-'gem?' It seems that the said authors neither remember law nor language. 2. Although they reckon sedition amongst the crime *læsæ majestatis*, yet that is not to be regarded; for they are obsolete Authors, and are not esteemed as authors in our law, as it is in Pl. 356, and Coke 8. 35, but they may be used for ornament, and they are good marks to shew to us how the law was then taken, but not to declare how the law is at this day; they are no binding authority; and if they be, yet we have them on our side likewise: for in his 14th book, Glanvile says, That a man accused of such a crime shall be bailed, and that the accuser shall give pledges. And Bracton says, That if no accuser appears they shall be set at liberty. And Hengham reckons amongst the crimes *læsæ majestatis*, the breach of the peace, and so does Glanvile also. Fleta, who was a follower of Bracton, and transcribes much *verbatim* out of him, calls Sedition, 'Seductionem' of the lord the king. And 12 Edw. 1, the statute of Rutland, which prescribes laws for Wales, enacts, that the sheriff shall inquire in his turn, 'de seductori-'bus domini regis;' and it is not apparent, whether he intended those which seduce the king or his people. And in latter times, *Seditio* is called *Sedutio*. In the time of Hen. 7, the earl of Northumberland, being a great and potent peer, and the king standing in awe of him, caused him, with 24 others of great quality, to enter into an obligation of 20,000*l.* (which obligation is in the hands of sir Robert Cotton) unto him, That if the said earl knew Treason, Sedution, loss, &c. to be intended to the king, that he should reveal it. 3. Also 'crimen 'læsæ majestatis,' which is the phrase of the Civil Law, is more general than Treason; and the old authors which have been cited much, follow the Civil Law, which hath this expression; and sedition by the Civil Law is treason. But it was resolved 11 R. 2. n. 14, we are not governed by the Civil Law.* And the 'Mirrour of Justices,' the principal copy whereof is in Bennet-College library in Cambridge, and there is also a copy in Lincoln's-Inn library; nor Britton in his Book, who writ in the name of the king, have not the word *Seditio* in them. And I affirm confidently, that there cannot be shewn any record, book, or statute, after the making the statute of 25 Edw. 3, in which *Seditio* is taken as a capital offence. And yet the 'Mirrour of Justices' reckons up several kinds of Treason, which he divides into Treasons against the celestial or terrestrial majesty; against the celestial majesty, as Schism, Heresy, Miscreancy (and according to this, the Book of 5 R. 2, Trial 54, is to be understood, which says, That a miscreant shall forfeit his lands, because it is a kind of treason). And also he shews divers Treasons against the king, as, The deflowering of the king's eldest daughter, &c. but not a word of Sedition. But admit, that Sedition imports a greater offence than tumult, yet there is no colour to say, that it is treason; for 25 Edw. 3, is a flat bar (that I may use the Inner-Temple phrase) to any thing to be treason, which is not contained in it, unless it be made treason by any special act afterwards; and 25 Edw. 3, does not make it treason. Stamford cites Glanville, and Bracton, and other ancient books, to shew what was treason before the said statute, and what not: and he says, that it was a great doubt what shall be called treason; saving that all agree, that any thing that tends to the death of the king was treason. 3dly, Now examine the words, — 'against us' — those words make not the crime more heinous, as the case is. I agree, that if the words had been,—'Sedition to take away 'the life of the king—it would have been treason; yea, the very thought of treason is treason, (though none can judge thereof till it be produced in act) 19 H. 6, 47. b. by Newton, 13 Jac. B. R. John Owen's case, the writing of a letter, whereby he intended the death of the king, was treason; but it is not expressed, that the raising of this sedition was with such intent, whereby this differs from all the cases which can be put, in which there is such an intent of the death of the king. Also this raising of sedition against us, shall not be intended treason; for if it had been so, the king would have so expressed it by the word Treason: for, as in his gracious disposition, he will not extend a fault beyond the magnitude thereof, so he will give to every offence the true and genuine name. If the return had been—'against our person'—it had been more certain, that it concerned the king immediately; this may be against any point of his government. And the proper and natural signification of the words,—'against us'—is as much as, against our authority, our superintendency, against our peace, crown and dignity,

* See Fortescue, f. 115, the which was not cited; there, never sedition, strife, or murmur is heard.

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which are the usual words in every indictment of felony. Every breach of the peace is against the king. The usual Return upon every ordinary writ out of this court is, that the party be before Us; and contempt to this court is, contempt against Us; and it is in the nature of sedition to the king. Contempts to the court of Star-Chamber are contempts against Us; and upon them, commissions of rebellion issue: and if the parties are brought in upon such commissions, yet they are bailable until their conviction. The king stiles himself, Us, in writs; and every disobedience to any writ may be said, 'Sedition against Us.' Routs, riots, illegal assemblies, may well be said and called, 'Sedition against Us:' and for such offences, a man shall not be restrained of his liberty upon an 'it may be.' Such a Return is necessary, by which the court may be truly informed of the offence. For the writ of Habeas Corpus is, to submit and receive what the court shall ordain. And this return of this nature is not to be compared to writs, which are general, and make a brief narration of the matter, and are pursued and explained by subsequent declarations. And yet I urge not, that the return ought to be as certain as an indictment; for an Indictment of Murder is not good, if it lack the word *murdravit*. But the return upon an Habeas Corpus, q. d. *interfecit* I. S. upon prepensed malice, is good; for the nature of the thing is expressed, although the formal word be wanting; but out of the Return, the substance of the offence ought always to appear, which appears not here. But it hath been said by the other side, That let the cause in the return be as it will, yet it is not traversable, 9 H. 6, 54. and I confess it. But as Coke's 11 Rep. p. 93. James Bagg's Case is, the return ought to have certainly so much in it, that, if it be false, the party grieved may have his action upon the case. And the grievance complained of in the Petition of Right is, That upon such return no cause was certified, that is, no such cause upon which any indictment might be drawn up; for we never understand, that the party shall be tried upon the H. Corpus, but that upon the matter contained within it an Indictment shall be made, and he shall have his trial upon it. And yet it is clear, and it hath been agreed of all hands, in the argument of the grand H. Corpus, Mich. 3 Car. in this court, that if the cause be certified upon the return of the H. Corpus, that the court may judge of the legality of that cause. 2. Consider the parts of this Return, as they are couple[d] together,—'for notable contempts by him 'committed against our self and our govern-'ment, and for stirring up of sedition against 'Us.'—Upon the entire Return, the king joins Sedition with notable Contempts; so that it is as much as if he had said, that Sedition is one of the notable contempts mentioned in the first part of the Return, so that he makes it but a contempt. For the generality and incertainty of the Return, I refer myself to the cases put by Mr. Ask, and I will not wave any of them. True it is, if the Return had been, that it was for treason, he had not been bailable but by the discretion of the court, and such return would have been good; but it is not so of Sedition. Gard. 157. treason is applied to a petty offence, to the breach of trust by a guardian in Socage; but it is not treason. And so Sedition is of far less nature than Treason, and is oftentimes taken of a trespass; it is not treason of itself, nor *seditiosè* was never used in an Indictment of Treason. It was not Treason before the 25 of Edw. 3, nor can it be treason; for 25 Edw. 3, is a flat bar (as I have said before) to all other offences to be treason, which are not contained within the said act, or declared by any statute afterwards. And there are offences which are more heinous in their nature than sedition is, which are no Treason, as Insurrections, &c. which see in the statute 11 H. 7, c. 7. 2 H. 5, c. 9. 8 H. 6, c. 14. 5 R. 2, c. 6. 17 R. 2, c. 8. And by 3 and 4 E. 6, c. 5, the assembly of twelve persons to attempt the alteration of any law, and the continuance together by the space of an hour, being commanded to return, is made treason; which act was continued by the Statute of 1 Mar. c. 12, and 1. Eliz. c. 16. but now is expired by her death, and is not now in force, (although the contrary be conceived by some) which I pray may be well observed. By the Statute of 14 Eliz. c. 1, rebellious taking of the Castles of the king is made Treason, if they be not delivered, &c. which shews clearly, that such taking of Castles in its nature was not treason. But the said Statute is now expired; and also all statutes, creating new Treasons, are now repealed. But, for a conclusion of this part of my argument, I will cite a case, which I think express in the point, or more strong than the case in question: and it was M. 9, E. 3, roll 39, B. R. Peter Russel's Case; he was committed to prison by the Deputy-Justice of North-Wales, because he was accused by one William Solyman of Sedition, and other things touching the king; And hereupon a Commission issued out of the Chancery, to enquire, if the said Peter Russel behaved himself well or seditiously against the king; and by the inquisition it was found, that he behaved himself well. And upon an Habeas Corpus out of this court, his body was returned, but no cause. But the said inquisition was brought hither out of Chancery, and for that no cause of his caption was returned, he prayed delivery; but the court would not deliver him, till it knew the cause of his commitment: Therefore, taking no regard of the said inquisition, they now send a Writ to the now justice of Wales, to certify the cause of his commitment. And thereupon he made this return, That the aforesaid Peter Russel was taken, because one William Solyman charged him, that he had committed divers Seditions against the lord the king; and for that cause he was detained, and for no other. And because the Return mentions not what Sedition in special, he was bailed, but not discharged. And I desire the bailment of the prisoner only, and not his

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deliverance. I desire that the Case be well observed. In the said case, there was an actual Sedition against the king; here is only a stirring up of sedition. The words of the said Award are, 'videtur curia;' which are the solemn words of a Judgment, given upon great deliberation. There it was—'for other things 'concerning us'—This is all one as if he had said,—'for other things against us'—Concerning the king, and, against the king, are all one, as appears by 25 E. 3, c. 4, de Clero, Stamf. 124, Westm. 1, c. 15. Bracton, f. 119, 14 Eliz. c. 2. And the words of the Judgment in the said Case, were not 'dimittitur' 'ideo dimittendus,' which imply the right of the party to be bailed. The said case in some things was more particular than our case, and more strong; for there was an accuser to boot, which wants in our case. There, true it is, that he was committed by the Justice of Wales, and here by the king himself; but this makes no difference, as to this Court; for, be the commitment by the king himself, or by any other, if it be not upon just cause, the party may be bailed in this court. And for the inquisition, which is mentioned, it was no trial in the case; nor did the court give any regard thereto. To detain the prisoner by the command of the king singly, is against the Petition of Right; but it being coupled with the cause, the cause is to be considered, and the truth of the cause is to be intended, as well where it is mentioned to be by an inferiour Judge, as where by the king himself, for it is traversable neither in the one nor other. And 22 H. 8, roll 37, B. R. and 1 H. 8, roll 8. Harrison's Case, resolved, That a man committed by the command of the king is bailable. And 33 Eliz. it was resolved by all the Justices of England, which I have viewed in Chief-Justice Anderson's Book, under his own hand, and it was produced in parliament, That all men committed by the privy-council are bailable, if the commitment be not for High-Treason. In all cases of commitment, an accuser is understood. Suppose that the accusation mentioned in Russel's Case of Sedition, had been an accusation of Treason, then the Judges ought not to have bailed him of right, and no man will say, but that the said accusation was a good cause to commit him. But the discovery of the offence ought to be afterward in an indictment.

Fourthly, I come to the Objections which have been made on the contrary.

1. It was objected, That this was a case of great consequence; I confess it, but this consequence is not to the king; for if it be truly treason, then they might have returned treason, and then the party was not to be bailed of right, till there should be a failure of prosecution; as was lately in Melvin's Case, who was bailed for lack of prosecution; the return being for High-Treason.

2. It was objected that there can be no conviction, as this case is, therefore there ought to be coercive power to restrain the prisoner. This is strange news to me, that there shall be any offence for which a man cannot be convicted. And if there can be no conviction, it hence follows, that there is no offence; and if there be no offence, there ought by consequence to be no imprisonment.

3. The case of 14 H. 7, 8, hath been objected, that a Justice of Peace may commit rioters without bail. I confess it, for this is by force of a statute which ordains it.

4. It hath been objected, That if an house be on fire, it is lawful to pull down the neighbour's house, for the prevention of further mischief; and the cases of 22 Ass. and 22 E. 4, that every man may justify the coercion of a mad-man. I answer, That these cases are true, as of necessity, and no other evasion: but here, bail is profferred, which is, body for body. Fire is swift, and cannot be punished, and no caution can be obtained thereof. But observe the true inference and consequence of this argument; If my house be on fire, my neighbour's must be pulled down; Mr. Selden is seditious, *ergo* Mr. Herbert, his neighbour, must be imprisoned

5. It hath been objected out of Br. Treason, 24. 1 Mar. That the said Statute of 25 E. 3, is taken largely, and that the detaining of a Castle or Fortress is Treason. To this I answer, that the bare detaining of a Castle is not Treason, unless it be with intention of the death of the king; but the taking of a Castle is treason. And the case there meant by Brook, is Constable's Case, Dy. 128. And I confess, 13 Eliz. Dy. 298, Dr. Story's Case*, that conspiracy to invade the kingdom, is Treason; for this cannot be without great danger of the death of the king; for, 'arma tenenti, omnia dat qui justa 'negat.' And all those Indictments were, that they intended the death of the king; but no such intention is expressed here.

6. It hath been objected, That this case is out of the Petition of Right, because in this return there is a cause shewed. But the grievance whereupon the Petition of Right was framed, was, where no cause was returned. It is true, that the grievance goes no further, but where no cause was returned; for that was the grievance at that time. But the words of the Petition of Right are further, 'without being charged 'with any thing, to which they might make an-'swer by the law,' which implies, that such cause ought to be contained in the Return, which being put into an Indictment, the party may have his Answer thereto.

7. It was objected, That the Return shall not be construed and expounded by fractions. I answer, That we need not make such an exposition; for the joint construction thereof makes more for us, than the several, as is shewed before.

8. That a general Return is sufficient, and it need not have terms of art in it, as an indict-

* See Shower's Magistracy of England vindicated; which will be found at the end of the Trial of Lord Russel: A. D. 1683. See also sir John Hawles's Reply to the Magistracy of England vindicated, p. 26.

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ment ought to have. For answer I confess it; but I affirm, as above, that a return ought to be so particular, that the nature of the offence ought to appear out of it: and it is not to be compared to general Writs, as 'Apostatâ capiendo, Idiotâ examinando, Læproso amovendo,' and the like: for those writs are good enough, because they contain the very matter. And although it hath been said, that there are two kinds of lepers, yet I never heard but of one: and the Writ, 'de hæretico comburendo,' is general, and good, because it is but a writ of execution upon a Judgment given by the spiritual power. But because they might not meddle with the blood of any man, the execution is by the secular power.

9. It hath been objected out of 30 Ass. p. 19. that the king would have one drawn and hanged for bringing into England the Bulls of the pope. But the Book answers itself, for he was not drawn and hanged.

10. The Statute of Westmin. 1, c. 15. was objected. But as oft as that Statute is objected, I will always cry out, 'The Petition of 'Right, The Petition of Right!' as the king of France cried out nothing but France, France! when all the several dominions of the king of Spain were objected to him.

11. A curious distinction hath been taken by serjeant Davenport, between stirring *to* Sedition, and stirring *up* Sedition; for the first implies an inclination only to do it, the second implies an act done. But this is too nice, for if a man stir up Sedition, or to Sedition, if it be with intention of the death of the king, the one and the other is Treason.

12. The opinion of Fortescue in 31 H. 6, 10. b. hath been objected, That for an offence done to the court, a man may be committed before conviction. To this I answer, 1. That the Book does not say, that he shall be committed without bail. 2. The offence being done in face of the court, the very view of the court is a conviction in law.

13. There was objected the 24 of Edw. 3, 23. Sir Thomas Fitchet's Case, who, for going armed in the palace, was committed by this court without bail or mainprize; which seems to be the strongest and hardest case that hath been objected. But the answer to it is clear, and undeniable; for the statute of 2 E. 3, c. 3. is, That if any one come armed before the Justices, he shall forfeit his armour, and shall be imprisoned during the king's pleasure; so that by the express purview of the statute, such a man is not bailable. So my conclusion remains firm, notwithstanding any of those objections. That the prisoner here, being committed before conviction of any offence, (it being not possible to understand this offence treason) is bailable; and that he is bailable here, I will offer two other reasons: 1. The return is here for Sedition; and there is an information in the Star-chamber against the prisoner, for seditious practices against the king and his government. I will not affirm, that they are the same offence, but there is some probability that they are the self-same; and if they be the same offence, then the sedition here intended is not Treason, and so the party is bailable. 2. This prisoner was ready at this bar the last term, and here was a grand-jury at bar the last term, and here was the king's counsel present, who are most watchful for the king; and yet an indictment was not preferred to them against this prisoner. Which things induce me to be of opinion, that the offence here mentioned in this Return is not Treason, or so great as is pretended on the other side. I will remember one case which perhaps may be objected, (and yet I think they will not object it) and so conclude. 11 R. 2, Parliament Roll 14. in the printed statute, c. 3. and 5. where it appears, that divers questions were propounded by the king to Tresilian and Belknap, the two Chief-Justices, and to the other justices: one of which questions was, how they are to be punished, who resisted the king in exercising his royal power, &c.? And the answer of the Judges was, *una voce*, that they are to be punished as traitors; and 21 R. 2, c. 21. this opinion was confirmed. But afterwards in 1 H. 4, c. 3. and 4. and 1 H. 4, in the Parliament-Roll, n. 66, 67, the Judges were questioned, for their opinion, in parliament. They answered, That they were threatened and enforced to give this opinion, and that they were in truth of the contrary opinion. And Belknap said, That he acquainted and protested to the earl of Kent aforehand, that his opinion was always to the contrary. But the parliament was not content with these excuses, but they were all adjudged Traitors; and Tresilian's end is known to all, and Belknap was banished; for his wife, in 2 H. 4, brought a writ, without naming her husband, because he was banished. And the said Statute of 21 R. 2, was repealed. Therefore upon the whole matter I conclude, that the prisoner ought to be bailed.

On the same day, sir Miles Hobart and Benjamin Valentine, and Denzil Holles, esquires were at the bar, upon an Habeas Corpus directed to the several prisons; and their counsel was ready at the bar to have argued the case for them also: but because the same Return was made as above, they said, That all of them would rely upon this Argument made by Mr. Littleton.

Mr. Selden's ARGUMENT.*

Upon the writ of Habeas Corpus *ad subjiciendum et recipiendum*, directed out of the King's-bench to the Lieutenant of the Tower, he returns, that the prisoner was first committed

* The Editor of Mr. Selden's Works, in his Preface to the third Volume, says, "This is the Substance of an Argument made in his (Mr. Selden's) own case, and which was pronounced by Mr. Littleton." But as there is so great a difference between them, we leave the Reader to judge of that; and, as it concerns so grand a point as the Liberty of the Subject, have therefore given both.

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to his custody by a warrant of the lords of the privy-council, dated 4 Martii 5 Caroli regis, and recites the warrant wherein the king's pleasure for the commitment is also signified. And farther, he returns, that the prisoner is detained by him, by virtue of another warrant, afterward directed to him, under the king's own hand, dated the 7th of May following; wherein it is signified, that he was to take knowledge, that the commitment was 'for notable 'contempts committed against Our Self and 'Our Government, and for stirring up of Sedi-'tion against Us,' with a command to detain him until his majesty's pleasure were farther known, &c. And so certifies the court, that these are the causes of taking and detaining him, and brings in his body according to the writ. And, whether upon this Return, the prisoner ought to be delivered by the court, upon sufficient bail, or remanded to the Tower, is the question? That is, supposing the Return to be every way true (as in all cases it must be supposed, when the question arises upon a return), whether there be sufficient cause expressed in it, for which the prisoner ought to be remanded? Or, that the cause of the commitment be such (as it is expressed in the return) that he ought to be bailed? If there were no more in the case, but the lords, or the king's command only, without farther cause shewed of the commitment; then it were clear, by the Declaration of both houses of parliament, and the Answer of his majesty to that Declaration, in the late Petition of Right, that the prisoners were to be remanded. And the objections that some have made, out of the statute of Westminster, the first, c. 15. That persons committed by command of the king, are not replevisable, and out of Stamford, fol. 73. as if he interpreted 'bailable' (which indeed he doth not, if he be observed) to be understood in that statute by 'replevisable,' and the like, are directly against the very body of the Petition of Right, and were so fully cleared in the debates, out of which the Petition of Right was framed, that to dispute them again, were but to question what the whole parliament had already resolved on, as the certain and established law of the kingdom. Nor is it timely to dispute here again the general power of commitment, by the lords or by the king himself. There is a commitment in the case, and there is a cause shewed of that commitment, and of the detainer in prison; and the quality of that cause only is truly the sole question; to the stating of which, the nature and course of bails upon offences, either returned generally upon Habeas Corpus, or appearing more specially upon indictments, is shortly to be first opened. All offences, by the laws of the realm, being of two kinds: the first, punishable by loss of life or limb; the second, by fine, or some pecuniary mulct, or damage and imprisonment, or by one of them; and those of the first kind being treason, murder, felonies of less nature, and some more; and of the second kind, bloodsheds, affrays, and other trespasses: If any prisoner stand committed (though before conviction) for treason or murder; the Judges, for aught appears in the Books, have not often used to let him to bail, unless it have appeared to them, that there hath been either want of prosecution, or of evidence to proceed, or that the proceeding through disability of the appellant (in case of appeals), as when he is excommunicate, is delayed; or that the evidence is slight, or some such like cause. So that in the bailing upon such offences of the highest nature, a kind of discretion, rather than a constant law, hath been exercised, when it stands wholly indifferent in the eye of the court, whether the prisoner be guilty or not.* And according to that, they often let to bail, detain in prison, or remand the prisoner. Also in Felonies of less nature; which being all, as those of the greatest nature, capital, and so the punishment of the same above imprisonment, the imprisonment of the offenders without bail, is only used *ad salvam custodiam*, and cannot be used *ad pœnam*. But if a prisoner before conviction, or somewhat that supplies a conviction, (so therefore also fit enough before conviction) stand committed for trespasses only, as all offences of the second kind are, and are punishable only by fine and imprisonment, or by one of them (in which case imprisonment is to be the highest part of his punishment, after conviction) there, by the constant course (unless some special act of parliament be to the contrary in some particular case) upon offer of good bail to the court, he is to be bailed; which agrees also with all justice and exactness of reason, that so both the court may, by his sureties and bail (to whose care he is a-new committed) be assured to have him ready at the day given him upon the bail, to answer all proceeding against him; and he himself, having sureties that so undertake for his appearance, may not be compelled, before conviction, to endure that continually, *ad custodiam* only, which is the highest part of what he is to suffer, after conviction, *ad pœnam*. So that in cases of imprisonment for offences of the first kind, divers circumstances might be, for which sufficient bail offered might, according to the use, be refused by the court. But in cases of imprisonment for offences of the second kind, sufficient bail, offered before conviction, ought of common right to be accepted; saving still, where a special act of parliament alters the law in some particular case: but there is no colour or pretence of any such act concerning the case in question; so that we are to examine it (for the point of bailing) only at the common law.

The state then of the question is but this: Whether that expression, 'for notable con-'tempts against Our-self, and our government, 'and for stirring up of sedition against Us,' do

* Vide 2 Assis. pl. 3. 3 Assis. pl. 12. 43 Assis. pl. 40. 26 Assis. pl. 47. 41 Assis. pl. 14. 21 Edw. 4, fol. 25, and 71 Brook, tit. Mainprise 60 and 63. 2 Eliz. Dyer, fol. 179, a.

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denote any offence of the first kind; Which, if it do not, or so do not, as that the court may by the words of it be sufficiently informed that it is some offence, at least, of the first kind; the bail, in this case, ought to be accepted. The offences in the return being two; first, 'notable contempts,' and then 'stirring of sedition,' and both 'against the king.'

There can be no question made of it, but that all Contempts, of what kind soever, that are punishable by the laws of the realm, are 'against the king and his government,' immediately or mediately. And although the latitude of them be such, as that some may vastly exceed others; yet they are all, as Contempts, only trespasses, &c. punishable only by fine or imprisonment, or by both, but not until conviction of the parties (as neither are other like offences), unless the contempt be in the face of some court, against which it is committed, which supplies a conviction. Now in this case, the contempts are only expressed in a generality, and no conviction appears of them. So that for that part of the return, there can be no colour why the bail ought not to be accepted. But all the doubt of the case depends upon the second offence; that is, 'the stirring 'up of Sedition against the king.' Which if it be an offence only of the same kind as Contempts are, or a mere trespass only to the king; or, if by the words of the return, it appears not to the court to be an offence of the first kind, that is, either treason, or felony at least, (there being no conviction in the case) the prisoner ought to be bailed. For, unless the court be assured, out of the words of the Return, that the prisoner stands committed for some such cause, for which he might not, of right, demand his bail; it is clear they ought to bail him. It rests therefore to examine the nature of the offence comprehended in those words 'stirring 'up sedition against us.' If it be any thing above what is trespass only, plainly it must be either treason or felony. For felony, no man pretends that by those words, any kind of felony is to be understood. The question then must be, whether the 'stirring up sedition 'against the king,' be treason or no; that is high-treason, as all treason is that toucheth the king, as treason? For petit-treason, by the common-law, is felony, in regard of the king, and treason only with respect to persons slain, against the faith and obedience due from the offender; and therefore the indictments of it say 'felonicè et proditoriè.'

In the consideration of the question thus stated, first, the use of the word Sedition, and the sense of it in our language, and in our laws, that received it out of that language, is to be examined; and then what those words 'against 'us,' import. Out of both which, it will be easily concluded, that the offence, as it is expressed in the return, although it be a great one, yet it is only a trespass, and punishable by fine only or imprisonment, or both of them. For Sedition, and the general notion of it, we have not either in the division or explication of offences that occur in our books an express definition, description or declaration of it, though it occurs sometimes as mingled with some other offences, and the adjective of it oftener than the substantive: Nor hath there been yet found any indictment or proceeding upon the crime of Sedition, by that name singly, as an offence in law, clearly enough known by itself. 'Unlawful assemblies, routs, riots, com-'motions,' are the nearest, if not the very things that by other names do, for the most part, express what sedition is in our laws. Vid. 3 Hen. 7, fol. 1, et Brook, Riots 4 et 5. But our language, rather than our laws, hath received the word from Latin, and thence hath in preambles of statutes, and of indictments, sometimes inserted it; so that missing an express exposition of the word in our law, we have reason to seek for it first in the language whence we received it, and then in the use of it in our own.

In Latin, that which is mutiny, raising of tumult, assembling of any armed power, or conventicles, or the like, is sedition. Whence it is, that in the civil-law, *seditio et tumultus* are frequently joined; and *concitatores seditionis*, and *actores seditionis*, occur in the text of that law *, for such as stir up Sedition. And thence also *seditio militaris* is used for a mutiny of the Soldiers in the Army, in Tacitus and others, and that for no more than the professing themselves against any command whatsoever given by the general. In this sense it is used also by a lawyer of Ephesus, in the holy text, where Demetrius the silversmith assembled the rest of his company against St. Paul, for preaching against Diana. 'For we are' (saith he, speaking to appease the assembly) 'even in jeopardy to be accused of this day's 'Sedition, forasmuch as there is no cause where-'by we may give a reason of this concourse of 'people,' Acts xix. 40. In the same sense Tertullus, an orator and lawyer, pleading against St. Paul at Cæsarea, before Felix the governor there, 'We have found this man a mover of 'Sedition amongst all the Jews throughout the 'world, and a chief maintainer of the sect of 'the Nazarenes,' Acts xxiv. 5. And such like testimonies are very obvious. In the self-same sense the word was received into our language, as we may see in that act of parliament against the Lollards, under H. 4, 2 H. 4, c. 15. The words there are, 'That they taught openly and 'privily divers new doctrines, contrary to the 'faith and determinations of the holy church; 'and of such sect and wicked doctrine and 'opinions they make unlawful conventicles and 'confederacies, they hold and exercise schools, 'they make and write books, they do wickedly 'instruct and inform people.' 'Et ad sedi-'tionem seu insurrectionem excitant quantum 'possunt, et magnas dissentiones et divisiones 'in populo faciunt.' Rot. Parl. 2 H. 4, n. 48.

* ff. ad I. Julian majestatis, lib. 1. & tit. ad leg. Jul. de vi publ. l. 3, &c. C. tit. de seditiosis, l. 1. & 2.

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'And, as much as they may, incite and stir 'them to Sedition and insurrection, and maketh 'great strife and division among the people, '&c.' And about the beginning of queen Mary, an act of parliament was made against Seditious Words and Rumours; in the preamble whereof, 'seditious and slanderous news' is mentioned, and 'seditious and slanderous 'writings, and persons intending and practising 'to move and stir seditions' (so it is in Rastall and the Roll of parliament, not 'seditious,' as in the Statutes at large), 'discord, dissension, and rebellion within this realm,' 1 et 2 Phil. et Mar. 3. And to the same purpose, an act of explanation of the said act of queen Mary was made in 1 Eliz. c. 6, wherein mention also is of 'false, seditious, and slanderous news, or tales,' against the queen. As also in her 13th year, c. 1, a provision is made against 'contentious 'and seditious spreading abroad of titles to the 'succession of the crown.' And in another Act of the same year, c. 2, also the bringing Bulls from Rome, 'to raise and stir sedition,' is mentioned in the preamble. And in the 23rd year, another act 23 Eliz. c. 2, was made with this title, 'Against seditious words and rumours ut-'tered against the queen's most excellent ma-'jesty.' And in indictments upon that statute of the 1st and 2nd of Philip and Mary, as it was continued in the act of the 23rd Eliz.; the party indicted for slanderous words, in defamation of the queen, is said to have been 'machinans et 'intendens seditionem et rebellionem infra hoc 'regnum Angliæ movere et suscitare,' and that 'advisate, et cum malitiosa intentione, contra 'dictam dominam reginam, et felonice ut felo 'dicte domine regine nunc, devisavit et scripsit 'quasdam falsas, seditiosas, et scandalosas ma-'terias, &c.' 34 Eliz. Coke, lib. intrat. indictment. fol. 352, col. 3 and 353, where the title is misreferred to the act of 1 Eliz. cap. 2.

In the lord Cromwell's Case also, 20 Eliz. Coke 4. *in act. de scandalis*, Seditio is mentioned 'against the queen's proceedings;' and 'seditio domini regis, vel exercitus sui,' in Bracton, fol. 118, and 'seditio regni, vel exercitus,' in Glanville, l. 14. c. 1, and 'seditio personæ 'domini regis vel exercitus,' in Hengham, c. 2.

Now, for the sense of the words 'sedition,' and 'seditious,' it will be most plain, that in all these places, (except those old Books of Bracton, Glanville, and Hengham, the interpretation of whom hath fittest place after the examination of the objections made to prove sedition to be treason) they denoted in our language, and in the use of our laws, that received them thence, such an offence as was not punishable (without some special provision by act of parliament) otherwise than by fine and imprisonment at the utmost; and were reputed singly, but as words or names designing 'tumults, un-'lawful assemblies, routs, factions or rebellions,' against any part of the established laws, or public commands. Therefore in that act of 2 Hen. 4, concerning the Lollards, the punishment of them that offended against the acts, and 'were 'such stirrers of sedition and insurrection,' was, that they should be imprisoned only by virtue of that act, until purgation, if they purged themselves; and imprisoned and fined after conviction, and detained in prison till abjuration: and upon refusal to abjure, or upon relapse, to be burnt for heretics: but that act is repealed by the 25 Hen. 8, c. 14. So, by the act of the 1st and 2nd of Philip and Mary, the first offence of 'speaking seditious and slanderous words,' or rumours of the king or queen, was after conviction, standing on the pillory, and loss of ears, (unless he redeemed them by the fine of 100*l.*) and three months imprisonment. And if any, from another's report, shall speak any seditious and slanderous news of the king and queen, he should, after conviction, lose one ear, (or redeem it by 100 marks) and have one month's imprisonment: And that 'if any should maliciously 'devise, or write any book or writing, contain-'ing any false matter, clause or sentence, of 'slander, reproach, and dishonour of the king 'or queen, to alienate the minds of the subjects 'from their dutiful obedience, or to the encou-'raging, stirring, or moving of any insurrection 'or rebellion within this realm; or, if any pro-'cure any such thing to be done (the said of-'fence being not punishable by the statute of '25 of Edw. 3, of treason) he should lose his 'right hand. And that the second offence of 'them that were punishable by loss of ear or 'ears, should be imprisoned during life, and loss 'of all their goods and chattels.' This act of queen Mary expired at her death, and agreeable to it was that provision of the act of 1 Eliz. c. 6, which extended the same to queen Eliz. during her life; but there is no such law at this day in being. So, in that of the 13 of Eliz. c. 1, the first offence of 'contentious and seditious spread-'ing abroad of titles to the succession of the 'crown,' is punished by the imprisonment of one whole year, and the loss of half the offender's goods, and the second offence by the pains of a *præmunire*. The bringing in of Bulls also from Rome, to alienate the minds of the subjects from their dutiful obedience, and to raise and stir sedition and rebellion, is made high treason by that other act of the same year. By which it appears, that 'stirring to sedition' alone is in that very act clearly supposed of far less nature. But that act is also expired. In that also of the 23 of Eliz. c. 2, the reporters of 'seditious news or rumours' against the queen, was made loss of ears (as before;) or, that to be redeemed at 200*l.* besides imprisonment of six months: and the reporters from another's mouth, to be punished according to that of 1 and 2 of Philip and Mary; saving, that the imprisonment, by this act, is three months, and the second offence is made felony, and writing of any seditious matter, to the purposes in that act of queen Mary, is made felony, upon which act the indictments of felony before mentioned, are grounded; but that act also expired by the death of queen Eliz. And in that case of the lord Cromwell, who brought a *scandalum magnatum* against the parson of Northelenham in Norfolk, for saying, 'That you like not of

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'me, but you like of them that maintain seditions against the queen's proceedings.' Although, in the report of the case, sedition generally be called an open and heinous crime, and described to be as in the nature of some great factious assembly, or riot; yet the defendant justifies the words, by this, that the plaintiff and he had discourse of one that preached against the Book of Common Prayer, and that in their discourse the plaintiff said to the defendant, 'I 'like not of thee:' To which he replied, 'It is 'no marvel, for you like of them that maintain 'sedition, (prædict' seditiosam doctrinam innu-'endo) against the queen's proceedings;' and the justification allowed good. Whence it appears clearly, that 'maintaining sedition,' generally may be, such preaching of seditious doctrine which is punishable only by the statute of 1 Eliz. cap. 1, by fine and imprisonment. Out of all which examples, it appears, that sedition, and acts seditiously done, are of themselves singly no capital crimes, or otherwise punishable than by fine or imprisonment, or both; unless by some special act of parliament it be ordained otherwise. And to confirm this also, we may observe divers other statutes; where routs, riots, rebellions, and insurrections (all which, of themselves, if no traitorous attempt appear, by some overt act, are punishable but by fine or imprisonment, unless some act of parliament especially ordain a greater punishment) have special punishments appointed for them; being at the common law but in the nature of trespasses. As in the 17 Rich. 2, c. 8. it appears, that in the 5th year of the same king (which is 5 Rich. 2, c. 6. Stat. 1.) 'outrageous assemblies 'of the people against the king's dignity, and 'his crown, and the laws of the land' (as every great riot is) were made Treason; which act is long since repealed. Whence it is also very observable to this purpose, that in two Acts of parliament, the one of the 2 Hen. 5, c. 9. Stat. 1. and the other of the 8 Hen. 6, c. 14. the simple word 'riots' (which is most known in the law, to this day, for seditious assemblies) is taken plainly as an expression sufficiently comprehending assemblies of people, in great number, in manner of insurrection, and also rebellions, as will appear plainly, by comparing the preambles with the bodies of the same acts. And in 11 Hen. 7, c. 7. for the punishment of 'unlawful raising and leading of people, riots, 'routs, and other unlawful assemblies,' a form of proceeding is appointed; wherein appears most plainly and expressly, that the punishment was only by fine and imprisonment, and the act was to continue but till the next parliament, when it expired. Therefore also by the act of 3 & 4 Edw. 6, c. 5. entitled, 'An Act for the 'punishment of unlawful assemblies, and rising 'of the king's subjects,' it was ordained, 'That 'if any persons, to the number of twelve, or 'above, being assembled together, shall intend, 'with force of arms, unlawfully, and of their 'own authority, to kill or imprison any of the 'king's privy-council, or to alter or change any 'laws established by parliament, and shall not 'depart and retire to their own habitations, 'within one hour after command made by the 'sheriff, some justice of the peace, or other such 'officer, in that behalf, the offence should be 'high-treason. And if such persons assembled, 'to the pulling down of ditches, or laying open 'inclosures, or to the committing of some such 'more offences, retire not within that space, 'that it shall be, felony in them. And if any 'should incite such persons to any such act, by 'speaking, ringing a bell, sounding a trumpet, 'firing of beacons, or the like; insomuch that 'they remained together after any such com-'mand as aforesaid by the space of an hour, 'and commit any such act, as aforesaid, it 'should be felony also. And the persons so 'assembled, and remaining together, to the 'number of forty, by the space of two hours, 'are by the same made traitors. And that if 'the number be above two, and under twelve, 'that with force of arms, unlawfully, and of 'their own authority, assembled for the casting 'down of ditches, inclosures, and divers such 'other things, their staying together after such 'command by the space of an hour, should be 'punished by a year's imprisonment, and fine 'and ransom at the king's pleasure.' And it is also in the same Act ordained, 'That if any 'person shall procure, move, or stir any other 'person, or persons, to arise, or make any 'traitorous or rebellious assembly, to the intent 'to do any of the things before-mentioned, it 'should be felony. And further, that if any 'person were spoken to, moved, or stirred to 'make any commotion, insurrection, or unlaw-'ful assembly for any of the intents before-'mentioned, and did not tell it within twenty-'four hours afterward, unless he have sufficient 'excuse, to some head officer where such speak-'ing were had, should suffer imprisonment, un-'til he were discharged by three justices of the 'peace, whereof one to be of the quorum.' This Act was to endure till the end of the next parliament only, which was in 7 Edw. 6, and then, cap. 11. it was continued till the end of the next which was in 1 Mar. sess. 2. wherein, c. 12. it is repealed, and another of the same nature made. Both which shew most evidently, that those unlawful assemblies, insurrections, commotions, and the like, which are plainly Seditions, provided for by those acts, were before but trespasses, punishable only by fine and imprisonment. That of the 1 Mar. sess. 2. c. 12. is intituled, 'An Act against unlawful and 'rebellious assemblies,' where the clause of the privy-counsellors (that was in the 3 & 4 Edw. 6,) is omitted; and the rest of the offence touching the altering of laws, is expressed, as in that of Ed. 6, saving that the crime is made felony, whereas it was treason by that of Ed. 6. The rest of that act of 1 Mar. is, for the most part, agreeable with that of Ed. 6, saving, that none of the offences are treason by this act, but felony at the most. And for the being 'spoken 'to, or stirred to make any commotion, and 'not discovering it,' here, in this of queen Mary, the offender is to suffer imprisonment

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only for three months, unless he be discharged by three justices of the peace, as in that of Ed. 6. This of queen Mary, was kept on by continuance only, from one parliament to another, during her time; and in 1 Eliz. c. 16. it was made to continue during the life of queen Eliz. and at her death expired. To this purpose also the Act of 14 Eliz. c. 1. is observable; where, 'unlawful practices, secret conspiracies and 'devices, to take or surprize any of the queen's 'fortified castles, and the malicious and rebel-'lious intent of surprizing, or taking them, be-'ing expressed by overt-act, or word,' are made felony; 'and the not giving them up within 'six days after command from her, is made 'treason;' which act also expired with her life. Here the offences made Treason and Felony by the Act, were both seditions of a high nature; and yet but trespasses before the act made, nor are they other now the act is expired. For the surprizing or detaining of a castle, without levying a war, or some other act of treason (as in Sherley's case in Dyer) was not treason, but by that act. To these we may justly add that case of the earl of Northumberland in 5 Hen. 4, rot. parl. n. 11, 12. &c. He acknowledged by writing, in parliament, that he was guilty of not 'keeping the laws as ligeance asketh, 'and of gathering power, and giving of liveries' (which are the words of the Parliament-Roll), and upon special consideration had, by the lords and Judges in parliament, of the nature of the offence thus set forth, they adjudged it was neither felony nor treason, but only trespass; and so are the express words of the roll. Yet the 'gathering of power, and giving liveries, and 'breaking of allegiance,' are large expressions of that, which in itself was truly sedition, and that of a high nature. And thus, both by the use of the word, and the punishment provided, in some cases in parliament, for remedy of the offence (without which special provision it is never found capital) it appears clearly that sedition, or the stirring of sedition, alone, at the common law, (and no statute, now in force, hath ordained otherwise) is but trespass, and punishable only by fine and imprisonment.

Now for the words 'against Us;' that is, against the king. There is no doubt at all, but that all offences are against the king. Every slight trespass, by the law, is 'contra pacem 'domini regis;' and whatsoever is against his peace is against him; as also divers indictments of mere trespasses conclude with 'in contemp-'tum domini regis,' and 'contra coronam et 'dignitatem suas:' As in an Indictment for hearing of mass, is 'contra pacem, dignitatem 'et coronam domini regis.' All which import 'against the king.' And that act of 23 Eliz. is made 'against seditious words against the 'queen's most excellent majesty;' which, even after the act, remained not capital, being before but trespass. And in the preamble of that of 14 Eliz. it appears, the act was made against 'unlawful practice, secret conspiracies and de-'vices, stirred and moved against our sovereign 'lady the queen, in seeking unlawfully to take 'her castles, fortresses, and the like.' And in Bracton, fol. 119. b. §. 3. & 120. b. §. 6. the concealing of treasure, which is punishable by fine and imprisonment, is expressly said to be 'gravis præsumptio contra regem et dignitatem, 'et coronam suam;' as also the not keeping the assises of bread and ale, and the like. Neither is there any doubt of this, but that the words, 'against the king,' may be applicable to any kind, and as well to the least as the greatest kind of offences, and imply nothing that increases the offence above trespass.

It follows then, for the last part of the consideration, that (sedition being but that which we otherwise call unlawful assemblies, riot, mutiny, rebellion, or the like; and every offence punishable, being against the king) the 'stirring up 'of sedition against the king,' which is or may be the 'stirring up of a rout, unlawful assem-'bly, mutiny, rebellion,' or the like, against some ordinary, or extraordinary command, process, writ, or execution of some established law, is no other offence, by the expression in the return; nor can thereby be understood to be other, without some special act of parliament have altered the law, than trespass, and punishable only by fine and imprisonment, and so, by consequence, no Treason. As for a special act of parliament, that maketh 'sedition 'against the king,' to be higher than 'trespass,' there is none such extant. Among all the acts of parliament that are in force, there is none gives any colour here, but that of 25 Ed. 3, wherein treason is declared: and in that act, only these words; 'if any one levy war against 'our lord the king, in his realm, or be adhering 'to the enemies of our lord the king in his 'realm, giving to them aid or comfort in his 'realm, or elsewhere, and hereof be attainted 'of overt act, it is High-Treason.' The other words concerning other and higher treasons, in that act, have nothing that can so much as of themselves suppose a 'sedition against the 'king;' but it is true, that in these before recited there may be a 'sedition against the 'king;' that is, the levying of war against the king may be by sedition, or the adhering to the king's enemies, or the levying of war against him, may be, by a low expression, perhaps stiled 'sedition against the king;' as in every greater crime, as in theft, trespass may be included, or understood. Now, unless on the other side, in that which is sedition against the king, treason must necessarily be understood, these words of the 25 Ed. 3, make no more to prove that sedition is treason, than any act against theft, can prove that trespass is felony. Therefore also, in that very act of 25 Ed. 3, the riding openly or secretly with armed men to kill or rob another man, or to take him, and keep him until he make fine and ransom for his deliverance, though it be plainly 'sedition 'against the king,' it being against his peace, his laws, and his crown and dignity, is but felony, if robbery be committed with it, and trespass only if imprisonment till fine and ransom. And so it is declared expressly in that

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act. And though there have been divers acts of parliament since that of the 25 Ed. 3, that have made divers other facts treason, yet there is none of them that remain unrepealed, or not expired, that make any such fact treason, as is of the nature of sedition against the king; and except only the treasons made by those special acts of parliament, that remain in force (as those concerning bulls from Rome, jesuits, clipping of coin, and some few more), there is nothing at this day treason, saving what is comprised in that act of 25 Ed. 3, to which some special laws * have, in the ages since Ed. 3, now and then reduced all treason, by abrogating all intervenient laws of treason. And by that act, if there be a doubt that happens before the judges, by reason of any new case that comes before them, they ought not to judge it treason, until it be enacted by parliament to be so. And it doth, in the same act, appear, that before that time, there was a greater latitude of treason, than at any time since. Now, even in that time, there is an express judgment of the very point in question; though not in the same terms with this case, yet in the self-same sense, as if this case had then been before the judges. It was the case of one Russel; he was imprisoned by the Justice of North Wales, in 9 Ed. 3, and returned to be so, 'eo quod A. B. imposuit ei fecisse debuisse diversas seditiones, '&c. dominum regem tangentes.' Upon this return, the court adjudged, that the offences contained in the return, and as they could thereby be understood, were such for which he ought to be bailed; and they give their reason with the judgment, 'because it did not appear 'what kind of seditions against the king were 'meant by it.' 'Eo quod non specificatur 'quales seditiones, &c. ideo dimittendus,' by mainprize or bail, which to this purpose are all one. For if the sedition had been with traitorous intents, and so expressed, then it had been treason, for which they would not have let him to mainprize. But because sedition against the king might be of divers other natures, and mere trespasses, therefore they said, 'ideo di-'mittendus est;' expressing therein the right of the prisoner, that he might justly claim to be bailed, and by law ought to be bailed, and not only that he was bailable. But three objections may, perhaps, be made to this judgment, to make it differ in substance from the case in question. The first, that 'A. B. imposuit ei 'fecisse debuisse diversas seditiones,' &c. which being as an accusation in so general terms, was not certain enough to make him answer to it, and thence might be cause of the judgment. The second, that it is not 'contra dominum 'regem,' or 'against the king,' as the case here is, but 'tangentes,' or 'touching' the king. And the third, that here is the king's warrant witnessing the offence, and command for imprisonment, and in that of 9 Ed. 3, only the charge of a subject and the commitment of a subject. To all three, the reply is easy. For the first, it is plain, that the justice of North Wales shews the reason of the imprisonment to be, because Russel was charged by A. B. to have committed 'sedition touching the king,' as every one that is returned to stand committed for any offence, is supposed to stand so committed, because somebody charged him, or accused him, or can testify against him; and that is here more particularly expressed, which in every return is supposed to be understood in the general words. As, suppose the return were, that such a one stands committed for treason, or murder, upon the accusation, testimony, or examination of A. B. taken thus, or thus: would the court bail him the sooner for that addition? And in returns, it was never expected that there should be such certainty as that the prisoner might plead and be tried. Which can never be done from returns, but only by appeals or indictments, wherein the offence is in special set forth by time, place, and all circumstances. Or, if they had, in this case of Russel, expected or considered such a certainty, they ought not to have let him into mainprize, or bailed him; but clearly dismissed him. For, if an appeal, which is an accusation, were brought against a man, or an indictment put in 'de diversis murdris,' or 'de murdro,' generally; or, 'de proditione,' generally; clearly, upon such an appeal or indictment, the court would not put the party neither to answer, nor so much as to the trouble of bail or mainprize, because such a charge that way, were merely void. For in appeals and indictments, the particular circumstance, and the special offence must always be set forth, or else they are void; but in returns, the general expression is sufficient for the court to judge, whether the offence be such, as that the prisoner ought to be bailed or no, as the common and most known practice is. So that the first objection is of no force. For the second, it is certain that the words 'tangentes 'regem,' and 'contra regem,' in matter of offences, occurring in our laws, are taken as synonimous. As in 25 Ed. 3, Stat. de Clero, c. 4. we have Treasons or Felonies, 'touchants au-'ters persons que le roy mesme ou son royal 'majestie,' 'touching others than the king;' which is the same with, 'being against others 'than the king,' or 'besides the king;' that is, petit Treasons (which are both Treasons and Felonies) as it appears in Stamford, l. 2. c. 43. fol. 124. b. High-Treason being 'touching the 'king,' or 'against the king,' or 'extending to 'the king;' which is the same in 25 Ed. 3, de proditionibus. Where the sense of the words appears by a law made but few years after this very case of Russel. So in Westmin. 1. ch. 15, 'Treason que toucha le roy mesme,' is expressly for 'Treason against the king;' that is, High-Treason. And Bracton, fol. 119, b. §. 2. calls the counterfeiting the Great Seal, which is High-Treason to this day, 'Crimen læsæ ma-'jestatis, quod tangit coronam regis,' or 'Trea-'son against the king.' And, in this latter age, we see in the statute of 14 Eliz. c. 2, that

* Vide 11 Rich. 2, c. 3, pet. 3, 1 Hen. 4, c. 10, 1 Edw. 6, c. 12. 1 Mar. Parl. 1, c. 6.

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'Treason touching the person of the queen,' and 'Treason concerning the person of the 'queen' are both as the same, and both for 'Treasons against the queen's person.' So that 'tangentes regem,' and 'contra regem,' denote the self-same thing in the law, and for that matter, Russel's case and this return are of the self-same nature. Now for the third objection concerning the king's warrant and command in this present case, which is not in that of Russel's, but only the accusation, or charge, and command of a subject. For the command singly considered, it is clearly against the Petition of Right: but if it be considered here (as it ought) joined with the cause of commitment, then the cause is only considerable by itself, as expressed by the warrant. But there is no book-case, act of parliament, or other testimony of law with us, that in this kind of consideration makes any difference between the expression of an offence, in a return of the king's warrant, and the expression of it in a return of a subject. For all returns of this kind, in judgment of law, are supposed true; and the sole point examinable, for matter of bail, is the nature of the offence; unless the commitment were by one that might not commit, or that some other circumstance, not concerning these matters, were in the case. And besides, in 22 Hen. 8, rot. 38. Parker's case, et 1 Hen. 8, rot.—the king's command for commitment for murder, and other offences of high nature, hath been in the return, where the prisoner was bailed. Nor will there remain any colour of testimony to maintain this last objection.

And as against this case of Russel (which is so fully in the point) these objections may be made; so against the main, the conclusion, it may be objected out of those old authors, Bracton, Glanville and Hengham; that Bracton, in express words, makes 'seditio domini 'regis' to be treason: 'si quis aliquid egerit' (saith he, fol. 118. b.) 'ad seditionem domini 'regis, vel exercitus sui, vel procurantibus aux-'ilium et consilium prabuerit vel consensum,' it is 'crimen læsæ majestatis,' to be punished with death, and so supposes it High-Treason. So Glanville, 'Si quis machinatus fuerit, vel 'aliquid fecerit, in mortem regis, vel seditionem 'regni, vel exercitus;' he saith it is likewise Treason. And Hengham bringing examples of the 'Placita de crimine læsæ majestatis,' adds, 'ut de nece vel seditione personæ do-'mini regis, vel regni, vel exercitus.' Where we see, 'seditio regis,' or 'regni,' or 'exerci-'tus,' is supposed Treason. But the answers to the authority of these old authors is various. First, However they were all three (if at least that of Glanville be the work of sir Randal Glanville, Chief-Justice of England under H. 2.) learned and famous Judges in their ages, yet they lived so long since, and the rest of the particulars of which they write, are so different (whether we observe the pleas of the crown in them, or the pleas between party and party) from the practice and established laws of the ensuing ages, that their authority is of slight or no moment, for direction in judgment of the law at this day, though it be very considerable in examination what the law was in their times: and that way it sometimes is used as an ornament in argument only, as it is said in the Commentaries of them. The first of them died about 400 years since; the second, about 350; and Hengham about 300 years past. Secondly, the words of 'seditio regis,' or 'regni,' are an obscure expression, and hardly so intelligible as that we may know what they meant. For what can 'sedition of the king' mean, in English or in Latin, as they express it? And if it be taken for 'sedition against the king' (as indeed the like words are interpreted in Scottish, out of the 'regiam majestatem,' by Mr. Skene) it must be so taken against all grammar, and usual context of words; for no more than 'tu-'multus regis, rebellio regis, insurrectio regis,' is 'tumult against the king,' or 'rebellion against the king,' or 'insurrection against the 'king,' is 'seditio regis,' in force of language, 'sedition against the king.' Thirdly, Admit it be rightly taken for 'sedition against the king,' in these old Authors, yet the statute of 25 Ed. 3, 'de proditionibus,' so settles the law for treason, that whatsoever was treason before that act, and is not comprised within that act, is no treason at this day, unless some special act of parliament have ordained it. Fourthly, The constant course of testimonies, as they are before shewed, since the 25th of Ed. 3, prove expressly, that only 'sedition against the king' is taken for a less offence, and mere trespass. Fifthly, in particular offences, we see Bracton (whose authority is the chief of the three, whether we regard the expression, or the quality of the writer) differs much from the common law of the later ages: and so much, that he is directly, in some things of great moment, contrary to the clear known law, both of the present and of ancient times. As he allows no killing of a man to be murder, but what is done so secretly, that it is not known who doth it. Bracton, l. 3, de Corona, fol. 134. b. & 135. And that if the offender be taken, or, if the party hurt live long enough to discover him that hurt him, though he die afterward, it is (saith he) no murder. Which is directly contrary to the law, yet altered by no special act of parliament. So, 'Si quis alterius virilia ab-'scinderit, et libidinis causa, vel commercii cas-'traverit, sequitur' (saith he, p. 144. b. §. 3.) 'pœna aliquando capitalis, aliquando perpe-'tuum exilium, cum omnium bonorum ademp-'tione;' whereas there is no such thing in the laws of England. But indeed, by the civil law, 'qui hominum libidinis, vel promercii causa 'castraverit, pœna legis Corneliæ de sicariis pu-'nitur;' that is, is punishable capitally, ff. ad leg. Cornel. de sicariis, l. 3. §. 4. & l. 4. §. ult. Whence, doubtless, Bracton, (who cites often, to other purposes, the very texts and words, and quotes the places of the Digests, and the Code) had that punishment for such as gelded men. And thence also had, by all likelihood,

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that touching sedition. For, by the Civil Law, all sedition, public raising of tumults, gathering armed men without public authority, and whatsoever is but with us as a commotion or riot, is treason (crimen læsæ majestatis) and capital. To which purpose there be divers texts in that law ff. ad leg. Juliam majest. l. 1. & de pœnis, l. 38. §. 2. de appellationibus, l. 16. C. de seditiosis, l. 1. & 2. &c. which doubtless he both read and often followed: and by 'concitatores 'seditionis,' or 'stirrers up of sedition,' by that very name were condemned as capital traitors. But this was never, for aught appears, law in England; but the contrary appears plain enough by what is already said. Sixthly, for answer to the objections out of Bracton and Glanville, if their authority shall be taken sufficient to maintain sedition to be treason: then will it be as reasonable to prove, that in such a case bail also should be taken. For Bracton saith expressly of that, and other treasons, that he joins with it, that the prisoner ought to be bailed, unless an accuser be present. 'Si quis,' saith he, 'de hoc crimine defamatus fuerit, tunc viden-'dum erat utrum apparent accusator, vel non; 'si autem nullus appareat, nisi sola fama quæ 'tantum apud bonos et graves oriatur, hic salvo 'attachiabitur per salvos et securos plegios vel si 'plegios non habuerit, per carceris inclusionem, 'donec de crimines sibi imposito veritas inquira-'tur.' And Glanville saith expressly, that although an accuser be present, yet he is to be bailed. 'Eti-'amsi accusator fuerit' (saith he) 'accusatus 'dimittitur per plegios; aut si non fuerit, in 'carcerem dimittitur.' So that either the authority of these old authors is of no moment, for the reasons before shewed; or if it be valuable, and that advantage must be taken from them, it is as reasonable that their other opinion, for the bail, be as well accepted and allowed of in this case. But there remains, perhaps, one objection, out of the opinions of Tresilian and Belknap, the two Chief-Justices; and of Holt, Fulthorp, and Burgh, justices of the Common-Pleas, and Lockton, one of the king's serjeants in 11 Rich. 2, (Vide 21 Rich. 2, c. 11, see the roll:) Who being, among other things, demanded at Nottingham by the king, and charged to answer, upon their faith and legiance to the king, how they ought to be punished that did interrupt the king, so that he might not exercise those things that pertaineth to his regality and prerogative: (in which words, perhaps, may be included all kind of sedition against any proceeding, process, or ordinary command of the king) with one assent they answered, That they ought to be punished as traitors. And if that were law, it were hard to find a sedition against the king, but that it were treason. For all his proceedings, process, and ordinary commands, belong to his regality and prerogative, and every sedition against him, is a kind of interruption of the exercise, at least, of those proceedings, process, and ordinary commands.

It is true, that in the 11 Rich. 2, such an answer, among divers others of like nature, were given by those judges, and that serjeant; and they put thir seals also to them. But it is as true, that for these very answers they were accused by the commons in parliament, the self-same year, where they answered upon the accusation: First, That the answers were written in the original to which their seals were put, otherwise than their meaning was, in some part. Secondly, That they had been threatened to make no other answer than what might agree with the king's liking. Thirdly, That their answers proceeded not of their free-will, but for fear of death; and that some of them had revealed as much to the earl of Kent, desiring him to witness as much hereafter if time served. Rot. Parl. 11 Rich. 2, n. 14, and vide Stat. 11 Rich. 2. c. 3, 5, &c. Notwithstanding all which, at the instance of the commons, they were judged all by declaration in parliament made by the king and commons, which was according to the act of 25 Edw. 3, and so by act of parliament, to be traitors, and to suffer as in case of treason; good part of which proceeding is remembered in the statutes of that year, but much more in the Rolls of that parliament. And although in the parliament of 21 Rich. 2, that parliament, and in particular, this proceeding against the judges, were wholly annulled, and their answers adjudged good; as appears in the printed statutes of that year, 21 Rich. 3, c. 12, yet in the 1st of Hen. 4, it was declared by parliament, 1 Hen. 4, c. 3, that this proceeding of parliament of 21. Rich. 2, being caused by a certain number only of the members of parliament, and that the 'Statutes, 'judgments, ordinances, and establishments, 'were made, ordained, and given erroneously 'and deceitfully, in great disherison and final 'destruction, and undoing of the liege people 'of the realm.' Where also it was further declared and adjudged, in the same parliament, that all the parliament of 21 Rich. 2, and all 'circumstances and dependents thereupon to 'be of no force or value, but annulled.' And besides, that 'the parliament of the 11 Rich. '2,' wherein those Judges were condemned as Traitors, for that answer, and all the rest of that kind, should 'be firmly holden and kept, after 'the purport and effect of the same, as a thing 'made for the great honour and common profit 'of the realm.' So that that answer of the Judges, in the 11 Rich. 2, so highly condemned as false and erroneous, by two parliaments, both which have to this day continued in firm strength, is of no weight to prove that 'sedition 'against the king is Treason.' Nor doth any thing else prove it, but the contrary is manifested by the arguments before urged. And by consequence, it is only trespass against the king, and punishable by fine and imprisonment, and therefore the prisoner returned to stand committed 'for stirring it up against the king' ought to be bailed.

Some days after, sir *Rob. Heath*, the King's Attorney General, argued, That this Return was good, and that the parties ought not to be bailed: And that within the Return there ap-

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pears good cause of their commitment, and of their detaining also. The case is great in expectation and consequence: and concerns the Liberty of the Subject on the one part, whereof the argument is plausible; and on the other part, it concerns the safety and sovereignty of the king, which is a thing of great weight. The consideration of both pertains to you the Judges, without slighting the one, or too much elevating the other. The Return, which now is before you, is entire; but I will first consider it as divided in parts. First, the first Warrant, which is that of the Lords of the Privy Council, is general, that it was by the command of the lord the king: and this in former times was held a very good return, when due respect and reverence was given to government; but, *tempora mutantur*. And this Return is no way weakened by any latter opinion; for notwithstanding that, the first commitment of a man may be general: for if upon the return, the true cause should be revealed to the gaoler, by this means, faults should be published and divulged before their punishment, and so the complices of the fact will escape, and it is not fit that the gaoler, which is but a ministerial officer, should be acquainted with the secrets of the cause. But when the cause is returned in court, more certainty is requisite; for then (as it hath been objected) something ought to be expressed to which the party may answer, and upon which the court may ground their judgment. And to this purpose, the Petition of Right hath been much insisted upon; but the law is not altered by it, but remains as it was before. And this will appear upon the view of all the parts of the Petition. 1. The occasion of the Petition, and the grievance, is shewed in these words: 'Divers of your subjects have been of late imprisoned, without any cause shewed,' &c. But in this return there is a cause shewed, to which the parties may answer. Then, 2. The prayer of the Petition is, That no Freeman, in any such manner as before is mentioned, be imprisoned or detained; that is, such manner of imprisonment, the ground whereof doth not appear. Then the Answer of the king to the Petition was in sundry words: 2 June 1628, in these words, 'The king willeth, that right be done according to the laws and customs of the realm, '&c.' Which answer gave not satisfaction. And afterwards his Answer was in a parliamentary phrase, 'Soit droit fait come est desire.' But afterwards, on the 26th of June, 1628, the king expressed his intention and meaning in the said Answer. "It must be conceived, that I have granted no new, but only confirmed the ancient Liberties of my Subjects, &c." A Petition in parliament is not a law, yet it is for the honour and dignity of the king, to observe and keep it faithfully; but it is the duty of the people not to stretch it beyond the words and intention of the king. And no other construction can be made of the Petition, than to take it as a confirmation of the antient liberties and rights of the subjects. So that now the case remains in the same quality and degree, as it was before the Petition. Therefore we will now consider, how the law was taken before the Petition; and for the discussing thereof, we will examine the second part of the Return, and in it two things: 1. If the Return, as it is now made, shall be intended for true. 2. Admit that it is true, if there be any offence contained within it, which is good to detain the prisoners. For the 1st it is clear, that the cause shall be intended true which is returned, though in truth it be false; and so are 9 H. 6, 44, and F. *Corpus cum causa*, and 2 Coke's Rep. 11. p. 93, Bagg's case. It seems that there is such a crime contained in this return, which is a good cause for detaining the prisoners. It is true, that it was confidently urged in parliament, in 3 Car. that general returns, that were committed by the command of the lord the king, are not good: and that those arguments remain as monuments on record, in the upper house of parliament; but I will not admit them for law. But I will remember what was the opinion of former times, 22 H. 6, 52, by Newton; a man committed by the command of the king, is not replevisable. And the opinion cannot be intended of a replevin made by the sheriff, because the principal case there is upon a return in this court. 33 Hen: 6, 28, Poyning's case, where the return was, That he was committed by the lords of the council, and it was admitted good. It is true, that this opinion is grounded upon West. 1. c. 15. but I will not insist upon it. But the constant opinion hath always been, that a man committed by the command of the king is not bailable. In 9 H. 6, 44, it is said, That if one be taken upon the king's suit, the court will not grant a *supersedeas*. The contrary opinion is grounded upon Magna Charta, which is a general law, and literally hath no sense to that purpose: and it is contrary to the usual practice in criminal causes, in which the imprisonment is always lawful until the trial, although it be made by a justice of peace, or constable. And that a man committed by the command of the king or privy council, is not bailable, he cited 1 Jac. sir John Brocket's case; 8 Jac. Thomas Cæsar's case; 12 Jac. James Demaistres's case; 43 Eliz. William Rinch's case; and in the case of M. 36 Eliz. and 4 and 5 Eliz. R. Thimelby's case; and said, that there are innumerable precedents to this purpose. M. 21 and 22 Eliz. upon the return of an Habeas Corpus it appears, that Michael Page was committed by the command of the lord the king, but was not delivered; and after was arraigned in this court, and lost his hand. And at the same time Stubbs was committed by the command of the lord the king, for seditious words and rumours, and he lost his hand also upon the same trial. M. 17 and 18 Eliz. upon Habeas Corpus for John Loan, it was returned, That he was committed for divulging sundry seditious writings, and he was remanded. And 7 H. 7, roll 6. Rug's Case; and roll 13. Chase's Case, where the return was, That they were committed by the command of the lord the king, and they were not delivered; and this was also the opinion in this court, M. 3 Car. and

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after the said time the law is not altered; and so, I hope, neither are your opinions.

But to consider the particular cause mentioned in the return, I will not rely upon the first part of the words, although they be of great weight, but only upon the last words,—'for 'stirring up of Sedition against Us.'—But it hath been objected, that Sedition is not a word known in the law: But I marvel that the signification of the word is not understood, when it is joined with the words—'against Us;'—this ought to be understood, Sedition against the king, in his politic capacity. Sedition hath sundry acceptations, according to the subject handled, as it appears Coke's 4 Rep. p. 13, lord Cromwell's Case, which hath been cited. If it be spoken of a man, that he is seditious, if it be of a Company in London, it shall be understood sedition in the company; if it be spoken of a Soldier, it shall be taken for mutinous. Mr. Littleton, who argued this case, very well said, That Tacitus used this word, and it is true; and he says, That there are two manners of seditious, 'Seditio armata et 'togata;' and the last is more dangerous than the former. But couple it with the subsequent words here, 'against us,' the interpretation and sense thereof is easy, and 'loquendum ut 'vulgus:' Mr. Littleton shews the acceptation of this word in divers places of Scripture, and I will not reject them, for they make for me; 20 Numb. 3, the Latin is,—'populi versi 'sunt in seditionem;'—and it is Englished 'murmuring,' but clearly it was high-treason against the governor, and God himself. 26 Numb. 9, 'in seditione Corah,' it is manifest, that that was a great insurrection. 12 Jud. 1, 'facta est ergo seditio in Ephraim,' 'The 'Ephraimites rose against Jephtha;' and he at the same time was their judge and governor, so it was the height of insurrection. It is true, that in 15 Acts 2, 'facta est seditio;' and in some translations it is, 'Orta est repugnantia 'non parva,' for it may be taken in several senses. 19 Acts 40, the town-clerk there knew not how to answer *for* 'this day's sedition,' or insurrection, and no doubt he was in great peril, for it was a great insurrection; and I wish the greater ones were as circumspect as he was. 24 Acts 5, 'Tertullus accused Paul 'of sedition,' and doubtless it was conceived a great offence, if you consider the time and other circumstances, for they were heathens and Romans. And although he in very truth taught the gospel of God, yet he was taken for a pestilent fellow, and as a persuader to shake off government. Bracton, lib. 3, de Corona, c. 2, ranks sedition amongst the crimes *læsæ majestatis*. But it hath been objected, that if it be a capital offence, it ought to be felony or treason. To this I say, that it cannot be felony, but it may be treason, for any thing that appears. It is true, that by the statute of 25 E. 3, treasons are declared, and nothing shall be called treason, which is not comprised within the said statute, unless it be declared so by act of parliament. But upon Indictment of treason, such sedition as this may be given in evidence, and perhaps will prove treason. And the return is not, that he was seditious, which shews only an inclination; but that he stirred up sedition, which may be treason, if the evidence will bear it. In divers acts of parliament, notice is taken of this word *Seditio*, and it is always coupled with insurrection or rebellion, as appears by the statutes of 5 R. 2, c. 6. 17 R. 2, c. 8. 2 H. 5, c. 9. 8 H. 6, c. 14. 3 & 4 E. 6, c. 5. 2 R. 2, c. 5. 1 & 2 Phil. & Mar. c. 2. 1 Eliz. c. 7. 13 Eliz. c. 2. 23 Eliz. c. 2. 27 Eliz. c. 2, and 35 Eliz. c. 1, all which were cited before; and they prove, that Sedition is a word well known in the law, and of dangerous consequence, and which cannot be expounded in good sense. Wherefore, as to the nature of the offence, I leave it to the court. But out of these statutes it appears, that there is a narrow difference between it and Treason, if there be any at all.

3dly, As to the Objections which have been made, I will give a short answer to them.

1. It was objected, That every imprisonment is either for custody, or punishment; the last is always after the Judgment given for the offence; and if it be but for custody, the party upon tender of sufficient mainpemers is bailable. I confess, that this difference is true, but not in all respects; for I deny, that a man is always bailable, when imprisonment is imposed upon him for custody: For imprisonment is for two intents; the one is, that the party which had offended, should not avoid the judgment of law; the second is, that he shall not do harm in the interim during his trial; and the law is careful in this point. But it hath been said, That although the party be bailed yet he is imprisoned. I deny that, for so is 1 H. 4, 6. If the party come not at the day, the bail shall be imprisoned; but yet the bail shall not suffer the same punishment which ought to have been inflicted upon the party; as if it were for treason, the bail shall not answer for the fault, but only for the body. Serjeant Berkley did well call a seditious man, an Incendiary to the government, and, as *commune incendium*, is to be restrained of his liberty. And he put 22 E. 4, and 22 Ass. 50, that a madman may be restrained, to prevent the hurt he would otherwise do himself and others. A seditious man is as a madman, in the public state of the Commonwealth, and therefore ought to be restrained. And it appears by the writ 'De Leproso amovendo,' that a leper is to be removed, and, in a manner, imprisoned, for the contagion of the disease; and this is for the safeguard of others, lest his leprosy infect others. The application is easy, and by the Statute of 1 Jac. c. 33, is restrained to keep within doors; and if he go abroad, any man may justify the killing of him. The infection of Sedition is as dangerous as any of these diseases, therefore it is not safe to let seditious men to bail, or at liberty; and in dangerous cases, the wisest way is to make all safe. In all cases of this nature, much is left to the dis-

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cretion of the court. The Case of M. 9 E. 3, roll. 39 Russell, hath been objected, to be in *the* point; I have viewed the record of that case, and although it be verbally, yet it is not materially to this purpose: for the commitment was by a Justice of North Wales, upon the accusation of an accuser; and it was within a short time after the statute of 5 E. 3, by which it was ordained, That none should be imprisoned upon the accusation of one accuser: but here the detainment is by the king himself, for stirring up of sedition. And there the return was, That he was accused of seditious and indecencies, where the latter word doth qualify the former. And there issued a Writ of good behaviour, (as the use was) to enquire of the truth of the offence; and it was found, that there was no such offence: and then upon the same return again he was set at liberty; so that the case there was special, and the manner of proceedings special. And I desire that one thing may be observed, that Russell came in here upon the Habeas Corpus, 20 Sept. but was not delivered until Hillary Term following. And for 28 H. 6, the duke of Suffolk's Case, which was objected, that the general accusation of divers treasons was not legal. That is true, because it was in parliament, and in the nature of an accusation; and being in a court of justice, it had been unjust to condemn a man before his trial; and yet this court, upon probability of a fault, does oftimes restrain a man before conviction. But it hath been objected in this case, They have been a long time imprisoned, and no proceedings against them. It is well known, there have been some proceedings against them, and they declined them; and also more than three months is requisite for the preparation of such proceedings, and the king intends to proceed against them in convenient time. And some that were offenders in the same kind are already delivered, to wit, Mr. Coriton and sir Peter Hayman. Therefore, if any injury be done to the Prisoners, they themselves are the cause of it, for not submitting themselves to the king. And for the instance which Mr. Littleton used of the Judges in 11 R. 2, although they suffered for their opinions given to the king, I desire, that the time when their opinion was delivered, may be considered, to wit, in the time of R. 2, and the time when they suffered, to wit, in the time of H. 4. And it was the saying of a noble gentleman, the lord Egerton, That Belknap suffered rather by the potency of his enemies, than the greatness of his offence: and yet it is to be confessed, that they might have given better counsel; but there was no time to dispute of the justness of their counsel, when the sword was in the hands of the conqueror.

What hath been relied upon is the Resolution of all the Justices of England in 34 Eliz. which Resolution is now registered in the upper house of parliament, at the request of the commons, in *tertio Caroli regis*; but I leave it to you, as that Resolution shall sway your judgments. The said Resolution is, That the cause ought to be certified in the generality, or specialty; and here the general cause is certified at least, if the special be not so: and upon the whole matter the bailment of these prisoners is left to your discretion; and I have shewed to you the discretion of your predecessors. And if any danger appear to you in their bailment, I am confident that ye will not bail them, if any danger may ensue; but first ye are to consult with the king, and he will shew you where the danger rests. Therefore upon the whole matter I pray, that they be remanded.

When the Court was ready to have delivered their Opinions in this great business, the Prisoners were not brought to the bar, according to the rule of the court. Therefore proclamation was made for the Keepers of the several prisons to bring in their Prisoners; but none of them appeared, except the Marshal of the King's-Bench, who informed the Court, that Mr. Stroud, who was in his custody, was removed yesterday, and put in the Tower of London by the king's own warrant: and so it was done with the other prisoners; for each of them was removed out of his prison in which he was before. But notwithstanding, it was prayed by the counsel for the prisoners, that the Court would deliver their Opinion as to the matter in law: but the Court refused to do that, because it was to no purpose; for the Prisoners being absent, they could not be bailed, delivered, or remanded.

The evening before, there came a letter to the Judges of this court from the King himself, informing the court with the Reasons, wherefore the Prisoners were not suffered to come at the day appointed for the Resolution of the Judges.

To our trusty and well-beloved, our Chief-Justice, and the rest of our Justices of our Bench.

"C. R. Trusty and well-beloved, we greet you well. Whereas by our special commandment we have lately removed sir Miles Hobart, Walter Long, and William Stroud, from the several prisons where they were formerly committed, and have now sent them to our Tower of London; understanding there are various constructions made thereof, according to the several apprehensions of those who discourse of it, as if we had done it to decline the course of justice; we have therefore thought fit to let you know the true reason and occasion thereof; as also, why we commanded those and the other Prisoners should not come before you the last day. We (having heard how most of them a while since did carry themselves insolently and unmannerly both towards us and your lordships) were and are very sensible thereof; and though we hear yourselves gave them some admonition for that miscarriage, yet we could not but resent our honour, and the honour of so great a court of justice, so far, as to let the world know how much we dislike the same:

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and having understood that your lordships, and the rest of our Judges and Barons of our Courts of Common Pleas and Exchequer, whose advices and judgments we have desired in this great business, so much concerning our government, have not yet resolved the main question; we did not think the presence of those Prisoners necessary; and until we should find their temper and discretions to be such as may deserve it, we were not willing to afford them favour. Nevertheless, the respect we bear to the proceedings of that Court, hath caused us to give way, that Selden and Valentine should attend you to-morrow, they being sufficient to appear before you, since you cannot as yet give any resolute Opinion in the main point in question. Given under our signet, at our manor at Greenwich, this 24th June, in the fifth year of our reign."

Within three hours after the receipt of those Letters, other letters were brought unto the said Judges, as followeth:

To our trusty and well-beloved, our Chief-Justice, and the rest of our Justices of our Bench.

"C. R. Trusty and well-beloved, We greet you well. Whereas by our letters of this day's date, we gave you to understand our pleasure, That of those prisoners which, by our commandment, are kept in our Tower of London, Selden and Valentine should be brought to-morrow before you; now, upon more mature deliberation, we have resolved, That all of them shall receive the same treatment, and that none shall come before you, until we have cause given us to believe they will make a better demonstration of their modesty and civility, both towards us and your lordships, than at their last appearance they did. Given under our signet, at Greenwich, this 24th day of June, in the fifth year of our reign."

So the Court this Term delivered no opinion, and the imprisoned Gentlemen continued in restraint all the long vacation.

Towards the latter end of this vacation, all the Justices of the King's-Bench being then in the country, received every one of them a letter to be at Serjeant's-inn upon Michaelmas-day. These Letters were from the Council-Table; and the cause expressed in them was, 'That his majesty had present and urgent occasion to use their service.' The Judges came up accordingly on Tuesday, being Michaelmas-day. The next morning about four o'clock, letters were brought to the Chief-Justice from Mr. Trumbal, Clerk of the Council then attending, that he and judge Whitelocke, one of the Judges of that court, should attend the king that morning so soon as conveniently they could; which the Chief-Justice and that Judge did at Hampton that morning; where the king taking them apart from the Council, fell upon the business of the Gentlemen in the Tower, and was contented they should be bailed, notwithstanding their obstinacy, in that they would not give the king a Petition, expressing, 'That they 'were sorry he was offended with them.' He shewed his purpose to proceed against them by the Common Law in the King's-Bench, and to leave his proceeding in the Star-Chamber. Divers other matters he proposed to the said Judges by way of Advice,* and seemed well contented with what they answered, though it was not to his mind; which was, That the offences were not capital, and that by the law the prisoners ought to be bailed, giving security for their good behaviour. Whereupon the king told them, 'That he would never be offended 'with his Judges, so they dealt plainly with 'him, and did not answer him by Oracles and 'Riddles.'†

The first day of Michaelmas Term it was moved by Mr. *Mason*, to have the Resolution of the Judges; and the court with one voice

* Mr. Whitelocke in his Memorials, p. 13, says, "My father did often and highly complain against this way of sending to the Judges for their Opinions beforehand; and said, That if bishop Laud went on in his way, he would kindle a flame in the nation."

† Mr. Whitelocke, in his Memorials of the English Affairs, page 14, says, "The Judges were somewhat perplexed about the Habeas Corpus for the Parliament-men, and wrote an humble and stout Letter to the king, 'That by their oaths they were to bail the 'Prisoners; but thought fit, before they did it, 'or published their Opinions therein, to inform 'his majesty thereof, and humbly to advise 'him (as had been done by his noble progenitors in like case) to send a direction to his 'Justices of his bench, to bail the prisoners.' But the Lord Keeper would not acknowledge to my father, who was sent to him from the rest of his brethren about this business, that he had shewed the Judges Letter to the king, but dissembled the matter, and told him, that he and his brethren must attend the king at Greenwich, at a day appointed by him.—Accordingly the Judges attended the king, who was not pleased with their determination, but commanded them not to deliver any Opinion in this case without consulting with the rest of the Judges; who delayed the business, and would hear Arguments in the case as well as the Judges of the King's-Bench had done; and so the business was put off to the end of the Term. Then the Court of King's-Bench being ready to deliver their Opinions, the Prisoners were removed to other prisons, and a Letter came to the Judges from the king, 'That this 'was done because of their insolent carriage 'at the bar.' And so they did not appear.—The Judges of the King's-Bench were sent for by the Lord-Keeper to be in London on Michaelmas-day; the chief-justice Hyde, and my father, were sent for to the king at Hampton-Court, who advised with them about the imprisoned Parliament-men; and both these Judges did what good offices they could, to bring on the king to heal these breaches."

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said, That they are now content that they should be bailed, but that they ought to find sureties also for the good behaviour. And justice Jones said, That so it was done in the Case which had been often remembered to another purpose, to wit, Russel's Case, in 9 E. 3. To which Mr. Selden answered (with whom all the other Prisoners agreed in opinion), That they have their sureties ready for the bail, but not for the good behaviour; and desire, that the bail might first be accepted, and that they be not urged to the other; and that for these reasons:

1. The case here hath long depended in court, and they have been imprisoned for these thirty weeks, and it had been oftentimes argued on the one side and the other; and those that argued for the king, always demanded that we should be remanded; and those which argued on our side, desired that we might be bailed or discharged; but it was never the desire of the one side or the other, that we should be bound to the good behaviour. And in the last Term four several days were appointed for the Resolution of the court, and the sole point in question was, If bailable or not? Therefore he now desires, that the matter of Bail and of good Behaviour may be severed, and not confounded.

2. Because the finding of Sureties of good behaviour is seldom urged upon Returns of Felonies or Treasons. And it is but an implication upon the return, that we are culpable of those matters which are objected.

3. We demand to be bailed in point of Right; and if it be not grantable of right, we do not demand it: but the finding of Sureties for the good behaviour, is a point of discretion merely; and we cannot assent to it without great offence to the parliament, where these matters which are surmised by return were acted; and by the statute of 4 H. 8, all punishments of such nature are made void, and of none effect. Therefore, &c.

Court. The Return doth not make mention of any thing done in parliament, and we cannot in a judicial way take notice that these things were done in parliament. And by *Whitelocke*, the surety of good behaviour, is a preventing medicine of the damage that may fall out to the commonwealth; and it is an act of government and jurisdiction, and not of law. And by *Croke*, it is no inconvenience to the Prisoners; for the same bail sufficeth, and all shall be written upon one piece of parchment. And *Heath*, Attorney-General, said, That by the command of the king, he had an Information ready in his hand to deliver in the court against them.

Hyde, Chief-Justice. If now you refuse to find Sureties for the good behaviour, and be for that cause remanded, perhaps we afterwards will not grant a Habens Corpus for you, inasmuch as we are made acquainted with the cause of your imprisonment.

Ashley, the King's Serjeant, offered his own bail for Mr. Hollis, one of the prisoners, who had married his daughter and heir, but the court refused it; for it is contrary to the course of the court, unless the Prisoner himself will become bound also.*

And Mr. *Long*, that had found sureties in the Chief-Justice's Chamber, for the good behaviour, refused to continue his sureties any longer, inasmuch as they were bound in a great sum of 2,000*l.* and the good behaviour was a ticklish point. Therefore he was committed to the custody of the Marshal, and all the other Prisoners were remanded to prison, because they would not find sureties for the good behaviour.

Mich. 6 Car. B. R.

John Selden was committed to the Marshalsea of the King's-Bench, for not putting in Sureties for his good behaviour. There were with him in the same prison, Hobart, Stroud, and Valentine. In the end of Trinity Term, 6 Car. the sickness increasing in Southwark, the three last named made suit unto the Judges of the King's-Bench, to be delivered over to the Gatehouse in Westminster, to avoid the danger. The Judges thought it charity, and by writ to the marshal of the King's-Bench, commanded him to deliver them to the Keeper of the Gatehouse, and sent him a writ to receive them. Mr. Selden never sent unto them whilst they were in town, but when they were all gone, made suit to the Lord-Treasurer to move the king, that, to avoid this danger, he might be removed to the Gatehouse; which he did, and sent a warrant under his hand to the marshal, signifying his majesty's pleasure to remove him to the Gatehouse: accordingly he was removed. Thereupon, when the Judges came to town in Michaelmas Term, they called the Marshal to account for his Prisoner, Mr. Selden; and he presenting unto them the Lord

* "This motion of discharging proceeded from the king himself, who had conferred with the Judges, and had declared his content the Prisoners should be bailed, notwithstanding their obstinacy, that they would not so much as present a Petition to him to express, that 'they were sorry he was offended with them.' But the Prisoners began now to value themselves upon their suffering, and had so much countenance from several of their late fellow-members, that they would not now accept of a deliverance, but unanimously refused to find sureties for their behaviour: nay, Mr. Hollis was so industrious to be continued in custody, that when offered his own bail, he would not yield to the course of the Court, to be himself bound with him. And even Mr. Long, who had actually found sureties in the Chief Justices Chamber, declared in court, that his sureties should no longer continue. Such a merit did they now place in confinement, as to labour against their own liberty; and by such glorying in persecution to raise a popularity to themselves, and cast an odium on the king." 3 Kennet, p. 49.

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Treasurer's Warrant by the king's direction, the Judges told him it would not serve, for he could not be removed but by writ; and upon his majesty's pleasure signified, it might so have been done. And although the Judges were out of town, yet the Clerk of the Crown would have made the writ upon so good a warrant, and it might have been subscribed by the Judges at their return. And to avoid the like error hereafter, the court sent justice Whitelocke to the Lord Treasurer, to let him know, that Mr. Selden never looked after any of the Court, but sought a new and irregular way to be removed without them. The Lord Treasurer made a very honourable answer, That he would not move the king for Mr. Selden to be removed by this means, until he sent him word, on his credit, that it was a legal way; and told that Judge, that Mr. Selden was at the Judges dispose, to remove back when they would, for it was not the king's meaning to do any thing contrary to the order of the court, or their formal proceedings: so Writs were sent this Michaelmas Term to remove the four Prisoners back again to the Marshalsea.

The Case of Sir Miles Hobart, and William Stroud, Esq.

On the 23rd of January, the Attorney-General exhibited two several Informations, the one against Wm. Stroud, esq. the other against sir Miles Hobart, knt. The charge against both of them therein, was for several escapes out of the prison of the Gatehouse: they both pleaded, Not Guilty. And their cases appeared to be as followeth: The said William Stroud, and sir Miles Hobart, were by the king's command committed to prison, for misdemeanors alleged against them, in their carriage in the House of Commons at the last parliament. Afterwards in Trinity Term, anno 6 Caroli, both of them being by order of this court, and by a warrant from the Attorney-General, to be removed unto the Gatehouse; the warden of the Marshalsea, where they were before imprisoned, sent the said Stroud to the keeper of the Gatehouse, who received him into his house lately built, and adjoining to the prison of the Gatehouse, but being no part thereof. After which receipt, the same night, he licensed the said Stroud to go with his keeper unto his chamber in Gray's-inn, and there to reside. Sir Miles Hobart was also by the said warden of the Marshalsea, delivered to the keeper of the Gatehouse, but being sick, and abiding at his chamber in Fleet-street, he could not be removed to the prison of the Gatehouse, but there continued with his keeper also. Afterwards the Sickness increasing in London, they (with the licence of the keeper of the Gatehouse, as it was proved) retired with their under-keepers to their several houses in the country for the space of six weeks, until Michaelmas Term then next following, when by direction of the said keeper they returned to his house; but in all that space it could not be proved, that they were in any part of the old prison of the Gatehouse, but in the new building thereto adjoining; unless when they once withdrew themselves to a close-stool, which was placed near to the parlour, and was part of the old prison of the Gatehouse. This Evidence was given to both the Juries, and both of them returned their Verdicts severally, 'That they 'were not Guilty,' according to the Information exhibited against them. And in this case it was debated at the Bar and Bench, whether by this receipt and continuance in the new house only, it may be said, That they ever had been imprisoned? And the Judges held, 'That their 'voluntary retirement to the close-stool made 'them to be prisoners.' They resolved also, that in this and all other cases, although a Prisoner depart from prison with his keeper's licence, yet it is an offence as well punishable in the prisoner as in the keeper. And Calthorpe made this difference between breach of prison and escape; the first is 'against the 'Gaoler's will;' the other is 'with his consent, 'but in both the Prisoner is punishable:' whereunto the whole Court agreed. It was also resolved that the Prison of the King's Bench is not any local prison, confined only to one place, and that every place where any person is restrained of his liberty is a prison: as, if one take sanctuary and depart thence, he shall be said to break prison.*

In the next parliament, which met April 13, 1640, it was referred to a committee, to consider of the breach of privilege by sir John Finch (the Speaker), 5 Car. 1, who refused to

* Mr. Whitlocke, in his Memorials, p. 16, says, "In the year 1631, some of the imprisoned Parliament-men, upon their Petition, were removed from the prisons wherein they then were, to other prisons, to prevent the danger of the sickness then increasing. Sir Miles Hobart put in sureties for his good behaviour, and so was discharged from his imprisonment. —Anno 1631. Sir John Walter died, a grave and learned Judge; he fell into the king's displeasure, charged by his majesty 'for dealing 'cautelously, and not plainly, with him, in the 'business concerning the parliament-men:' as if he had given his opinion to the king privately one way, and thereby brought him on the stage, and there left him, and then was of another Judgment. His opinion was contrary to all the rest of the Judges, 'That a Parliament-'man for misdemeanor in the house, criminally, 'out of his office and duty, might be only im-'prisoned, and not farther proceeded against:' which seemed very strange to the other Judges, because it could not appear, whether the party had committed an offence, unless he might be admitted to his answer. The king discharged him of his service by Message, yet he kept his place of Chief-Baron, and would not leave it but by legal proceeding; because his patent of it was, *Quam diu se bene gesserit*, and it must be tried whether he did *bene se gessere*, or not: he never sat in court after the king forbad him, yet held his place till he died."

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put the question by command of the house; and the committee ordered to state matter of fact, and so report.

Monday, April 20. Mr. Treasurer reported, That sir John Finch late Speaker did not say, 'He would not put the question;' but that, 'He durst not put it:' that 'he left the Chair not to disobey the house,' but 'to obey his majesty.'

The house thereupon resolved, That it was a breach of Privilege of the house, for the Speaker not to obey the commands of the house; and that it appeared the Speaker did adjourn the house by command of the king, without consent of the house, which is also a breach of privilege; it was therefore ordered, that this should be humbly represented to his majesty. But this parliament being soon dissolved, viz. May 5, 1640, nothing was done for these Gentlemen, but in the next parliament, which met Nov. 3, 1640, reparation was ordered them; as will be shewn in the following proceeding.

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130. Proceedings against Sir John Elliot, Denzil Hollis, esq. and Benjamin Valentine, esq. for seditious Speeches in Parliament: in B. R. Mich. 5 Charles I. A. D. 1629.*

Sir Robert Heath, the king's Attorney-General, exhibited informations in this court against sir John Elliot, knight, Denzil Hollis, and Benjamin Valentine, esqrs. the effect of which was,† That the king that now is, for weighty causes, such a day and year, did summon a parliament, and to that purpose sent his writ to the sheriff of Cornwall to chuse two knights: by virtue whereof sir John Elliot was chosen and returned knight for Cornwall. And that in the same manner, the other defendants were elected burgesses of other places, for the same parliament. And shewed further, that sir John Finch was chosen for one of the citizens of Canterbury, and was Speaker of the house of commons. And that the said Elliot publicly and maliciously in the house of commons, to raise sedition between the king, his nobles, and people, uttered these words, 'That 'the Council and Judges had all conspired to 'trample under foot the Liberties of the Subjects.' He further shewed, that the king had power to call, adjourn, and dissolve parliaments: and that the king, for divers reasons, had a purpose to have the house of commons adjourned, and gave direction to sir John Finch, then the Speaker, to move an adjournment; and if it shouldsnot be obeyed, that he should forthwith come from the house to the king. And that the Defendants, by confederacy aforehand, spake a long and continued speech, which was recited *verbatim*, in which were divers malicious and seditious words, of dangerous consequence. And to the intent that they might not be prevented of uttering their premeditate speeches, their intention was, that the Speaker should not go out of the Chair till they had spoken them; the Defendants, Hollis and Valentine, laid violent hands upon the Speaker, to the great affrightment and disturbance of the house. And the Speaker being got out of the Chair, they by violence set him in the Chair again; so that there was a great tumult in the house. And after the said speeches pronounced by sir John Elliot, Hollis did recapitulate them.

And to this Information,

The Defendants put in a Plea to the Jurisdiction of the court, because 'these offences 'are supposed to be done in parliament, and 'ought not to be punished in this court, or in 'any other, but in parliament.'

And the Attorney-General moved the Court, to over-rule the plea to the jurisdiction. And that, he said, the court might do, although he had not demurred upon the plea. But the court would not over-rule the plea, but gave day to join in demurrer this term. And on the first day of the next term, the record shall be read, and within a day after shall be argued at bar.

Hyde, Chief-Justice, said to the counsel of the Defendants; So far light we will give you: this is no new question, but all the Judges in England, and Barons of the Exchequer, before now, have oft been assembled on this occasion, and have, with great patience, heard the arguments on both sides; and it was resolved by them all with one voice, That an offence committed in parliament, criminally or contemptuously, the parliament being ended, rests punishable in another court.

Jones. It is true, that we all resolved, That an offence committed in parliament against the crown, is punishable after the parliament in another court; and what court shall that be, but the court of the King's-bench, in which the king, by intendment, sitteth?

Whitlocke. The question is now reduced to a

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* The king at first intended to proceed against the above gentlemen in the Star-Chamber, to which end an Information was exhibited against them in that court, on the 7th of May; but that being dropped, they were proceeded against in the King's-bench, and the same matters in effect were set forth as in the Information in the Star-Chamber.

† See the Information in the King's-bench, the Defendant's Plea, the Attorney-General's Demurrer, &c. at large, at the end of the Case, upon occasion of the Reversion of the Judgment in B. R. by the House of Lords on a Writ of Error, A. D. 1668.

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narrow room, for all the Judges are agreed, That an offence committed in parliament against the king or his government, may be punished out of parliament. So that the sole doubt which now remains, is, whether this court can punish it.

Croke agreed, That so it had been resolved by all the Judges, because otherwise there would be a failure of justice. And by him, if such an offence be punishable in another court, what court shall punish it but this court, which is the highest court in the realm for criminal offences? And perhaps not only criminal actions committed in parliament are punishable here, but words also.

Mr. *Mason* of Lincoln's-Inn argued for sir John Elliot, one of the Defendants. The charges in the Information against him are three:

1. For Speeches.

2. For Contempts to the King, in resisting the Adjournment.

3. For Conspiracy with the other Defendants, to detain Mr. Speaker in the Chair.

In the discussion of these matters, he argued much to the same intent he had argued before, therefore his argument is reported here very briefly.

1. For his Speeches, they contain matter of accusation against some great peers of the realm; and as to them, he said, that the king cannot take notice of them. The Parliament is a Council, and the Grand Council of the king; and councils are secret and close, none other have access to those councils of parliament, and they themselves ought not to impart them without the consent of the whole house. A Jury in a leet, which is sworn to inquire of offences within the said jurisdiction, are sworn to keep their own counsel; so the house of commons inquire of all grievances within the kingdom, and their counsels are not to be revealed. And to this purpose was a Petition, 2 H. 4, n. 10. That the king shall not give credit to any private reports of their proceedings, to which the king assents: therefore the king ought not to give credit to the information of these offences in this case. 2. The words themselves contain several accusations of great men; and the liberty of accusation hath always been parliamentary. 50 E. 3. Parliament Roll, n. 21, the lord Latimer was impeached in parliament for sundry offences. 11 R. 2, the archbishop of York; 18 H. 6, n. 18, the duke of Suffolk; 1 Mar. Dy. 93, the duke of Norfolk; 36 H. 6, n. 60, un Vickar General; 2 and 3 E. 6, c. 18. the lord Seymour; 18 of king James, the lord of St. Albans, Chancellor of England; and 21 of king James, Cranfield, Lord Treasurer; and 1 Car. the duke of Buckingham. 3. This is a privilege of parliament, which is determinable in parliament, and not elsewhere; 11 R. 2, n. 7. the Parliament Roll, a Petition exhibited in parliament, and allowed by the king, That the liberties and privileges of parliament shall only be discussed there, and not in other courts, nor by the common, nor civil law; (see this Case more at large in Selden's Notes upon Fortescue, f. 42.) 11 R. 2, Roll of the process and judgment. An appeal of Treason was exhibited against the archbishop of Canterbury and others, and there the advice of the sages of the one law and the other being required; but because the appeal concerned persons which are peers of the realm, which are not tried elsewhere than in parliament, and not in an inferior court. 28 H. 6, n. 18. There being a question in parliament concerning precedency, between the earl of Arundel, and the earl of Devon, the opinion of the Judges being demanded, they answered, That this question ought to be determined by the parliament, and by no other. 31 H. 6, n. 25, 26. During the prorogation of the parliament, Thorp that was the Speaker, was out in execution at the suit of the duke of York; and upon the re-assembly of the parliament, the commons made suit to the king and lords to have their Speaker delivered. Upon this, the lords demand the opinion of the Judges; who answer, That they ought not to determine the privileges of the high court of parliament. 4. This accusation in parliament is in legal course of justice, and therefore the accuser shall never be impeached, 13 H. 7, and 11 Eliz. Dy. 285. Forging of false deeds brought against a peer of the realm, action *de scandalis magnatum*, doth not lie. Coke's Rep. 4. 14, Cutler and Dixy's case, where divers cases are likewise put to this purpose. 35 H. 6, 15. If upon the view of the body the slayer cannot be found, the Coroner ought to enquire, Who first found the dead body? And if the first finder accuse another of the murder, that is afterward acquit, he shall not have an action upon the case, for it was done in legal manner. So it is the duty of the commons to enquire of the Grievances of the Subjects, and the causes thereof, and doing it in a legal manner, 19 H. 6, 19. 8 H. 4, 6. in conspiracy it is a good plea, that he was one of the indictors. And 20 H. 6, 5. that he was a grand Jury-man, and informed his companions. And 21 E. 4, 6, 7. and 35 H. 6, 14. that he was a Justice of Peace, and informed the Jury, 27 Ass. p. 12. is to the same purpose. And if a Justice of Peace, the first finder, a juror, or indictor, shall not be punished in such cases; *à fortiori*, a member of the house of commons shall not, who, as 1 H. 7, is a Judge. 27 Ass. p. 44, may be objected, where two were indicted of a conspiracy, because they maintained one another; but the reason of the said case was, because maintenance is a matter forbidden by the law; but parliamentary accusation, which is our matter, is not forbidden by any law. Coke's Rep. 9. 56. there was a conspiracy, in procuring others to be indicted. And it is true, for there it was not his duty to prefer such accusation. (2) The accusation was extra-judicial, and out of court; but it was not so in our case. (3) Words spoken in parliament, which is a superior court, cannot be questioned in this court, which is inferior. 3 E. 3, 19. and Stamford 153, will be objected, where the bishop of Winchester was arraigned in this court, because he departed the parliament without licence; there is but the opinion

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of Scroop, and the case was entered, P. 3 E. 19. And it is to be observed, that the plea of the bishop there, was never over-ruled. From this I gather, that Scroop was not constant to his opinion, which was sudden, being in the same term in which the plea was entered; or if he were, yet the other Judges agree not with him; and also at last the bishop was discharged by the king's writ. From this I gather, that the opinion of the court was against the king, as in Pl. 20. in Fogassa's case, where the opinion of the court was against the king, the party was discharged by privy seal. 1 and 2 Phil. and Mar. hath been objected, where an information in this court was preferred against Mr. Plowden, and other members of the house of commons, for departing from the house without licence. But in that case I observe these matters. (1) That this information depended during all the life of the queen, and at last was *sine die*, by the death of the queen. (2) In the said case, no plea was made to the jurisdiction of the court, as here it is. (3) Some of them submitted themselves to the fine, because it was easy, for it was but 53*s*. 4*d*. But this cannot be urged as a precedent, because it never came in judgment, and no opinion of the court was delivered therein. And it is no argument, that because at that time they would not plead to the jurisdiction, therefore we now cannot if we would. (4) These offences were not done in the parliament house, but elsewhere by their absence, of which the country may take notice; but not of our matters done in parliament. And absence from parliament, is an offence against the king's summons to parliament. 20 R. 2, Parliament Roll 12. Thomas Hacksey was indicted of high treason in this court, for preferring Petition in parliament; but 1 H. 4, n. 90. he preferred a Petition to have this judgment voided, and so it was, although the king had pardoned him before. And 1 H. 4. n. 104. all the commons made petition to the same purpose, because this tends to the destruction of their privileges. And this was likewise granted. 4 H. 8, c. 8, Strode's case, That all condemnations imposed upon one, for preferring of any Bill, speaking, or reasoning in parliament, are void. And this hath always been conceived to be a general act, because the prayers, time, words, and persons are general, and the answer to it is general; for a general act is always answered with, *Le roy voit*, and a particular act with *Soit droit fait al partyes*. And 33 H. 6, 17, 18. a general act is always inrolled, and so this is.

2. For the second matter, the Contempt to the command of the adjournment, Jac. 18. it was questioned in parliament, whether the king can adjourn the parliament, (although it be without doubt that the king can prorogue it). And the Judges resolve, that the king may adjourn the house by commission: and 27 Eliz. it was resolved accordingly. But it is to be observed, that none was then impeached for moving that question. (2.) It is to be observed, that they resolve, that the adjournment may be by commission, but not resolved that it may be by a verbal command, signified by another; and it derogates not from the king's prerogative, that he cannot so do, no more than in the case of 26 H. 8, 8. that he cannot grant one acre of land by parol. The king himself may adjourn the house in person, or under the great seal, but not by verbal message, for none is bound to give credit to such message; but when it is under the Great Seal, it is *teste meipso*. And if there was no command, then there can be no contempt in the disobedience of that command. (3) In this, no contempt appears by the information; for the information is, that the king had power to adjourn parliaments. Then put the case, the command be, that they should adjourn themselves: this is no pursuance of the power which he is supposed to have. The house may be adjourned two ways, to wit, by the king, or by the house itself: the last is their own voluntary act, which the king cannot compel, for, 'Voluntas non cogitur.'

3. For the third matter, which is the Conspiracy: although this be supposed to be out of the house, yet the act is legal; for members of the house may advise of matters out of the house: for the house itself is not so much for consultations, as for proposition of them. And 20 H. 6, 34. is, that inquests which are sworn for the king, may enquire of matters elsewhere. (2) For the Conspiracy to lay violent hands upon the Speaker, to keep him in the Chair; the house hath privilege to detain him in the Chair, and it was but lightly and softly, and other Speakers have been so served. (3) The king cannot prefer an information for trespass; for it is said, the king ought to be informed by a jury, to wit, by indictment, or presentment. (4) This cannot be any contempt, because it appears not that the house was adjourned; and if so, then the Speaker ought to remain in the chair; for without him, the house cannot be adjourned. But it may be objected, that the information is, That all these matters were done maliciously and seditiously. But to this I answer, That this is always to be understood according to the subject matter, 15 E. 4, 4. and 18 H. 8, 5. A wife that hath title to have dower, agrees with another to enter, (which hath right) that she against him may recover her dower. This shall not be called Covin, because both the parties have right and titles. (2). It will be objected, That if these matters shall not be punishable here; they shall be unpunished altogether, because the parliament is determined. To this I say, That they may be punished in the subsequent parliament, and so there shall be no failure of right. And many times matters in one parliament have been continued to another, as 4 E. 3, n. 16. the lord Berkley's Case, 50 E. 3, n. 185. 21 R. 2, c. 16. 6 H. 6, n. 45, 46. 8 H. 4, n. 12, offence in the forest ought to be punished in eyre, and eyres oftentimes were not held but every third year. C. 9. Epistle. and 36 E. 3. c. 10. A parliament may be every year. Error in this court

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cannot be reversed but in parliament, and yet it was never objected, that therefore there shall be a failure of right. 25 E. 3, c. 2. If a new case of treason happen, which is doubtful, it shall not be determined till the next parliament. So in Westm. 2, c. 28. where a new case happens, in which there is no writ, stay shall be made till the next parliament. And yet in these cases, there is no failure of right. And so the judges have always done in all difficult cases; they have referred the determination of them to the next parliament, as appears by 2 E. 3, 6, 7. 1 E. 3, 8. 33 H. 6, 18. 5 E. 2, Dower 145, the case of dower of a rent-charge. And 1 Jac. the Judges refuse to deliver their opinions concerning the union of the two kingdoms. The present case is great, rare, and without precedent, therefore, not determinable but in parliament. And it is of dangerous consequence; for (1) by the same reason, all the members of the house of commons may be questioned. (2) The parties shall be disabled to make their defence, and the clerk of parliament is not bound to disclose those particulars. And by this means, the debates of a great council shall be referred to a petty jury. And the parties cannot make justification, for they cannot speak those words here, which were spoken in the parliament, without slander. And the defendants have not means to compel any to be witnesses for them; for the members of the house ought not to discover the counsel of the house: so that they are debarred of justification, evidence, and witness. Lastly, By this means, none will adventure to accuse any offender in parliament, but will rather submit himself to the common danger; for, for his pains he shall be imprisoned, and perhaps greatly fined: and if both these be unjust, yet the party so vexed can have no recompence. Therefore, &c.

The Court. The question is not now, whether these matters be offences, and whether true or false. But admitting them to be offences, the sole question is, Whether this court may punish them; so that a great part of your argument is nothing to the present question.

At another day, being the next,

Mr. *Calthorpe* (who succeeded Mr. Mason, as Recorder of London) argued for Mr. Valentine, another of the defendants:

1. In general, he said, for the nature of the crimes, that they are of four sorts: 1. In Matter. 2. In Words. 3. By Consent. 4. By Letters.

Two of them are laid to the charge of this Defendant, to wit, the crime of the Matter, and of Consent. And of offences, Bracton makes some public, some private. The offenses here are public. And of them, some are capital, some not capital; as assault, conspiracy, and such like, which have not the punishment of life and death. Public crimes capital are such as are against the law of nature, as treason, murder; I will agree, that if they be committed in parliament, they may be questioned elsewhere out of parliament. But in our case, the crimes are not capital, for they are assault and conspiracy, which in many cases may be justified, as appears by 22 H. 7, Keilw. 92. 2. Ass. 3 H. 4, 10. 22 E. 4, 43. Therefore this court shall not have jurisdiction of them, for they are not against the law of nations, of God, or nature; and if these matters shall be examinable here, by consequence all actions of parliament-men may be drawn in question in this court. But it seems by these reasons, that this court shall not have jurisdiction, as this case is:

1. Because these Offences are justifiable, being but the bringing the Speaker to the Chair, which also perhaps was done by the Votes of the Commons; but if these matters shall be justified in this court, no trial can be, for upon issue of his own wrong, he cannot be tried, because acts done in the house of commons are of record, as it was resolved in the parliament, 1 Jac. and 16 H. 7, 3. C. 9. 31. are that such matters cannot be tried by the country. And now they cannot be tried by record, because, as 22 H. 8, Dy. 32. is, an inferior court cannot write to a superior. And no Certiorari lies out of the Chancery, to send this here by Mittimus, for there was never any precedent thereof; and the book of the house of commons, which is with their clerk, ought not to be divulged. And *C. Little.* is, that if a man be indicted in this court for piracy committed upon the sea, he may well plead to the jurisdiction of this court, because this court cannot try it.

2. It appears by the old Treatise, 'De modo 'tenendi Parliamentum,' that the Judges are but assistants in the parliament; and if any words or acts are made there, they have no power to contradict or controul them. Then it is incongruous that they, after the parliament dissolved, shall have power to punish such words or acts, which at the time of the speaking or doing, they had not power to contradict. There are superior, middle, and more inferior magistrates; and the superior shall not be subject to the controul of the inferior. It is a position, that 'in pares est nullum imperium, 'multo minus in eos, qui magis imperium ha-'bent.' *C. Littl.* says, That the parliament is the supreme tribunal of the kingdom, and they are Judges of the supreme tribunal; therefore they ought not to be questioned by their inferiors. (3). The Offences objected do concern the privileges of parliament, which privileges are determinable in parliament, and not elsewhere, as appears by the precedents which have been cited before. (4.) The Common Law hath assigned proper courts for matters, in respect of the place and persons: 1. For the place, it appears by 11 Ed. 4, 3, and old Entries, 101, that in an *ejectione firmæ*, it is a good plea, that the land is ancient demesne, and this excludes all other courts. So it is for land in Durham, old Entries, 419, for it is questionable there, and not out of the county. 2. For persons, H. 15 H. 7, rol. 93, old Entries, 47. If a clerk of the Chancery be impleaded in

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this court, he may plead his privilege, and shall not answer. So it is of a Clerk of the Exchequer, old Entries, 473, then much more when offences are done in parliament, which is exempt in ordinary jurisdiction, they shall not be drawn into question in this court. And if a man be indicted in this court, he may plead sanctuary, 22 H. 7, Keilw. 91. & 22, and shall be restored, 21 E. 3, 60. The Abbot of Bury's Case is to the same purpose. (5.) For any thing that appears, the house of commons had approved of these matters, therefore they ought not to be questioned in this court. And if they be offences, and the said house hath not punished them, this will be a casting of imputation upon them. (6.) It appears by the old Entries, 446, 447. that such an one ought to represent the borough of St. Germains, from whence he was sent; therefore he is in nature of an ambassador, he shall not be questioned for any thing in the execution of his office, if he do nothing against the Law of Nature or Nations, as it is the case of an ambassador. In the time of queen Elizabeth, (Camden's Brit. 449.) the bishop of Ross, in Scotland, being ambassador here, attempted divers matters against the State; and by the opinion of all the civilians of the said time, he may be questioned for those offences, because they are against the law of nations and nature; and in such matters, he shall not enjoy the privileges of an ambassador. But if he commit a civil offence, which is against the municipal law only, he cannot be questioned for it, as Bodin. de Republica, agrees the case. Upon the Statute of 28 H. 8, c. 15, for Trial of Pirates, 13 Jac. the case fell out to be thus: A Jew came ambassador to the United Provinces, and in his journey he took some Spanish ships, and after was driven upon this coast; and agreed upon the said statute, that he cannot be tried as a pirate here by commission, but he may be questioned *civiliter* in the admiralty; for, 'legati suo regi soli judicium faciunt.' So ambassadors of parliament, *soli parliamento*, to wit, in such things, which of themselves are justifiable. (7.) There was never any precedent, that this court had punished offences of this nature, committed in parliament, where any plea was put in, as here it is to the jurisdiction of the court; and where there is no precedent, non-usage is a good expositor of the law. Lord *Littl. Section* 180. *Co. Littl.* f. 81, says, as usage is a good interpreter of the laws, so non-usage, where there is no example, is a great intendment that the law will not bear it. 6 Eliz. Dy. 229, upon the Statute of 27 H. 8, of inrollments, that bargain and sale of a house in London ought not to be enrolled; the reason there given is, because it is not used. 23 Eliz. Dy. 376, no error lies here of a Judgment given in the five ports, because such writ was never seen; yet in the diversity of Courts it is said, that error lies of a Judgment given in the five ports. 39 H. 6, 39, by Ashton, that a protection to go to Rome was never seen, therefore he disallowed it. (8.) If this Court shall have jurisdiction, the court may give judgment according to law, and yet contrary to parliament law, for the parliament in divers cases hath a peculiar law. Notwithstanding the Statute of 1 H. 5, c. 1. That every burgess ought to be resident within the borough of which he is burgess, yet the constant usage of parliament is contrary thereunto; and if such matter shall be in question before ye, ye ought to adjudge according to the statute, and not according to their usage. So the house of Lords hath a special law also, as appear by 11 R. 2, the Roll of the process and judgment (which hath been cited before to another purpose) where an appeal was not according to the one law or the other, yet it was good according to the course of parliament. (9.) Because this matter is brought in this court by way of Information, where it ought to be by way of Indictment. And it appears by 41 Ass. p. 12, that if a bill of Deceit be brought in this court, where it ought to be by writ, this matter may be pleaded to the jurisdiction of the court, because it is *vi et armis*, and *contra pacem*. It appears by all our Books, that informations ought not to be grounded upon surmises, but upon matter of record, 4 H. 7, 5. 6 E. 6, Dy. 74. Information in the Exchequer, and 11 H. 8, Keilw. 101, are to this purpose. And if the matter be *vi et armis*, then it ought to be found by inquest. 2 E. 3, 1, 2. Appeal shall not be granted upon the return of the sheriff, but the king ought to be certified of it by indictment. 1 H. 7, 6, and Stamf. f. 95, a. upon the statute of 25 E. 3, c. 4, that none shall be imprisoned but upon indictment or presentment; and 28 E. 3, c. 3, 42 E. 3, c. 3, are to the same purpose. So here, this information ought to have been grounded upon indictment, or other matter of record, and not upon bare intelligence given to the king. (10.) The present case is great and difficult, and in such cases, the Judges have always outed themselves of jurisdiction, as appears by Bracton, Book 2, f. 1, 'Si aliquid novi non usitatum in regno acciderit,' 2 E. 3, 6, 7, and Dower 242.

Now I will remove some Objections which may be made.

Where the king is Plaintiff, it is in his election to bring his action in what Court he pleases. This is true in some sense, to wit, That the King is not restrained by the Statute of Magna Charta, 'Quod communia placita non sequantur curiam nostram;' for he may bring his *quare impedit* in B. R. And if it concerns Durham, or other County Palatine, yet the king may have his action here: for the said Courts are created by patent, and the king may not be restrained by parliament, or by his own patent, to bring his action where he pleaseth. But the king shall not have his action where he pleaseth against a prohibition of the common law, as 12 H. 7, Keilw. 6, the king shall not have a *formedon* in Chancery. And C. 6. 20 Gregory's Case, if the king will bring an information in an inferior court, the party may plead to the jurisdiction. So where

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the Common Law makes a prohibition, the king hath not election of his court.

The information is *contra formam statuti*, which Statute, as I conceive, is intended the statute of 5 H. 4, c. 6, and 11 H. 6, c. 11, which gives power to this court to punish an assault made upon the servant of a knight of Parliament. But our case is not within those statutes, nor the intent of them; for it is not intendible, that the parliament should disadvantage themselves in point of their privilege. And this was a Trespass done within the house, by parliament-men amongst themselves. And Crompton's Jurisdiction of Courts, f. 8, saith, That the parliament may punish trespasses done there.

Precedents have been cited of Parliament-men imprisoned and punished for matters done in parliament. To this I say, That there is *via juris*, and *via facti*; and *via facti* is not always *via juris*. C. 4, 93, Precedents are no good directions, unless they be judicial.

Otherwise there will be a failure of justice, wrongs shall be unpunished. To this I answer, That a mischief is oft-times rather sufferable than an inconvenience, to draw in question the privileges of parliament. By the antient Common Law, as it appears by 21 E. 3, 23, and 21 Ass. if an infant bring an Appeal, the suit shall be staid during his infancy; because the party cannot have his trial by battle against the infant; but the law is now held otherwise in the said case. And in some cases, criminal offences shall be dispunished, 29 H. 8, Dy. 40. Appeal of Murder lies not for Murder done in several Counties.

This court of B. R. is *coram ipso rege;* the king himself, by intendment, is here in person. And, as it is said, C. 9, 118, it is, 'Supremum 'Regni Tribunal,' of ordinary jurisdiction. But to this I say, That the Parliament is a transcendent court, and of transcendent jurisdiction: it appears by 28 Ass. p. 52, that the stile of other courts is *coram rege*, as well as this is; as 'coram rege in cancellaria, coram rege in 'camera;' and though it be *coram rege*, yet the Judges give the judgment. And in the time of H. 3, in this court, some entries were 'coram rege,' others, 'coram Hugone de Bigod.'

The Privileges of Parliament are not questioned, but the conspiracies and misdemeanors of some of them. But to this I say, that the distinction is difficult and narrow in this case, where the offences objected are justifiable, and if they be offences, this reflects upon the house, which hath not punished them.

The Cases of 3 E. 3, 19, and 1 and 2 Phil. et Mar. have been objected. But for the last it is observable, That no plea was pleaded to the jurisdiction, as it is in our case. And if a parliament-man, or other which hath privilege, be impleaded in foreign court, and neglect his plea to the jurisdiction, the court may well proceed, 9 H. 7, 14, 36 H. 6, 34 H. 13 Jac. In this Court the lord Norreys, that was a peer of parliament, was indicted for the murder of one Bigod, and pleaded his pardon. And there it was doubted, how the Court should proceed against him (for he, by law, ought to have his trial by his peers). And it was resolved, that when he pleads his pardon, or confesseth his fault, thereby he gives jurisdiction to the court, and the court may give judgment against him. So that these cases, where it was not pleaded to the jurisdiction, can be no precedent in our case.

The privilege here is not claimed by Prescription or Charter, therefore it is not good. But I say, that notwithstanding this, it is good; for where the Common Law outs a court of jurisdiction, there needs no Charter or Prescription; 10 H. 6, 13, 8 H. 8, Keilw. 189. Br. n. c. 515. Where sanctuary of a Church is pleaded, there is no need to make prescription, because every Church is a sanctuary by the common law. Therefore, &c.

Sir *Robert Heath*, the King's Attorney, the same day argued on the other side, but briefly. First, he answered the Objections which had been made.

1. He said, That informations might well be for matters of this nature, which are not capital; and that there are many precedents of such informations. (But Note, that he produced none of them.)

2. It hath been objected, That they are a council, therefore they ought to speak freely. But such speeches which are here pronounced, prove them not counsellors of state, but Bedlams; the addition of one word would have made it treason, to wit, *proditorie*. But it is the pleasure of the king to proceed in this manner, as now it is. And there is great difference between Bills and Libels, and between their proceedings, as council and as mutinous.

3. That it would be of dangerous consequence; for by this means none would adventure to complain of grievances. I answer, they may make their complaints in a parliamentary manner; but they may not move things, which tend to distraction of the king and his government.

4. These matters may be punished in following parliaments. But this is impossible, for following parliaments cannot know with what mind these matters were done. Also the House of Commons is not a court of justice of itself. The two houses are but one body, and they cannot proceed criminally to punish crimes, but only their members by way of imprisonment; and also they are not a Court of Record. And they have forbid their clerk to make entry of their speeches, but only of matters of course; for many times they speak upon the sudden, as occasion is offered. And there is no necessity that the king should expect a new parliament. The Lords may grant Commissions to determine matters after the parliament ended; but the House of Commons cannot do so. And also a new House of Commons consists of new men, which have no cognizance of these offences: 1 H. 4. The bishop of Carlisle, for words spoken in the parliament, that the king had not right to the crown, was arraigned

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in this court of High-treason; and then he did not plead his privilege of parliament, but said, That he was *Episcopus unctus*, &c.

5. 4 H. 8. Strode's Case hath been objected. But this is but a particular act, although it be in print; for Rastal entitles it by the name of Strode: so the title, body, and proviso of the act are particular.

6. That this is an inferior court to the parliament, therefore, &c. To this I say, That, even sitting the parliament, this court of B. R. and other courts, may judge of their privileges, as of a parliament-man put in execution, &c. and other cases. It is true that the judges have oft-times declined to give their judgment upon the privileges of parliament, sitting the court. But from this it follows not, that when the offence is committed there, and not punished, and the said court dissolved, that therefore the said matter shall not be questioned in this court.

7. By this means the Privileges of parliament shall be in great danger, if this court may judge of them. But I answer, That there is no danger at all; for this court may judge of acts of parliament.

8. Perhaps these matters were done by the Votes of the house; or, if they be offences, it is an imputation to the house to say, That they had neglected to punish them; but this matter doth not appear. And if the truth were so, these matters might be given in evidence.

9. There is no precedent in the case, which is a great presumption of law. But to this I answer, That there was never any precedent of such a fact, therefore there cannot be a precedent of such a judgment. And yet in the time of queen Elizabeth, it was resolved by Brown, and many other justices, that offences done in parliament may be punished out of parliament, by imprisonment or otherwise. And the case of 3 E. 3, 19, is taken for good law by Stamf. and Firzh. And 22 E. 3, and 1 Mar. accord directly with it. But it hath been objected, that there was no plea made to the jurisdiction. But it is to be observed, that Powden, that was a learned man, was one of the defendants, and he pleaded not to the jurisdiction, but pleaded licence to depart. And the said information depended during all the reign of queen Mary, during which time there were four parliaments, and they never questioned this matter.—But it hath been further objected, That the said case differs from our case, because that there the offence was done out of the house, and this was done within the house. But in the said case, if licence to depart be pleaded, it ought to be tried in parliament, as well as these offences here. Therefore, &c.

The Judges also the same day spake briefly to the case, and agreed with one voice, 'That 'the court, as this case is, shall have jurisdic-'tion, although that these offences were com-'mitted in parliament, and that the imprisoned 'members ought to answer.'

Jones began and said, That though this question be now newly moved, yet it is an ancient question with him; for it had been in his thoughts these 18 years. For this information, there are three questions in it: 1. Whether the matters informed be true or false? And this ought to be determined by Jury or Demurrer. 2. When the matters of the information are found or confessed to be true, if the information be good in substance? 3. Admit that the offences are truly charged, if this Court hath power to punish them? And that is the sole question of this day.—And it seems to me, that of these offences, although committed in parliament, this court shall have jurisdiction to punish them. The plea of the Defendants here to the jurisdiction being concluded with a demurrer, is not peremptory unto them, although it be adjudged against them; but if the plea be pleaded to the jurisdiction, which is found against the Defendant by verdict, this is peremptory.

In the discussion of this point, I declined these questions: 1. If the matter be voted in parliament, when it is finished, it can be punished and examined in another court? 2. If the matter be commenced in parliament, and that ended, if afterward it may be questioned in another court?

I question not these matters; but I hold, that an offence committed criminally in parliament, may be questioned elsewhere, as in this court; and that for these Reasons:

1. 'Quia interest reipublicæ ut maleficia 'non maneant impunita:" and there ought to be a fresh punishment of them. Parliaments are called at the king's pleasure, and the king is not compellable to call his parliament; and if before the next parliament, the party offending, or the witnesses die, then there will be a failure of justice.

2. The parliament is no constant court; every parliament mostly consists of several men, and, by consequence, they cannot take notice of matters done in the foregoing parliament; and there they do not examine by oath, unless it be in Chancery, as it is used of late time.

3. The parliament cannot send process to make the offenders to appear at the next parliament; and being at large, if they hear a noise of a parliament, they will *fugam facere*, and so prevent their punishment.

4. Put the case, that one of the Defendants be made a baron of parliament, now he cannot be punished in the house of commons, and so he shall be unpunished.

It hath been objected, 'That the parliament 'is the superior court to this, therefore this 'court cannot examine their proceedings.'

To this I say, That this Court of the King's-Bench is a higher court than the Justices of Oyer and Terminer, or the Justices of Assize: but if an offence be done where the King's-Bench is, after it is removed, this offence may be examined by the Justices of Oyer and Terminer, or by the Justices of Assize. We can-

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not question the judgments of parliaments, but their particular offences.

2 Object. It is a privilege of parliament, where we are not competent judges.

To this I say, That 'privilegium est privata 'lex et privat. legem.' And this ought to be by grant or prescription in parliament: and then it ought to be pleaded for the manner, as is in 33 H. 1, Dy. as it is not here pleaded. Also we are Judges of all acts of parliament: as 4 H. 7, ordinance made by the king and commons is not good, and we are judges what shall be a session of parliament, as it is in Plowden, in Partridge's Case. We are Judges of their lives and lands, therefore of their liberties. And 8 Eliz. which was cited by Mr. Attorney, it was the opinion of Dyer, Oatlyn, Welsh, Brown, and Southcot, justices, That offences committed in parliament may be punished out of parliament. And 3 Ed. 5, 19, it is good law. And it is usual near the end of parliaments, to set down some petty punishment upon offenders in parliament, to prevent other courts. And I have seen a Roll in this Court, in 6 H. 6, where Judgment was given in a Writ of Annuity in Ireland, and afterward the said judgment was reversed in parliament in Ireland; upon which judgment, Writ of Error was brought in this Court, and reversed.

Hyde, Chief-Justice, to the same intent: No new matter hath been offered to us now by them that argue for the Defendants, but the same reasons and authorities in substance, which were objected before all the justices of England, and barons of the Exchequer, at Serjeants-inn in Fleet-street, upon an Information in the Star-Chamber for the same matter. At which time, after great deliberation, it was resolved by all of them, 'That no offence com-'mitted in parliament, that being ended, may 'be punished out of parliament.' And no court more apt for that purpose than this court in which we are: and it cannot be punished in a future parliament, because it cannot take notice of matters done in a foregoing parliament.

As to what was said, That an inferior court cannot meddle with matters done in a superior; true it is, that an inferior court cannot meddle with judgments of a superior court; but if particular members of a superior court offend, they are oft-times punishable in an inferior court, as, if a judge shall commit a capital offence in this court he may be arraigned thereof at Newgate, 3 E. 3, 19. and 1 Mar. which have been cited, over-rule this case. Therefore, &c.

Justice *Whitlocke*. 1. I say in this case, 'Nihil dictum quod non dictum prius.' 2 That all the Judges of England have resolved this very point. 3. That now we are but upon the brink and skirts of the cause: for it is not now in question, if these be offences or no; or, if true or false; but only if this court have jurisdiction.

But it hath been objected, That the offence is not capital, therefore it is not examinable in this court.

But though it be not capital, yet it is criminal, for it is sowing of sedition to the destruction of the commonwealth. The question now is not between us that are Judges of this Court, and the parliament, or between the king and the parliament, but between some private members of the house of commons and the king himself: for here the king himself questions them for those offences, as well he may. In every commonwealth there is one super-eminent power, which is not subject to be questioned by any other, and that is the king in this commonwealth, who, as Bracton saith, 'Solum 'Deum habet ultorem.' But no other within the realm hath this privilege. It is true, that that which is done in parliament by consent of all the house, shall not be questioned elsewhere: but if any private members 'exuunt 'personas judicem, et induunt malefacientium 'personas, et sunt seditiosi;' is there such sanctimony in the place, that they may not be questioned for it elsewhere? The bishop of Ross, as the case hath been put, being ambassador here, practised matters against the state: and it was resolved, That although 'legatus 'sit rex in alieno solo,' yet when he goes out of the bounds of his office, and complots with traitors in this kingdom, that he shall be punished as an offender here. A minister hath a great privilege when he is in the pulpit; but yet, if in the pulpit he utter speeches, which are scandalous to the state, he is punishable. So in this case, when a burgess of parliament becomes mutinous, he shall not have the privilege of parliament. In my opinion, the realm cannot consist without parliaments, but the behaviour of parliament-men ought to be parliamentary. No outrageous speeches were ever used against a great minister of state in parliament which have not been punished. If a judge of this court utter scandalous speeches to the state, he may be questioned for them before commissioners of Oyer and Terminer, because this is no judicial act of the court.

But it hath been objected, That we cannot examine acts done by a higher power.

To this I put this case: when a peer of the realm is arraigned of Treason, we are not his judges, but the High-Steward, and he shall be tried by his peers: but if error be committed in this proceeding, that shall be reversed by error in this court: for that which we do is *coram ipso rege*.

It hath been objected, 'That the Parlia-'ment-law differs from the law by which we 'judge in this court in sundry cases.' And for the instance which hath been made, 'That by 'the statute, none ought to be chosen burgess 'of a town in which he doth not inhabit, but 'that the usage of parliament is contrary;' But if information be brought upon the said statute against such a burgess, I think that the statute is a good warrant for us to give judgment against him.

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And it hath been objected, 'That there is 'no Precedent in this matter.'

But there are sundry Precedents, by which it appears, that the parliament hath transmitted matters to this court; as 2 R. 2, there being a question between a great peer and a bishop, it was transmitted to this court, being for matter of behaviour: and although the Judges of this court are but inferior men, yet the court is higher. For it appears by 11 Eliz. Dy. That the Earl Marshal of England is an officer of this court; and it is always admitted in parliament, That the Privileges of Parliament hold not in three cases, to wit, 1. In case of Treason. 2. In case of Felony. And 3. in suit for the Peace. And the last is our very case. Therefore, &c.

Croke argued to the same intent: he said, That these offences ought to be punished in the court, or no where; and all manner of offences which are against the crown are examinable in this court. It hath been objected, 'That by 'this means, none will adventure to make com-'plaints in parliament.' That is not so; for he may complain in a parliamentary course, but not falsely and unlawfully, as here is pretended: for that which is unlawfully, cannot be in a parliamentary course.

It hath been objected, 'That the parliament 'is a higher court than this.' And it is true: But every member is not a Court; and if he commit offence he is punishable here. Our court is a court of high jurisdiction, it cannot take cognizance of real pleas; but if a real plea comes by error in this court, it shall never be transmitted. But this court may award a Grand Cape, and other process usual in real actions: but of all capital and criminal causes, we are originally competent judges, and by consequence of this matter. But I am not of the opinion of Mr. Attorney-General, that the word *proditorie* would have made this treason. And for the other matters, he agreed with the judges. Therefore by the court, the defendants were ruled to plead further: and Mr. Lenthal of Lincoln's-Inn was assigned of counsel for them.

But inasmuch as the Defendants would not put in any other Plea, the last day of the Term judgment was given against them upon a *nihil dicit*; which Judgment was pronounced by Jones to this effect:

"The matter of the Information now, by the confession of the Defendants, is admitted to be true, and we think their plea to the jurisdiction insufficient for the matter and manner of it. And we hereby will not draw the true Liberties of Parliament-men into question; to wit, for such matters which they do or speak in a parliamentary manner. But in this case there was a conspiracy between the Defendants to slander the state, and to raise sedition and discord between the king, his peers, and people; and this was not a parliamentary course. All the Judges of England, except one, have resolved the statute of 4 H. 8, to be a private act, and to extend to Strode only. But every member of the parliament shall have such privileges as are there mentioned; but they have no privilege to speak at their pleasure. The parliament is an high court, therefore it ought not to be disorderly, but ought to give good example to other courts. If a Judge of our court should rail upon the state, or clergy, he is punishable for it. A member of the parliament may charge any great officer of the state with any particular offence; but this was a malevolous accusation in the generality of all the officers of state, therefore the matter contained within the information is a great offence, and punishable in this court.

2. "For the Punishment, although the Offence be great, yet that shall be with a light hand, and shall be in this manner.

1. "That every of the Defendants shall be imprisoned during the king's pleasure: Sir John Elliot to be imprisoned in the Tower of London, and the other Defendants in other prisons.

2. "That none of them shall be delivered out of prison until he give security in this court for his good behaviour, and have made submission and acknowledgment of his offence.

3. "Sir John Elliot, inasmuch as we think him the greatest offender, and the ringleader, shall pay to the king a Fine of 2,000*l.* and Mr. Hollis, a Fine of 1,000 marks: and Mr. Valentine, because he is of less ability than the rest, shall pay a Fine of 500*l.*" And to all this, all the other Justices with one voice accorded.

Afterwards the Parliament which met the 3d of November, 1640, upon report made by Mr. Recorder Glyn, of the state of the several and respective Cases of Mr. Hollis, Mr. Selden, and the rest of the imprisoned Members of the parliament, in Tertio Caroli, touching their extraordinary sufferings, for their constant affections to the Liberties of the kingdom, expressed in that parliament; and upon Arguments made in the house thereupon, did, upon the 6th of July, 1641, pass these ensuing Votes: which, in respect of the reference they have to these last mentioned proceedings, we have thought fit to insert: viz.

July 6, 1641.

1. "Resolved upon the question, That the issuing out of the Warrants from the lords and others of the privy-council, compelling Mr. Hollis, and the rest of the members of that parliament, 3 Car. during the parliament, to appear before them, is a breach of the privilege of parliament by those privy counsellors.

2. "That the committing of Mr. Hollis and the rest, by the lords and others of the privy-council, during the parliament, is a breach of the Privilege of parliament by those lords, and others.

3. "That the searching and sealing of the chamber, study, and papers of Mr. Hollis, Mr. Selden, and sir John Elliot, being members of this house, and during the parliament, and issuing of Warrants to that purpose, was a breach of the privilege of parliament, by those that executed the same.

4. "That the exhibiting of an Information in

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the Court of Star-Chamber, against Mr. Hollis and the rest, for matters done by them in parliament, being members of parliament, and the same so appearing in the Information, is a breach of the privilege of parliament.

5. "That sir Robert Heath, and sir Humphrey Davenport, sir Heneage Finch, Mr. Hudson, and sir Robert Berkley, that subscribed their names to the Information, are guilty thereby of the breach of privilege of parliament.

6. "That there was a delay of justice towards Mr. Hollis, and the rest that appeared upon the Habeas Corpus, in that they were not bailed in Easter and Trinity-term, 5 Car.

7. "That sir Nich. Hyde, then Chief Justice of the King's-bench, is guilty of this delay.

8. "That sir William Jones, being then one of the Justices of the court of King's-bench, is guilty of this delay.

9. "That sir James Whitlocke, knt. then one of the justices of the court of King's-bench, is not guilty of this delay*."

* Mr. Whitlocke in his Memorials of the English Affairs, p. 38, 39, says, "In the house there fell out a Debate touching the Writs of Habeas Corpus, upon which Selden and the rest of his fellow-prisoners demanded to be bailed; and the Judges of the King's-bench did not bail them, as by law they ought; but required of them sureties for their good behaviour. This was so far aggravated by some, that they moved, 'The prisoners might have reparation 'out of the estates of those Judges who then 'sat in the King's-bench when they were re-'manded to prison;' which Judges they named to be Hyde, Jones, and my father: as for judge Croke, who was one of that court, they excused him, as differing in opinion from the rest.—I being a member of the house, and son to the Judge, knew this to be mistaken, as to the fact, and spake in the behalf of my father, to this effect: 'That it was not unknown to 'divers worthy members of the house, that 'judge Whitlocke had been a faithful, able, and 'stout assertor of the Rights and Liberties of 'the free-born subjects of this kingdom; for 'which he had been many ways a sufferer. And 'particularly by a strait and close imprisonment, 'for what he said and did, as a member of this 'honourable house in a former parliament: and 'he appeals to those noble gentlemen, who can-'not but remember those passages; and some 'who were then sufferers with him. And for 'his Opinion, and carriage in the Case of the 'Habeas Corpus, it is affirmed to have been 'the same with that of Judge Croke; and 'he appeals for this, to the honourable gentle-'men who were concerned in it; and others, 'who were present then in court.' Hampden, and divers others, seconded this motion; who affirmed very much of the matter of fact, and expressed themselves with great respect and honour to the memory of the deceased Judge, who was thereupon reckoned by the house in the same degree with Judge Croke, as to their censure and proceedings."

Ordered, That the further debate of this shall be taken into consideration on to-morrow morning.

July 8, 1641.

10. "Resolved upon the question, That sir George Croke, knight, then one of the Judges of the King's-bench, is not guilty of this delay.

11. "That the continuance of Mr. Hollis, and the rest of the Members of Parliament, 3 Car. in prison, by the then Judges of the King's-bench, for not putting in sureties for their good behaviour, was without just or legal cause.

12. "That the exhibiting of the information against Mr. Hollis, sir John Elliot, and Mr. Valentine, in the King's-bench, being Members of Parliament, for matters done in parliament, was a breach of the privilege of parliament.

13. "That the over-ruling of the Plea, pleaded by Mr. Hollis, sir John Elliot, and Mr. Valentine, upon the information, to the jurisdiction of the court, was against the law and privilege of parliament.

14. "That the judgment given upon a *nihil dicit*, against Mr. Hollis, sir John Elliot, and Mr. Valentine, and fine thereupon imposed, and their several imprisonments thereupon, was against the law and privilege of parliament,

15. "That the several proceedings against Mr. Hollis, and the rest, by committing them, and prosecuting them in the Star-Chamber, and in the King's-Bench, is a Grievance.

16. "That Mr. Hollis, Mr. Stroud, Mr. Valentine, and Mr. Long, and the heirs and executors of sir John Elliot, sir Miles Hobart, and sir Peter Heyman, respectively, ought to have reparation for their respective damages and sufferings, against the lords and others of the council, by whose warrants they were apprehended and committed, and against the council that put their hands to the information in the Star-Chamber, and against the Judges of the King's-Bench.

17. "That Mr. Lawrence Whitaker, being a member of the parliament 3 Car. entering into the chamber of sir John Elliot, being likewise a member of the parliament, searching of his trunks and papers, and sealing of them, is guilty of the breach of the privilege of parliament, this being done before the dissolution of parliament.

18. "That Mr. Lawrence Whitaker being guilty of the breach of the privileges as aforesaid, shall be sent forthwith to the Tower, there to remain a prisoner during the pleasure of the house."

Mr. Whitaker was called down, and kneeling at the bar, Mr. Speaker pronounced this Sentence against him accordingly.

Mr. Whitaker being at the bar, did not deny, but that he did search and seal up the chamber, and trunk, and study of sir John Elliot, between the 2d and 10th of March, during which time the parliament was adjourned: but endeavoured to extenuate it, by the confusion of the times, at that time; the length of the time since that crime was committed, being

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thirteen years; the command that lay upon him, being commanded by the king and 23 *privy-counsellors.*

Afterwards Mr. Recorder Glyn made a farther Report to the House of Commons, viz.

The Warrant, which issued and was subscribed by twelve privy-counsellors, to summon nine of the members of the house of commons, in the Parliament of *tertio Caroli*, to appear before them during the parliament, viz. Mr. Wm. Stroud, Mr. Benj. Valentine, Mr. Hollis, sir John Elliot, Mr. Selden, sir Miles Hobart, sir Peter Heyman, Mr. Walter Long, and Mr. Wm. Coriton, bearing date *tertio Martii, quarto Caroli;* and the names of the twelve privy-counsellors that signed this warrant, were read: the parliament being adjourned the 2d of March, to the 10th of March, and then dissolved.

The Warrants under the hands of sixteen privy-counsellors, for committing of Mr. Denzil Hollis, sir John Elliot, Mr. John Selden, Mr. Benj. Valentine, and Mr. Wm. Coriton, close prisoners to the Tower, bearing date, *quarto Martii, quarto Caroli*, during the parliament; were read; and the names of the privy-counsellors that subscribed them, were read. The Warrants under the hands of 22 privy-counsellors, directed to Wm. Boswel, esq. to repair to the lodgings of Denzil Hollis, esq. and to Simon Digby, esq. to repair to the lodgings of Mr. John Selden, and to Lawrence Whitaker, esq. to repair to the lodgings of sir John Elliot, requiring them to seal up the trunks, studies, and cabinets, or any other thing that had any papers in them, of the said Mr. Hollis, Mr. John Selden, and sir John Elliot, were read, and likewise the names of the privy-counsellors that subscribed the said Warrants. A Warrant under the hands of 13 privy-counsellors, for the commitment of Mr. Wm. Stroud close prisoner to the King's-Bench, bearing date 2d April, 1628, was read, and the names of the privy-counsellors that subscribed it: The like Warrant was for the commitment of Mr. Walter Long, close prisoner to the Marshalsea.

Resolved, &c. 1. "That Mr. Hollis shall have the sum of 5,000*l.* for his damages, losses, imprisonments, and sufferings, sustained and undergone by him, for his service done to the commonwealth in the parliament of *tertio Caroli.*

2. "That Mr. John Selden shall have the sum of 5,000*l.* for his damages, losses, imprisonments, and sufferings, sustained and undergone by him, for his service done to the commonwealth in the parliament of *tertio Caroli.*

3. "That the sum of 5,000*l.* be assigned for the damages, losses, imprisonments, and sufferings, sustained and undergone by sir John Elliot, for his service done to the commonwealth in the parliament of *tertio Caroli*, to be disposed of in such manner as this house shall appoint.

4. "That the sum of 2,000*l.* part of 4,000*l.* paid into the late court of Wards and Liveries, by the heirs of sir John Elliot, by reason of his marriage with sir Daniel Norton's daughter, shall be repaid to Mr. Elliot, out of the arrears of monies payable into the late court of Wards and Liveries, before the taking away of the said late court.

Ordered, "That it be referred to the committee who brought in this report, to examine the decree made in the late court of Wards and Liveries, concerning the marriage of sir John Elliot's heir with sir Daniel Norton's daughter; and what monies were paid by reason of the said Decree, and by whom; and to report their opinion thereupon to the house. Also, That it be referred to the committee, to examine after what manner sir John Elliot came to his death, his usage in the Tower, and to view the rooms and places where he was imprisoned, and where he died, and to report the same to the house.

Resolved, &c. 5. "That the sum of 5,000*l.* shall be paid unto the ..... of sir Peter Heyman, for the damages, losses, sufferings, and imprisonments, sustained and undergone by sir Peter, for his service done to the commonwealth in the parliament of *tertio Caroli.*

6. "That Mr. Walter Long shall have the sum of 5,000*l.* paid unto him, for the damages, losses, sufferings, and imprisonment, sustained and undergone by him, for his service done to the commonwealth in the parliament *tertio Caroli.*

7. "That the sum of 5,000*l.* shall be assigned for the damages, losses, sufferings, and imprisonment, sustained and undergone by Mr. Stroud (late a member of this house) deceased, for service done by him to the Commonwealth in the parliament of *tertio Caroli.*

8. "That Mr. Benj. Valentine shall have the sum of 5,000*l.* paid unto him, for the damages, losses, sufferings, and imprisonments, sustained and undergone by him, for his service to the Commonwealth in the parliament of *tertio Caroli.*

9. "That the sum of 500*l.* shall be bestowed and disposed of, for the erecting a Monument to sir Miles Hobart, a member of the parliament of *tertio Caroli*, in memory of his sufferings for his service to the Commonwealth in the parliament of *tertio Caroli.*"

Ordered, That it be recommitted to the Committee, who brought in this report, to consider how the several sums of money this day ordered to be paid for damages to the several members before named, for their sufferings in the service of the Commonwealth, may be raised.

In the reign of king Charles 2, this Affair was taken into consideration, and the house of commons came to several Resolutions; viz.

Die Martis, 12 Nov. 1667.

Upon a Report made by Mr. Vaughan from the committee concerning Freedom of Speech in parliament.

Resolved, &c. That the house do agree with the committee, That the act of parliament in 4 Hen. 8, commonly intitled, An Act concern-

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ing Richard Strode, is a general law, extending to indemnify all and every the members of both houses of parliament, in all parliaments, for and touching any bills, speaking, reasoning, or declaring of any matter or matters, in and concerning the parliament to be communed and treated of, and is a declaratory law of the ancient and necessary rights and privileges of parliament.

Die Sabbati, 23 Nov. 1667.

Resolved, &c. That the Judgment given 5 Car. against sir John Elliot, Denzil Hollis, and Benj. Valentine, in the King's-Bench, is an illegal judgment, and against the freedom and privilege of parliament.

Die Sabbati, 7 Dec. 1667.

Resolved, &c. That the concurrence of the lords be desired to the Votes of this house concerning Freedom of Speech in parliament: and that a Conference be on Monday next desired to be had with the lords, at which time the Votes may be delivered, and reasons for them given.

Die Jovis, 12 Dec. 1667.

A message from the lords by sir William Child and sir Thomas Estcourt. 'Mr. Speaker; The lords have commanded us to acquaint you, that they agree with this house in the Votes delivered them at the last Conference concerning Freedom of Speech in parliament.

Die Mercurii, 11 Dec. 1667.

Next the Lord Chamberlain and the lord Ashley reported the effect of the Conference with the house of commons yesterday, which was managed by Mr. Vaughan, who said he was commanded by the house of commons to acquaint their lordships with some resolves of their house concerning the Freedom of Speech in Parliament, and to desire their lordships concurrence therein.

In order to which, he was to acquaint their lordships with the Reasons that induced the house of commons to pass those resolves. He said the house of commons was accidentally informed of certain Books published under the name of sir George Croke's Reports, in one of which there was a Case published, which did very much concern this great Privilege of Parliament: and which passing from hand to hand amongst the men of the long robe, might come in time to be a received opinion as good law.

The House of Commons considering the consequence, did take care that this Case might be enquired into, and caused the Book to be produced and read in their house, and he thought it the next and clearest way to inform their lordships, is to read the Case itself, which is Quinto Caroli primi Michaelmas term, which Cuse was read as followeth:

"The King *v.* sir John Elliot, Denzil Hollis, and Benjamin Valentine.

"An Information was exhibited against them by the Attorney-General, reciting, that a parliament was summoned to be held at Westminster, 17 Martii 3 Caroli regis ibidem inchoat. And that sir John Elliot was duly elected and returned knight for the county of Cornwall, and the other two burgesses of parliament for other places: and sir John Finch chosen Speaker. That sir John Elliot, 'machinans et intendens omnibus viis et modis 'seminare et excitare' discord, evil will, murmurings, and seditions, as well 'versus regem, 'magnates, prælatos, proceres et justiciarios, et 'reliquos subjectos regis, et totaliter deprivare 'et subvertere regimen et gubernationem regni 'Angliæ, tam in domino rege quam in concilliariis et ministris suis cujuscunque generis, et 'introducere tumultum et confusionem' in all estates and parts, 'et ad intentionem,' that all the king's subjects should withdraw their affections from the king, the 23d of Feb. anno 4 Car. in the parliament, and hearing of the commons, 'falso, malitiose, et seditiose,' used these words, 'The king's privy council, his 'judges, and his counsel learned, have con-'spired together to trample under their feet the 'Liberties of the Subjects of this realm, and 'the liberties of this house.'

"And afterwards, upon the 2nd of March, anno 4, aforesaid, the king appointed the parliament to be adjourned until the 10th of March next following, and so signified his pleasure to the house of commons; and that the three Defendants the said 2d day of March, 4 Car. *malitiose* agreed, and amongst themselves conspired to disturb and distract the commons, that they should not adjourn themselves according to the king's pleasure before signified; and that the said sir John Elliot, according to the agreement and conspiracy aforesaid, had maliciously 'in propositum et intentionem prædictam' in the house of commons aforesaid, spoken these false, pernicious, and seditious words precedent, &c. And that the said Denzil Hollis, according to the Agreement and Conspiracy aforesaid, between him and the other defendants, then and there 'falso, malitiose, et seditiose uttered hæc falsa, malitiosa et scandalosa 'verba præcedentia, &c.' And that the said Denzil Hollis, and Benjamin Valentine, 'secundum agreamentum et conspirationem prædict. '&c. ad intentionem et propositum prædict.' uttered the said words upon the said 2d day of March, after the signifying the king's pleasure to adjourn; and the said sir John Finch, the Speaker, endeavouring to get out of the Chair, according to the king's command, they 'vi et 'armis manu forti et illicito' assaulted, evil intreated, and forcibly detained him in the Chair; and afterwards being out of the Chair, they assaulted him in the house, and evil entreated him, 'et violenter manu forti et illicito' drew him to the Chair, and thrust him into it. Whereupon there was great tumult and commotion in the house, to the great terror of the Commons there assembled, against their allegiance, in *maximum contemptum,* and to the disherison of the king, his crown and dignity, for which, &c. To this Information the Defendants appearing, pleaded to the jurisdiction of this court, that

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the court ought not to have cognizance thereof, because it is for offences done in parliament, and ought to be there examined and punished, and not elsewhere. It was thereupon demurred, and after Argument adjudged, that they ought to answer; for the charge is for conspiracy, seditious acts and practices, to stop the adjournment of the parliament, which may be examined out of parliament, being seditious and unlawful acts; and this court may take cognizance and punish them: Afterwards divers rules being given against them, viz. Sir John Eliot, that he should be committed to the Tower, and should pay 2,000*l.* fine, and upon his enlargement should find sureties for his good behaviour; and against Hollis, that he should pay 1,000 marks, and should be imprisoned, and find sureties, &c. and against Valentine, that he should pay 500*l.* fine, be imprisoned, and find sureties."

Then Mr. *Vaughan* laid much emphasis upon the words 'machinans et intendens, &c.' and then went on, That the house of commons had not only read the Case as it was in the Book, but did look into the Record, where, in the Information itself, they found some considerable differences from the print; as that the crime alledged consisting partly of Words spoken in the house, partly of criminal actions pretended to be committed; the Gentlemen accused pleaded severally, namely, specially to the words, and a several plea apart to the criminal actions: But the court dealt so craftily, that they over-ruled the whole plea, mingled together, and took it in general, so that perhaps whatsoever was criminal in the actions might serve for a justification of their rule, and might make it seem in time to become a Precedent, and a ruled case against the Liberty of Speech in Parliament, which they durst not singly and bare-faced have done.

The House of Commons did take care to enquire what ancient laws did fortify this the greatest Privilege of both houses; and they found in the 4 Hen. 8. an Act concerning one Richard Strode, who was a member of parliament, and was fined at the Stannary Courts, in the West, for condescending and agreeing with other members of the house to pass certain acts to the prejudice of the Stannaries; this act was made occasionally for him, but did reach to every member of parliament that then was, or shall be; the very words being, viz.

'And over that, it be enacted by the same authority, that all suits, accusements, condemnations, executions, fines, amercements, punishments, corrections, grievances, charges and impositions, put or had, or hereafter to be put or had unto, or upon the said Richard, and to every other person or persons aforespecified, that now be of this present parliament, or that of any parliament hereafter shall be, for any bill, speaking, reasoning, or declaring of any matter or matters concerning the parliament to be commenced and treated of, be utterly void, and of none effect. And over that, be it enacted by the said authority, that if the said Richard Strode, or any of the said other person or persons hereafter be vexed, troubled, or otherwise charged for any causes, as is aforesaid, that then he or they, and every of them so vexed or troubled of, or for the same, to have action upon the case against every such person or persons so vexing or troubling any, contrary to this ordinance and provision; in the which action the party grieved shall recover treble damages and costs, and that no protection, essoyne, nor wager of law in the said action in any wise be admitted nor received.'

He said, it is very possible the Plea of those worthy persons, Denzil Hollis, sir John Elliot, and the rest, was not sufficient to the jurisdiction of the court, if you take in their criminal actions altogether; but, as to the words spoken in parliament, the court could have no jurisdiction while this act of 4 Hen. 8. is in force, which extends to all members that then were (or ever should be,) as well as Strode; and was a public general law, though made upon a private and a particular occasion.

He recommended to their lordships the consideration of the time when these words in the Case of sir George Croke's Reports were spoken, which was the 2nd of March, 4 Caroli primi, being in that parliament which began in the precedent March, 3 Car. at which time the Judgment given in the King's-Bench about the Habeas Corpus was newly reversed, which concerned the freedom of our persons, the liberty of speech invaded in this case; and not long after the same Judges (with some others) joined with them in the Cases of Ship-money, invaded the propriety of our goods and estates; so that their lordships find every part of these words for which those worthy persons were accused, justified.

If any man should speak against any of the great officers, as the Chancellor or Treasurer, or any of the rest recited in those acts, as by accusing them of corruption, ill counsel, or the like, he might possibly justify himself by proving of it; but in this case it was impossible to do it, because those judgments had preceded and concluded him, for he could make none, but by alledging their own judgments which they themselves had resolved, and would not therefore allow to be crimes, which they had made for laws.

He did inform their lordships, that the Bill in the Rolls hath another title than that he did mention; this being that, that the clerks knew it by, rather than the proper title.

The words in the Case are charged *ea intentione*, which ought not to be; for it is clear, and undoubted law, that whatever is in itself lawful, cannot have an unlawful intent annexed to it. Things unlawful may be made a higher crime by the illness of the intent; for instance, taking away my horse is a trespass only, but intending to steal him makes it felony; borrowing my horse, though intending to steal him, is not felony, because borrowing is lawful; and there were no use of freedom of speech otherwise, for a depraved intention may be

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annexed to any the most justifiable action. If a man eat no flesh, he may be accused for the depraved intention of bringing in the Pythagorean religion, and subverting the Christian: If a man drink water, he may be accused of the depraved intention of subverting the king's government, by destroying his revenue both of excise and custom.

No man can make a doubt, but whatsoever is once enacted is lawful; but nothing can come into an act of parliament, but it must be first offered or propounded by somebody, so that if the act can wrong nobody, no more can the first propounding; the members must be as free as the houses. An act of parliament cannot disturb the state, therefore the debate that tends to it cannot, for it must be propounded and debated before it can be enacted.

In the reign of Henry 8, when there were so many persons taken by act of parliament out of the lords house, as the Abbots and Priors, and all the religious houses and lands taken away; it had been a strange information against any member of parliament then, for propounding so great an alteration in church and state.

Besides, religion itself began then to be altered, and was perfected in the beginning of queen Edward the 6th's reign, and returned again to Popery in the beginning of queen Mary's; and the Protestant religion restored again in the beginning of queen Elizabeth's.

Should a member of parliament, in any of these times, have been justly informed against in the King's-Bench for propounding or debating any of these alterations; so that their lordships perceive the reasons and inducements the house of commons had to pass these votes now presented to their lordships?

Afterwards these Votes were read, viz.

Resolved, &c. "1. That the act of parliament 4 Hen. 8, commonly intitled, An Act concerning Richard Strode, is a general law, extending to indemnify all and every the members of both houses of parliament, in all parliaments, for and touching any bills, speaking, reasoning, or declaring of any matter or matters in and concerning the parliament, to be communed and treated of; and is a declaratory law of the antient and necessary rights and privileges of parliament. 2. That the Judgment given 5 Car. against sir John Elliot, Denzil Hollis, and Benjamin Valentine, esquires, in the King's-bench, was an illegal Judgment, and against the freedom and privilege of parliament."

To both which Votes the lords agree with the house of commons.

Upon consideration had this day of a Judgment given in the court of King's-Bench in Michaelmas term, in the 5 Charles 1, against sir John Elliot, knt. Denzil Hollis, and Benjamin Valentine, esquires, which Judgment is found to be erroneous: It is ordered by the lords spiritual and temporal in parliament assembled, That the said Denzil Hollis, esq. (now lord Hollis, baron of Ifeild) be desired to cause the Roll of the Court of King's-Bench, wherein the said Judgment is recorded, to be brought before the lords in parliament by a Writ of Error, to the end that such further Judgment may be given upon the said case, as this house shall find meet.

Attorn. Gen. et al. *v.* Hollis et al.—Mich. 10 Car. secundi regis. Rot. 75.

An Information in the King's-bench against Sir John Elliot.

Memorandum, quod Rob. Heath mil. attorn. dom. regis nunc general. qui pro eodem dom. rege in hac parte sequitur in propr. persona sua ven. hic in cur. dicti dom. regis coram rege apud Westm. die Mercur. prox. post crastin. Animar. isto eodem term. et pro eodem domino rege protulit hic in cur. dicti domin. regis coram ipso rege tunc ibidem quandam informationem versus Johan. Elliot nuper de London mil. Benjamin Valentine nuper de London ar. et Denzil Hollis nuper de London ar. que sequitur in hec verba scilicet Midd. ss. Memorandum quod Robertus Heath mil. attorn. dom. regis nunc general. qui pro eodem dom. rege in hac parte sequitur in propria persona sua ven. hic in cur. dicti dom. regis coram ipso rege apud Westm. die Mercur. prox. post crastin. Animar. isto eodem termino. Et pro eodem dom. rege dat cur. hic intelligi et informari. Quod cum dictus dom. rex pro diversis arduis et urgentibus negotiis ipsum regem et statum et defension. regn. Angl. et ecclesiæ Anglican. concernen. quoddam parliament. suum apud civit. suam Westm. pred. teneri ordinavit. Cumque superinde quoddam parliamentum suum debito modo inchoat. et tent. fuit apud Westm. pred. decimo septimo die Martii anno regni dicti dom. regis 3 et ibidem per diversas prorogationes continuat. usque 10 diem Martii anno regni dicti dom. regis 4. quo quidem 10 die Martii idem parliament. dissolut. fuit. Cumque antea pred. 17 diem Martii anno 3 suprad. scilicet 16 die ejusdem mensis Mar. anno 3 suprad. Johannes Elliot nuper de London mil. debito modo elect. et retorn. fuit un. mil. pro com. Cornub. in eodem parliament. deservitur. Cumque etiam Benjamin Valentine nuper de London ar. eodem 16 die Martii anno 3 suprad. debito modo elect. et retornat. fuit un burgens. pro burgo de St. Germans in pred. com. Cornub. in eodem parliament. deservitur. Cumque etiam Denzil Hollis nuper de London ar eodem 16. die Martii anno 3. suprad. debito modo elect. et retornat. fuit un. burgens. pro burgo de Dorchester in com. Dors. in eodem parliament deservitur. Cumque etiam Johannes Finch mil. eodem 16 die Martii anno 3 suprad. debito modo elect. et retornat. fuit un. civium pro civitat. Cantuar. in eodem parliament. deservitur. Cumque pred. 16 die Martii anno 3 suprad. prefat. J. Finch apud Westm. pred. debito modo electus et constitut. fuit Prolocutor. per commun. in eodem parliament. Et sic Prolocutor pro commun. continuavit usque dissolution. ejusdem parliament. Quod prefat. J. E. machinans et intendens omnibus viis et modis quibus poterit discord. malevolenc. murmuraciones et

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seditiones tam int. pred. dom. regem et magnat. prælatos, proceres et justic. suos hujus regni quam int. pred. magnat. prælat. proceres et justiciar. dicti dom. regis et reliquos subdit. suos seminare et excitare et regimen et gubernation. hujus regni Angl. tam in pred. dom. rege quam in consiliar. et ministris suis cujuscunque generis totalit. deprivare et enervare et tumult. et confusion. in omnibus statibus et partibus hujus regni Angl. introducere et ad intention. quod veri et ligei subdit. dicti domini regis cordialem suum amorem ab ipso rege retraherent in et duran. parliament. pred. scilicet 23 die Febr. anno 4 suprad. apud Westm. pred. in domo commun. parliament. ibidem et sedente eadem domo militib. civib. et burgens. adtunc et ibidem assemblat. et in eor. presentia et auditu falso et malitiose et seditiose hec falsa ficta malitiosa et scandalosa verba Anglicana alta voce dixit et propalavit, videlicet, 'The King's Privy Council, all his 'judges and his counsel learned, have con-'spired together to trample under their feet 'the liberty of the subjects of this realm, and 'the privileges of this house.' (Privileg. pred. domus commun. parliament. innuendo) eamque potestas summonend. parliament. ejusdemque continuand. adjornand. prorogand. et dissolvend. dom. regi spectat et de jure pertinet ad libitum et beneplacitum suum. eamque dictus dom. rex pro divers. urgent. causis ipsum ad hoc specialit. moven. secundo die Martii anno 4 suprad. parliament. pred. adjornari ordinavit eodem secundo die Martii usque 10 diem ejusdem mensis Martii adtunc prox. futur. Et dictus dom. rex pred. secundo die Martii anno 4 suprad. apud Westm. pred. mandavit prefat. Johann. Finch adtunc Prolocutori pred. quod ipse eodem secundo die Martii militibus civibus et burgens. in domo commun. parliament. adtunc et ibidem assemblat. beneplacitum dicti dom. regis significaret et notum faceret quod immediate post signification. ill. sic fact. pred. domus commun. per ipsos mil. cives et burgens. adjornaretur usque 10 diem Martii adtunc prox. futur. Et superinde prefat. Johannes Finch eodem secundo die Martii apud Westm. pred. militib. civib. et burgens. in dicta domo commun. parliament. adtunc et ibidem assemblat. seden. eadem domo publice significavit et notum fecit pred. beneplacitum dicti dom. regis quod pred. domus immediate post signification. ill. fact. usque ad pred. 10 diem Martii per seipsos adjornaretur et quod pred. Johannes Elliot B. Valentine et Denzil Hollis tempore signification. pred. per pred. Prolocutor. in forma pred. fact. presentes fuer. in domo commun. pred. et adtunc et ibidem audiverunt eandem signification. et ill. bene intellexer. pred. tamen J. E. B. V. et D. H. eodem secundo die Martii anno quarto suprad. apud West. pred. malitiose agreaver. et inter eos comparuer. ad distuebandd. milites cives et burgens. de pred. domo commun. parliament. in eadem domo apud Westm. pred. adtunc et ibidem assemblat. ne illi secundum beneplacitum dicti dom. regis eis ut prefertur significat. seipsos adjornarentur. Et pred. J. E. secundum agreament. et conspiration. pred. ad malitiosa, proposita et intention. pred. postea scilicet eodem secundo die Martii anno 4 suprad. apud Westm. pred. in eadem dom. commun. parliament. in presentia et auditu pred. milit. civium et burgens. adtunc et ibidem assemblat. alta voce falso malitiose et seditiose dixit et propalavit hec falsa ficta scandalosa malitiosa et seditiosa Anglicana verba sequen. 'The miserable condi-'tion we are in, both in matters of religion and 'policy, makes me look with a tender eye both 'to the person of the king and the subject: 'you know how Arminianism doth undermine 'us, and how popery comes upon us so open-'faced as it gives a terror to the law; that 'particularly concerning the plantation of 'Jesuits amongst us, and other things incident 'thereto, do manifestly shew it. And not only 'these men who are actors themselves, I mean 'the Jesuits, but those that are their great mas-'ters and fautors, they have the power of the 'law, and dare check magistrates in the exe-'cution of their duties; from them it comes that 'we suffer their guilt, and the fear of punishment 'that may befall them, brings us upon those rocks. 'There are among them some prelates of the 'church, the great bishop of Winchester and his 'fellows; it is apparent what they have done to 'cast an aspersion upon the honour, piety and 'goodness of the king. These are not all: but it 'is extended to some others, who, I fear, in guilt 'and conscience of their own ill deserts, do 'join their power with that bishop, and the 'rest, to draw his majesty into a jealousy of 'the parliament; amongst them I shall not 'fear to name the great Lord Treasurer, in 'whose person is, I fear, contracted all that 'which we suffer. If we look into religion and 'policy, I find him building upon the ground 'laid by the duke of Bucks, his great master; 'from him, I fear, came those ill counsels 'which contracted that unhappy conclusion of 'the last session of parliament. And whoso-'ever shall go about to break parliaments, par-'liaments will break him! I find that not only 'in the affections of his heart, but also in rela-'tion to him, he is the head of the Papists. 'They and their priests and Jesuits have all re-'lation to him, and I doubt not to fix it indu-'bitably upon him; and so far from the great-'ness and power of him comes the danger of 'our religion. For policy in that great ques-'tion of Tonnage and Poundage; that interest 'that is pretended to be the king's, is but the 'interest of that person to undermine the po-'licy of this government, and thereby to weaken 'the kingdom. It was the counsel of Hospi-'tales, chancellor to Charles the Ninth, king 'of France, that the way to weaken this king-'dom was to impeach the trade of it, and so to 'lay our walls waste and open. And I doubt 'not, but by the disquisition of a few days 'to prove that his labours are to undermine 'us; That he invites strangers to come in to 'drive our trade, or at least our merchants to 'trade in strange bottoms, which is as danger-

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'ous; and this is that which imprints this fear 'in his person, and makes him to misinterpret 'our proceedings to his majesty. Now there-'fore it will be fit for true Englishmen to per-'form their duties, and to shew their desire of 'the safety both of the king and kingdom, and 'to resolve to defend the sincerity of our reli-'gion, and to declare our resolutions also for 'the defence of the right of the subject, where-'by we may declare ourselves to be freemen, 'and so the more wealthy and able to supply 'his majesty upon all occasions. And that 'we should declare all that we have suffered 'to be the effect of new counsels, to the ruin 'of the government of this state, and to make 'a protestation against all those men, whether 'greater or subordinate, that they shall all be 'declared as capital enemies to the king and 'kingdom, that will persuade the king to take 'Tonnage and Poundage without grant of par-'liament. And that if any merchants shall 'willingly pay those duties without consent of 'parliament, they shall be declared as acces-'saries to the rest.' Quodque pred. D. H. secundum agreament. et conspiration. inde inter ipsum et prefat. J. E. & B. V. ut prefertur prehabit. postea scilicet eodem secundo die Martii anno 4 suprad. apud Westm. pred. in eadem domo commun. parliament. militib. civib. et burgens. adtunc et ibidem assemblat. et in cor. presentia et auditu alta voce falso malitiose et seditiose dixit et propalavit hec falsa ficta malitiosa perniciosa et seditiosa verba Anglican. sequen. videlicet, 'Whosoever shall counsel 'the taking up of Tonnage and Poundage with-'out an act of parliament, let him be account-'ed a capital enemy to the king and kingdom; 'and what merchant soever shall pay Tonnage 'and Poundage, without an act of parliament, 'let him be accounted a betrayer of the liber-'ties of the subject, and a capital enemy to 'the king and kingdom.' Quodque prefat. B. V. & D. H. secundum agreament. et conspiration. pred. inde inter eos et prefat. J. E. prehabit. ad intention. et proposit. pred. et ad intention. quod. prefat. J. E. & D. H. pred. falsa malitiosa scandalosa et seditiosa verba pred. in forma pred. et ad intention. et proposita pred. per eos pred. secundo die Martii anno 4 suprad. dict. et propalat. ut prefertur dicerent et propalarent eodem secundo die Martii post signification. pred. pred. beneplaciti dicti dom. regis pro adjornament. dict. domus commun. parliament. ut prefertur. fiend. per prefat. Prolocutorem fact. et ante dictionem et Propalationem aliquor. verbor. pred. prefat. J. E. & D. H. eodem secundo die Martii ut prefertur dict. et propalat. prefat. Johanne Finch Prolocutor. pred. adtunc. et ibidem in quadam cathedra Anglice vocat. 'the 'Speaker's Chair' in domo pred. existen. et extra pred. secundum mandat. dicti dom. regis ei in hac parte prius dat. ire conan. in et super prefat. Johannem Finch adtunc et ibidem in pace Dei et dict. dom. regis existen. vi et armis et manu forti et illicite insult. fecer. et eundem J. Finch maletractaver. et eundem J. F. in cathedra pred. contra voluntat. suam manu forti et illicite detinuer. Quodque postea eodem secundo die Martii et ante diction. propalation. aliquor. verbor. pred. per pred. J. E. et D. H. dict. et propalat. secundo die Martii anno 4. suprad. prefat. J. F. Prolocutor. pred. apud Westm. pred. in domo pred. extra cathedram pred. adtunc existen. in et super prefat. J. F. adtunc et ibidem in pace Dei et dict. domini regis insult. fecer. et prefat. J. Finch maletractaver. et violent. manu forti et illicite contra voluntat. suam in cathedram pred. traxer. truser. et impuler. per quod magn. tumult. et periculosa commotio et confusio in dom. commun. pred. et maximi terror. pred. militib. civib. et burgens. adtunc et ibidem assemblat. adtunc et ibidem mot. et excitat. fuer. contra ligeanc. suar. debit. in magn. contempt. et manifest. exheredationem dicti domini regis et derogation. persone regiminis et prerogative sue regie et in legum et status hujus regni Angl. subversion. et in magn. scandal. et ignominiam consiliar. de privato concilio dicti dom. regis et al. magnat. prelator. et procer. hujus regni Angl. et justiciar. et justic. dicti dom. regis ac in disturbation et terrorem communitat. in parliament. pred. sic ut premittitur assemblat. necnon ad pessimum et perniciosissimum exemplum omn. al. in hujusmodi casu delinquen. et contra pacem ejusdem dom. regis coron. et dignitat. suas necnon contra formam statut. &c. Unde idem attorn. &c. per quod precept. fuit vic. quod non omitt. &c. Quin venire fac. eos ad respond. &c.

The Defendants plead severally for themselves, that they were Parliament-men, and that the offence was committed in parliament, and ought there to be heard and determined, and not in the King's-Bench.

Et modo scilicet die Martis prox. post octab. Sancti Martini isto eodem termino coram dom. rege apud West. ven. pred. J. E. mil. B. V. & D. H. in propr. person. suis et pred. J. E. habit. audit. information. pred. idem J. quoad supposit. transgr. offens. et contempt. pred. in informatione pred. mentionat. in dicend. et propaland. pred. Anglicana verba in informatione pred. superius recitat. Ac eidem J. per informationem pred. in forma pred. imposit. dic. quod ipse non intend. quod dom. rex nunc de aut pro supposit. transgr. offens. et contempt. ill. eidem J. sic imposit. in cur. dicti dom. regis nunc hic responderi velit aut debeat quia dic. quod pred. supposit. offens. transgr. et contempt. in dicend. et propaland. pred. Anglicana verba in informatione pred. mentionat. et eidem J. in forma pred. imposit in parliament. et non in cur. dom. regis nunc hic audiri et terminari debent, &c. Et ulterius idem Johannes dic. quod ipse pred. 16 die Martii anno 3 suprad. in informatione pred. mentionat. debito modo elect. et retorn. fuit un. mil. pro pred. com. Cornub. in parliament. pred. deservitur. prout in informatione pred. superius mentionat. Quodque idem. J. tempore supposit. offens. transgr. et contempt. pred. in

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dicend. et propaland. Anglicana verba pred. eidem J. in forma pred. imposit. ac duran. toto tempore parliament. pred. apud Westm. pred. fuit et remansit un. mil. pro com. Cornub. pred. pro eodem parliament. Et hoc parat. est verificare unde ex quo in informatione pred. evidenter apparet et plene liquet quod supposit. offens. transgr. et contempt. pred. in dicend. et propaland. Anglicana verba pred. eidem J. in forma pred. imposit. et per information. pred. supposit. commiss. fore commiss. fuit in pred. domo commun. parliament. pred. in parliament. pred. idem J. pet. judic. si pred. dom. rex nunc hic de offens. transgr. et contempt. pred. quoad Anglicana verba pred. per ipsum J. in parliament. pred. in forma pred. dici et propalari supposit. in cur. dicti dom. regis nunc hic responderi velit aut debeat. Et quoad tot. resid. supposit. offens. transgr. et contempt. in informatione pred. mentionat. eidem J. in forma pred. imposit. eidem J. dic. quod ipse non intendit quod dictus dom. rex nunc de aut pro pred. resid. offens. transgr. et contempt. pred. in eadem informatione mentionat. eidem J. superius in forma pred. imposit. in cur. dicti dom. regis nunc hic responderi velit aut debeat quia dic. quod resid. pred. supposit. offens. transgr. et contempt. in informatione pred. superius spec. eidem Johanni per information. pred. in forma pred. imposit. in parliament. et non in cur. dom. regis nunc hic audiri et terminari debent. Et idem J. ulterius dic. quod ipse pred. 16 die Martii anno 3 suprad. in informatione pred. mentionat. debito modo elect. et retornat. fuit un. mil. pro pred. com. Cornub. in pred. parliament. deservitur, prout per information. pred. superius mentionat. Quodque idem J. tempore resid. supposit. offens. transgr. et contempt. pred. ei in forma pred. imposit. Ac duran. toto tempore parliament. pred. apud Westm. pred. fuit et remansit un. mil. pro pred. com. Cornub. in parliament. pred. Et hoc parat. est verificare. Unde et ex quo in informatione pred. evident. apparet et plene liquet quod pred. resid. pred. supposit. transgr. offens. et contempt. pred. in informatione pred. mentionat. eidem J. in forma pred. imposit. per eandem information. supposit. fore commiss. fuit commiss. in pred. domo commun. parliament. pred. in parliament. pred. idem J. pet. judic. si dictus dom. rex nunc de resid. pred. supposit. offens. transgr. et contempt. in informatione pred. mentionat. eidem J. in forma pred. imposit. in parliament. pred. in forma pred. fieri supposit. in cur. dom. regis nunc hic responderi velit aut debeat, &c.

Et pred. Benjamin. Valentine habit. audit. information. pred. idem B. dic. quod ipse non intendit quod dictus dom. rex nunc de aut pro supposit. offens. et contempt. pred. in informatione pred. mentionat. eidem B. per eandem information. imposit. in cur. dicti dom. regis nunc hic responderi velit aut debeat. Quia dic. quod pred. supposit. offens. transgr. et contempt. in informatione pred. mentionat. eidem B. per eandem informationem in forma pred. imposit. in parliament. et non in cur. domini regis nunc hic audiri et terminari debent. Et idem B. ulterius dicit quod ipse pred. 16 die Martii anno 3 suprad. in informatione pred. mentionat. debito modo elect. et retorn. fuit un. burgens. pro predicto burgo de St. Germans in pred. com. Cornub. in pred. parliament. deservitur, prout per information. pred. superius mentionat. Quodq; idem B. tempore supposit. offens. transgr. et contempt. pred. ei in forma pred. imposit. Ac duran. toto tempore parliament. pred. apud Westm. pred. fuit et remansit. un. burgens. pro pred. burgo. de St. Germans in eodem parliament. Et hoc parat. est verificare. Unde et ex quo in informatione pred. evident. apparet et bene liquet quod supposit. offens. transgr. et contempt. pred. in informatione pred. mentionat. eidem B. in forma pred. imposit. per information. pred. supposit. fore commiss. fuit commiss. in pred. domo commun. parliamenti pred. Idem B. pet. judic. si dictus dominus rex nunc de offens. transgr. et contempt. pred. sic sibi imposit. per ipsum B. in parliament. predict. fieri supposit. in cur. dicti dom. regis nunc hic responderi velit aut debeat, &c.

Et pred. Denzil Hollis habit. audit. information. idem D. quoad supposit. transgr. offens. et contempt. pred. in informatione pred. mentionat. in dicend. et propaland. pred. Anglicana verba in informatione pred. superius recitat. Ac eidem D. per information. pred. in forma pred. imposit dic. quod ipse non intendit quod dominus rex nunc de aut pro supposit. transgr. offens. et contempt. ill. eidem. D. sic imposit. in cur. dicti domini regis nunc hic responderi velit aut debeat. Quia dic. quod pred. supposit. offens. trans. et contempt. in dicend. et propaland. pred. Anglicana verba in informatione pred. mentionat. eidem D. in forma pred. imposit. in parliament. et non in cur. dom. regis nunc hic audiri et terminari debeant, &c. Et ulterius idem D. dic. quod ipse pred. 16 die Martii anno 3 suprad. in informatione pred. mentionat. debito modo elect. et retornat. fuit un. burgens. pro pred. burgo de Dorchester in pred. com. Dors. in parliament. pred. deservitur, prout in informatione pred. superius mentionat. Quodque idem D. tempore supposit. offens. transgr. et contempt. pred. in dicend. et propaland. Anglicana verba pred. eidem D. in forma pred. imposit. ac duran. toto tempore parliament. pred. apud Westm. pred. fuit et remansit. un. burgens. pro pred. burgo de Dorchester in eodem parliament. Et hec parat. est verificare. Unde et ex quo in informatione pred. evident. apparet et plene liquet quod supposit. offens. transgr. et contempt. pred. in dicend. et propaland. Anglicana verba pred. eidem D. in forma pred. imposit. per informationem pred. supposit. fore commiss. fuit commiss. in domo pred. commun. parliament. pred. parliament. pred. idem D. pet. judic. si dictus dom. rex nunc de offens. transgr. et contempt. pred. quoad Anglicana verba pred. per ipsum D. in parliament pred. in forma pred. dici et propalari supposit. in cur. dom. regis nunc hic responderi velit aut debeat. Et quoad tot.

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resid. supposit. offens. transgr. et contempt. in informatione pred. mentionat. eidem D. superius in forma pred. imponit. idem D. dicit quod ipse non intendit quod dictus dom. rex nunc de aut pro pred. resid. offens. transgr. et contempt. pred. in eadem informatione mentionat. eidem D. superius in forma predict. imposit. in cur. dicti dom. regis nunc hic responderi velit aut debeat. Quia dic. quod pred. resid. supposit. offens. transgr. et contempt. in informatione pred. superius specificat. eidem D. per information. pred. in forma pred. imponit. in parliament. et non in cur. dom. regis nunc hic audiri et terminari debent. Et idem D. ulterius dic. quod ipse pred. 16 die Martii anno 3 suprad. in informatione pred. mentionat. debito modo elect. et retornat. fuit un. burgens. pro pred. burgo de Dorchester in pred. com. Dors. in pred. parliament. deservitur, prout per information. pred. superius mentionatur. Quodque idem D. tempore resid. supposit. offens. tranegr. et contempt. pred. ei in forma pred. imposit. ac duran. toto tempore parliament. pred. apud Westm. pred. fuit et remansit un. burgens. pro pred. burgo de Dorchester in pred. com. Dors. in parliament. pred. Et hoc parat. est verificare. Unde et ex quo in informatione pred. evident. apparet et plene liquet quod pred. resid. supposit. offens. transgr. et contempt. pred. in informatione pred. mentionat. eidem D. in forma pred. imposit. per eandem informationem suppon. fore commiss. in pred. domo commun. parliament. pred. in parliament. pred. idem D. pet. judic. si dictus dom. rex nunc de resid. predict. supposit. offens. transgr. et contempt. in informatione pred. mentionat. eidem D. in forma pred. imposit. in parliament. pred. in forma pred. fieri supposit. in cur. dom. regis hic responderi velit aut debeat, &c.

The Attorney-General demurs to the Pleas severally.

Et prefat. Robertus Heath mil. qui sequitur, &c. quoad pred. placitum pred. J. Elliot pro eodem dom. rege dic. quod placitum ill. prefat. J. in forma pred. superius placitat. materiaque in placito pred. content. minus sufficien. in lege existunt ad precludend. cur. hic a jurisdiction. sua audiend. et terminand. offens. transgr. et contempt. in informatione pred. mentionat. eidem J. per eandem informationem in forma pred. imposit. Unde pro defectu sufficien. respon. in hac parte pet. judic. Et quod prefat. J. dicto dom. regi in cur. hic respondeat de et in premiss. &c.

Et prefat. R. H. mil. qui sequitur, &c. quoad pred. placitum prefat. B. V. pro eodem domino rege dic. quod placitum ill. prefat. B. in forma pred. superius placitat. materiaque in eodem content. minus sufficien. in lege exist. ad precludend. cur. hic a jurisdiction. sua audiend. et terminand. offens. transgr. et contempt. pred. in informatione pred. mentionat. eidem B. per eandem information. in forma pred. imposit. Unde pro defectu sufficien. respons. in hac parte pet. judic. et quod prefat. B. dicto dom. regi in cur. hic respondeat de et in premiss. &c. Et simile quo ad placitum Denzil Hollis.

The Defendants severally join in Demurrer.

Et pred. J. Elliot mil. ut prius dic. quod placitum pred. per ipsum J. superius in forma pred. placitat. materiaque in placito pred. content. bon. et sufficien. in lege existunt ad precludend. cur. hic a jurisdiction. sua audiend. et terminand. offens. transgr. et contempt. pred. in informatione pred. mentionat. eidem Johanni per eandem informationem in forma pred. imposit. Quod quidem placitum materiamque in eodem placito content. idem J. E. mil. parat. est verificare. Unde ex quo idem attorn. dicti dom. regis pro eodem dom. rege ad placitum ill. non respond. nec ill. aliqualit. dedic. sed verification. ill. admittere omnino recusat pet. judic. et quod ipse idem J. de offens. tranegr. et contempt. pred. in informatione pred. mentionat. eidem J. per eandem informationem in forma pred. imposit. per cur. hic dimittatur, &c. Et sic de verbo in verbum pro Valentine, et Hollis separatim.

The Attorney-General prays that the Defendants may answer.

Et quia cur. dom. regis hic de judic. suo inde reddend. nondum advisatur dies inde dat. est tam prefat. Roberto Heath mil. qui sequitur, &c. quam pred. J. E. B. V. & D. H. in statu quo nunc, &c. usque octab. Sancti Hillar. coram dom. rege ubicunque, &c. de judicio suo inde audiend. eo quod cur. nondum, &c. Ad quas quidem octab. Sancti Hillar. coram dom. rege apud Westm. ven. tam prefat. R. H. qui sequitur, &c. quam pred. J. E. B. V. & D. H. in propr. person. suis. Et prefat. R. H. qui sequitur, &c. pro eodem dom. rege pet. judic.

Judgment that the Pleas to the Jurisdiction of the King's-Bench are insufficient.

Et quod pred. J. E. B. V. D. H. dicto dom. regi in cur. hic respondeant et eor. quilibet respondeat de et in premiss. &c. Super quo visis lectis et audit. omnibus et singulis premiss. pro eo quod videtur cur. hic quod separal. placita pred. per prefat. J. E. B. V. & D. H. in forma pred. superius placitat. materiaque in separal. placitis pred. content. minus sufficien. in lege existunt ad precludend.

The Defendants ordered to answer over.

Cur. hic a jurisdictione sua audiend. et terminand. offens. transgr. et contempt. pred. in informatione pred. mentionat. eisdem J. E. B. V. & D. H. per eandem information. in forma pred. imposit. dictum est eisdem J. E. B. V. & D. H. quod ipsi iidem J. E. B. V. & D. H. dicto dom. regi in cur. hic respondeant & eor. quilibet respondeat de et in premiss. in informatione pred. superius content. &c. Et super hoc dies dat. est per cur. eisdem J. E. B. V. & D. H. coram dom. rege ubicunque, &c. usque diem Veneris prox. post octab. Pur. beate Marie Virgin. ad information. predict. interloquend. et tunc ad respond. periculis suis.

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Judgment against them for want of Pleas in Chief.

Ad quem diem coram dom. rege apud Westm. ven. tam prefat. R. H. qui sequitur, &c. quam prefat. J. E. B. V. & D. H. in propr. personis suis. Et prefat. J. E. B. V. & D. H. licet ipsi sepius premonit. et solempnit. exact. ad respond. sibil dicunt in barr. sive exoneration. information. pred. per quod idem dominus rex remanet versus eos indefense. Ideo cons. est quod pred. J. E. B. V. & D. H. capiantur ad satisfaciend. dom. regi de finib. suis occasione transgr. et contempt. pred. Ac quod habeant imprisonament. corpor. suor. ad voluntat. ipsius dom. regis, et quod antequam deliberentur quilibet eor. inveniat. suffic. secur. de se bene gerend. erga dictum dominum regem et cunctum populum suum. Et quod pred. J. E. committatur locumtenen. Turris domini regis London. salvo custodiend. quousque, &c. Quod, que pred. B. V. & B. H. committantur Mar. maresc. domini regis coram ipso rege salvo custodiend. quousque, &c.

Et finis ejusdem J. E. afferatur per cur. occasione predict. ad 2,000*l.*

Et finis ejusdem B. V. afferatur per cur. occasione pred. ad 500*l.*

Et finis ejusdem D. H. afferatur per cur. ad. 1000 mercas.

Afterwards the Attorney-General comes into Court, and acknowledges that Hollis has paid his Fine.

Postea scilicet die Lune prox. post octab. Pur. beate Marie Virgin. anno regni dom. Caroli nunc regis Angl. &c. 18. coram dom. rege apud West. ven. Johannes Banks mil. attorn. dom. regis nunc general. qui pro eodem dom. rege modo in hac parte sequitur et pro eodem dom. rege dic. et cognovit quod pred. D. H. solvit et satisfecit pred. 1,000 mercas recept. ad Scaccarii dicti dom. regis ad usum dicti dom. regis in plen. satisfaction. pred. finis super ipsum D. pro offens. pred. in informatione pred. superius nominat. per cur. hic in ipsum imposit. prout per constat. sub manu Edwardi Wardour mil. clerici pellium recept. Scaccarii dicti dom. regis hic in cur. ostens. plene liquet. Et pro eodem dom. rege idem attorn. dicti dom. regis general. cognovit dictum dom. regem inde fore satisfactum. Ideo idem D. H. de eisdem 1,000 mercis eat inde quiet.

At another time after, the Attorney brings into Court the king's Letters Patents under his privy-seal, whereby the king remits to Valentine his Fine, and all the rest of the Judgment; and prays the same may be enrolled and allowed.

Postea scilicet die Mercur. prox. post quinden. Pasche anno regni dicti dom. regis nunc Angl. &c. 16 coram dom. rege apud Westm. ven. Johannes Banks mil. attorn. dom. regis nunc general. in propr. persona sua. Et protulit in cur. dicti dom. regis coram dom. rege tunc ibidem quoddam breve ipsius dom. regis de privat. sigillo sibi et al. direct. et petiit illud irrotulari et allocari, cujus quidem brevis tenor sequitur in hec verba: 'Charles, by the 'grace of God, king of England, Scotland, 'France, and Ireland, Defender of the Faith, '&c. To the lord high-treasurer of England, 'chancellor, under-treasurer, and barons of 'our Exchequer, and all other officers and ministers of the same court for the time being, 'and to the chief-justice, and the rest of our 'justices of our court of King's-Bench, and to 'our attorney-general, and all other officers 'and ministers of the same court for the time 'being, greeting. Whereas in Michaelmas 'term, in the tenth year of our reign, upon an 'Information in our name exhibited in our 'court of King's-Bench, against Benjamin Valentine, esq.; and others, for divers offences, 'trespasses, and contempts therein mentioned, 'the said Benjamin Valentine, by Judgment of 'the same court, was fined to us in the sum of '500*l.* and to be committed to our prison of 'our Marshalsea during our pleasure; and 'that he shall find sufficient security for his 'good behaviour to us and our people, as by 'the said Information and Judgment thereupon remaining upon record in our said court 'of King's-Bench, more at large may appear. 'And whereas the said B. V. hath been restrained of his liberty since the last parliament for not satisfying the said fine so imposed on him, as aforesaid. Now know ye, That 'we of our special grace have remised, released, and quit-claimed, and by these presents, 'for us, our heirs and successors, do remise, release, and quit-claim unto the said B. V. the 'said fine or sum of 500*l.* by the Judgment of 'our said court on him the said B. V. imposed 'as aforesaid. And all commitment, imprisonment, and other matters whatsoever adjudged 'or inflicted upon him by our said court, for or 'by reason of the trespasses, offences or contempts aforesaid. Wherefore we do by these 'presents will and require, as well the lord-'treasurer, chancellor, under-treasurer, and 'barons of our Exchequer, as the justices of 'our court of King's-Bench, and the officers 'and ministers of the said several courts respectively, to whom it shall or may appertain, 'that they, and every of them respectively, at 'all times hereafter do forbear, and utterly surcease to make or grant forth any extents, 'seizures, executions, or other process whatsoever, against the said B. V. his heirs, executors or administrators, or his or their lands, 'tenements, hereditaments, goods or chattels, 'for or concerning the levying of the said fine 'or sum of 500*l.* or any part thereof. And 'that they take order as well for his full and 'clear discharge thereof, as of and from his 'commitment and imprisonment as aforesaid. 'And these presents, or the enrolment thereof, shall be unto them, and every of them to 'whom it shall or may appertain, a sufficient 'warrant and discharge in that behalf. And 'lastly, we will, and by these presents authorise and require our attorney-general for the 'time being, for us, and in our behalf, to ac-

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'knowledge satisfaction upon record of and for 'the said fine of 500*l.* on the said B. V. by 'Judgment of our said court so imposed as 'aforesaid. Whereby he may be fully and ab-'solutely acquitted and discharged thereof 'against us, our heirs and successors; and 'these presents, or the enrolment thereof, shall 'be unto our said attorney-general for the 'time being, a good and sufficient warrant in 'that behalf. Given under our privy-seal at 'our palace of Westminster, the 7th day of 'March, in the fifteenth year of our reign.'

Judgment of the Court at the Attorney's prayer, that Valentine be discharged.

Et super hoc idem J. B. miles attorn. dicti dom. regis general. pro eodem dom. rege virtute brevis de privat. sigillo predict. dicit et cognovit ipsum dominum regem fore plenar. satisfact. de pred. fin. 500*l.* super ipsum B. V. pro offens. predict. in informatione predict. mentionat. per cur. hic ut prefertur imposit. et pet. quod pred. B. V. virtute brevis pred. de imprisonament. suo ads. ipsius dom. regis et de judic. pred. exoneretur et dimittatur super quo vis. et per cur. hic intellect. omnibus et singulis premiss. cons. est per cur. quod pred. B. V. pro offens. pred. in informatione pred. superius mentionat. per cur. hic ut prefertur imposit. sit inde quiet. et eat inde sine die, et quod ipse idem B. V. de imprisonament. suo ad sect. dom. regis et de judic. pred. versus ipsum B. in forma pred. reddit exoneretur et dimittatur, &c.

D. Hollis, now Lord Hollis, brings a Writ of Error upon the said Judgment, returnable in Parliament.

Postea scilicet 12 die Febr' anno regni dom. nostri Caroli secundi nunc regis Angl. &c. 20 dominus rex mandavit dilecto et fidel. suo Johanni Kelynge mil. capital. justic. dicti dom. regis ad placita coram ipso rege tenend. assign. breve suum clausum in hæc verba, Carolus secundus, &c. dilecto et fidel. nostro Johanni Kelynge mil. capital. justic nostro ad placita coram nobis tenend. assign. salutem. Quia in record. process. ac etiam in redditione judicii super quandam informationem in cur. dom. Caroli primi nuper regis Angl. patris nostri prechariſſimi coram ipso nuper dom. rege exhibit. per Robertum Heath mil. tunc attorn. general. ipsius nuper dom. regis, qui pro eodem domino rege in ea parte sequebatur versus Johannem Elliot nuper de London mil. B. Valentine nuper de London pred. ar. et D. Hollis nuper de Lond. pred. ar. de divers. malegestur. ut dicitur error intervenit manifestus de grave dampn. ipsius D. H. modo dom. Hollis baron. de Ifeild sicut ex querela sua accepimus. Nos errorem siquis fuerint modo debito corrigi et eidem D. H. modo domino Hollis baron. de Ifeild plenam et celerem justic. fieri volen. in hac parte vobis mandamus quod si judic. inde reddit. sit tunc record. et process. pred. cum omnibus ea tangen. nobis in present. parliament. nostrum distincte et aperte mittatis et hoc breve ut inspect. record. et process. pred. ulterius inde assensu dominor. spiritual. et temporal. in eodem parliament. existen. pro error. ill. corrigend. quod de jure et secundum legem et cons. regni nostri Angl. fuerit faciend. T. meipso apud Westm. 12 die Febr. anno regni nostri 20. NORBURY.

The Lord Chief Justice delivers the Record.

Virtute cujus quidem brevis dictus capital. justic. record. pred. dom. regi in present. parliament. propr. manibus protulit secundum exigenc. ejusdem brevis et postea scilt. 8 die Martii anno regni dom.. regis nunc Caroli secundi 20 coram ipso rege in presenti parliament. ven. pred' D. H. modo dom. Hollis baro de Ifeild per Samuel. Astry attorn. suum et dicit quod in record. et process. pred. ac etiam in redditione judicii pred. manifest. est errat. videlicet in hæc verba in informatione pred. mentionat. fore dicti et propalat. in domo commun. parliament. per pred. D. H. modo dominum Hollis tunc existen. burgens. pro burgo de Dorchester in tunc presen. parliament. deservien' audiri et terminari in domo commun. parliament. debeant per legem terre et non in cur. domini regis et in hoc quod per information. in dicto record. mentionat. idem D. H. modo dominus Hollis oneratur cum dictione et propalatione quorundam verbor. in domo commun. parliament. ac etiam cum transgrs. et insult. fact. vi et armis super Johannem Finch Prolocutor. ejusdem tunc domus commun. parliament. Ad que idem D. H. modo dominus H. quo separal. placita placitabat tamen unicum tantum judic. reddit. est de utroque per cur. et unicus finis ubi duo judicia reddi et duo fines imponi debuissent quia si forte transgr. et insult. audiri et terminari forte possit aut debeat in cur. dom. regis coram ipso rege tamen dictio et propalatio verbor. quorumcunque in domo commun. parliament. per burgens. in eodem parliament. deservien. alibi quam in parliament. audiri seu terminari non debeat, &c.

Et Galfridus Palmer mil. et bar. attorn. domini regis nunc general. qui per eodem dom. rege in hac parte sequitur presen. in propr. persona sua pro eodem dom. rege dicti quod nec in record. et process. pred. nec in redditione judicii pred. in ullo est errat. et pet. &c.

A Message was sent to the House of Commons by sir William Child and sir Justinian Lewin, to acquaint them, that the Lords do agree to those Votes which were delivered at the Conference yesterday.

Die Mercurii, 15 April, 1668.

"Whereas counsel have been this day heard at the bar, as well to argue the Errors assigned by the lord Hollis, baron of Ifeild, upon a Writ of Error depending in this house, brought against a Judgment given in the court of King's-Bench in 5 Car. 1, against the said lord Hollis, by the name of Denzil Hollis, esq. and others; as also to maintain and defend the said Judgment on his majesty's behalf: Upon due consideration

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had of what hath been offered on both parts thereupon, the Lords spiritual and temporal in parliament do order and adjudge, That the said Judgment given in the court of King's-Bench in 5 Car. 1, against the said Denzil Hollis, and others, shall be reversed."

The Form whereof (to be affixed to the Transcript of the Record) followeth:

'Et quia curia parliamenti de judicio suo de 'et super præmissis reddend' nondum advisatur, 'dies datus est tam prædict' Galfrido Palmer 'militi et baronet' qui sequitur, &c. quam præ-'dict' Denzil domino Hollis coram eadem curia 'usque ad diem Mercurii decimum quintum 'diem Aprilis tunc proximum sequentem apud 'Westmonast. in comitat' Midd' de judicio suo 'inde audiend' eo quod curia prædict' nondum, '&c. Ad quem diem coram curia prædict' 'Galfridus Palmer qui sequitur, &c. quam præ-'dictus Denzil dominus Hollis in propriis per-'sonis suis. Super quo, visis, et per eandem 'curiam nunc hic plenius intellectis omnibus et 'singulis præmissis, maturaque deliberatione 'inde habita, consideratum est per curiam præ-'dictam, quod judicium prædict' ob errores 'prædictos et alios in recordo et processu præ-'dictis compertos, revocetur, adnulletur et pe-'nitus pro nullo habeatur. Et quod prædict' 'Denzil dominus Hollis ad omnia quæ idem 'Denzil dominus Hollis occasione judicii præ-'dict. amisit, restituatur.'

Jo. BROWNE, Cleric. Parliamentorum.

It seems to be but just towards the characters of the Judges of this time to add the following passages from Kennet:

"The urgent necessity of Supplies, to be in some measure suitable to the king's honour, and the very nation's support, must exercise the king's council in finding out all possible ways and means to bring in money. In order to this urgent end, the king sent his letters, dated May 13, 1630, to the Judges and Attorney-General, to frame and publish certain orders for execution of the office of Receiver and Collector of Fines and Forfeitures, erected by his late father of blessed memory, and by his present majesty confirmed to John Chamberlayn his majesty's physician, and Edward Brown, esq. The Judges met and concluded, that the said letters patents were both against law and his majesty's profit, and sent an account of the excesses and irregularities in the said patent, in a letter from all the Justices and Barons, directed severally to the Lord Keeper and Lord Treasurer. And though this did well demonstrate the integrity of the Judges, that they would never prostitute an opinion to the mere interest of the king; and did as much vindicate his majesty's honour, that he would insist upon no method, though begun by his father, which the Judges of his realm should not pronounce to be strictly lawful; yet, however, this too was applied to the prejudice of the court, as if they were pursuing methods which the very Judges condemned for arbitrary and illegal.

"Westminster-hall was exercised with many singular cases, that serve much to express the disposition of the times. In Easter Term sir Henry Martyn, LL.D. and Judge of the Admiralty, made a great complaint to the king against the Judges of the King's-Bench, for granting prohibitions against his court: and upon this occasion the Judges were called before the king, where they stoutly justified their proceedings in those cases to be according to law, and from whence they could not depart by virtue of their oaths. About the next Term, the feoffees in trust for the buying in of impropriations to be bestowed upon preaching ministers, were brought into the Exchequer for breach of their trust in not augmenting poorer vicarages, but giving arbitrary pensions to lecturers and disaffected preachers: their corporation was dissolved, and their fund and stock adjudged to the king; of which we must take some farther notice in our view of church affairs. Nigh the same time, Huntley, a minister in Kent before mentioned, having been censured and imprisoned by the High Commission Court, brought now his action of false imprisonment against the keeper Mr. Barker, and some of the commissioners by name. The Attorney General moved, that the action might lay against the gaoler only, and by no means against any of the persons in the High Commission: but after long debate, the Court ordered that two of the commissioners should answer. The bishop of London made the king sensible, that the authority of his High Commission Court would fall to nothing, if the Judges of it must be now exposed to personal actions. Upon which the king sent his advocate, Dr. Ryves, to the Lord Chief Justice, requiring him to proceed no farther in that cause till he had spoken with his majesty. The Chief Justice answered, 'We receive the Message;' and then consulted with the Judges, and they came to this resolution, that 'they conceived such a message not to 'stand with their oaths, which commanded an 'indefinite stay of a cause between party and 'party, that might stop the course of justice so 'long as the king would.' And they farther declared the doctor to be no fit messenger, all messages from the king to them being usually by the lord keeper, or the attorney general, in causes relating to the administration of justice. By the court's desire, the chief justice acquainted the lord keeper and the bishop of London, who both agreed that the message was mistaken, and that the king's mind was not to command a stop, but to desire as much slowness as might stand with justice. After this, upon the importunity of the commissioners, who would no longer act if thus exposed to suits at common law; the king assumed the matter to himself, and sending for the Judges, charged them with 'express command, that 'they should not put the commissioners to an-'swer.' The Judges stoutly replied, that they could not, without breach of their oaths, perform that command. Afterwards the matter was handled at the council-table in presence

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of the Judges; where, after long hearing, it was determined, that the Judges had done their duty, and that the commissioners ought to answer. Toward the end of Trinity term the sickness encreasing in Southwark, Hobart, Stroud, and Valentine, three of the late members, imprisoned in the Marshalsea, sued to the Judges of the King's-bench to be removed to the Gate-house, and were by writ from the court so removed. But Mr. Selden, being at the same time in the Marshalsea, had forgot or omitted to make the like application to the King's-bench till the term was over, and the Judges in the circuit: After which he sued to the Lord-Treasurer for the like favour of removal, and by warrant from his lordship was accordingly so removed: But in Michaelmas term the Judges called on the marshal for his prisoner Selden; and he producing the treasurer's warrant by the king's direction, they declared such warrant to be illegal, and sent their writ to remand the prisoner back again to the Marshalsea. In the Hilary term following, the attorney-general exhibited two several informations against sir Miles Hobart, kt. and William Stroud, esq.; (who by writ from the King's-bench had been removed from the Marshalsea to the Gate-house) for escapes out of prison, proving that Stroud had resided with a keeper in his own chambers at Gray's-Inn; and Hobart had continued with a keeper at his lodgings in Fleet-street. The jury returned their verdicts severally Not Guilty: And the Judges resolved, that the prison of the King's-bench is not any local prison confined to one place; but that every place where any person is by authority of that court restrained of his liberty, is a prison. These several cases, and the decision of them, do abundantly prove, that the present set of Judges were no servile creatures of the court; and that the king did not insist upon their obsequious compliance with him; but they gave their judgments with freedom and courage, and the king acquiesced in their opinion, though contrary to his own."

That the court of King's-bench can commit to any prison, see Rex v. Hart and White, in dom. proc. May 1809, and the cases and authorities cited in that case.

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131. Proceedings against ROGER MANWARING, D. D. for preaching and publishing two Sermons, maintaining Doctrines tending to the Subversion of the Laws and Liberties of the Kingdom: 4 CHARLES I. A. D. 1628. [1 Rushw. Coll. 2 Cobb. Parl. Hist. 388. Sir John Napier's MS.]

DR. Roger Manwaring promoted the same business (the Forced Loan) in two Sermons. In one of them he said: 'That the king is not 'bound to observe the laws of the realm con-'cerning the Subjects' Rights and Liberties, but 'that his royal will and command in imposing 'Loans and Taxes, without common consent 'in parliament, doth oblige the subjects con-'science upon pain of eternal damnation. That 'those who refused to pay this Loan, offended 'against the law of God, and the king's su-'preme authority, and became guilty of impiety, 'disloyalty, and rebellion. And that the au-'thority of parliament is not necessary for the 'raising of Aids and Subsidies; and that the 'slow proceedings of such great assemblies, 'were not fitted for the supply of the state's 'urgent necessities, but would rather produce 'sundry impediments to the just designs of 'princes.'*

On the 23rd of June 1629, Mr. Rouse, a Member of the House of Commons, brought in a Charge against Dr. Roger Manwaring, which some days after was seconded with a Declaration: viz.

"Mr. Speaker; I am to deliver from the committee a Charge against Mr. Manwaring, a preacher in divinity; but a man so criminous, that he hath turned his titles into accusations; for the better they are, the worse is he that dishonours them. Here is a great Charge that lies upon him, it is great in itself, and great, because, it hath many great Charges in it; 'Serpens qui serpentem devorat fit draco,' his Charge having digested many Charges into it, becomes a Monster of Charges.

"The main and great one is this, a Plot and Practice to alter and subvert the frame and

* Sanderson, in his Life of Charles 1, says, "That this Dr. Manwaring preached two bold Sermons, one before the king, and the other at his parish church. In the first he asserted, 'That the king's royal command, imposing 'Taxes and Loans, without consent of parlia-'ment, did so far bind the conscience of the 'subjects of this kingdom that they could not 'refuse the payment without peril of damna-'tion.' The other was on this topic, 'That 'the authority of parliament was not necessary 'for the raising Aids and Subsidies.' This author adds, he well remembers what the king said when he was afterwards censured for it; 'He that will preach more than he can prove, 'let him suffer for it; I give him no thanks for 'giving me my due.' So that this being entirely the business of parliament, he was left, both by the king and church, to their Sentence."

Kennet says, both Sermons were first preached at Oatlands in July 1627. The preacher was made Dean of Worcester 1638; bishop of St. Davids 1635; and died at Carmarthen, in poverty, 1653.

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fabric of this estate and commonwealth. This is the great one, and it hath others in it that gives it more light. To this end,

"1. He labours to infuse into the conscience of his majesty, the persuasion of a Power not bounding itself with laws, which king James of famous memory, calls, in his Speech to the parliament, Tyranny, yea tyranny accompanied with perjury.

"2. He endeavours to persuade the conscience of the Subjects, that they are bound to obey commands illegal; yea, he damns them for not obeying them.

"3. He robs the Subjects of the Propriety of their Goods.

"4. He brands them that will not lose this propriety with most scandalous speech, and odious titles, to make them both hateful to prince and people; so to set a division between the head and the members, and between the members themselves.

"5. To the same end, not much unlike to Faux and his fellows, he seeks to blow up Parliaments, and Parliamentary powers.

"The fifth being duly viewed, will appear to be so many Charges, and they make up all the great and main Charge, a mischievous Plot to alter and subvert the frame and government of this state and commonwealth.

"And now, though you may be sure, that Mr. Manwaring leaves us no propriety in our goods, yet he hath an absolute propriety in this Charge; hear himself making up his own Charge. [Here he read several passages out of his Book, and then proceeded and said;] You have heard his Charge made up by his own words, and withal I doubt not but you seem to hear the voice of that wicked one, 'quid da-'bitis?' What will you give me, and I will betray this state, kingdom, and commonwealth?

"But there are two observations (I might add a third, which is like unto 'a three-fold 'cord, which cannot easily be broken)' will draw the Charge more violently upon him.

"The first is of the time when this Doctrine of destruction was set forth; it was preached in the heart of the Loan, and it was printed in the beginning of that Term which ended in a Remittitur: so that you might guess there might be a double plot, by the law and conscience, to set on fire the frame and estate of this common-wealth: and one of these entailed foxes was Mr. Manwaring.—Another note may be taken of the time, that is, the unseasonableness of it; for this Doctrine of the Loan (in case of necessity) was the year after an assent in parliament to four Subsidies and three Fifteens, which might serve for a sufficient stopple for the doctor's mouth, to keep in his doctrine of necessity.

"A second observation may be of the means by which he seeks to destroy this commonwealth; his means are Divinity, yea, by his Divinity he would destroy both king and kingdom.

"The king: for there can be no greater mischief to a prince, than to put the opinion of deity into his ears; for if from his ears it should have passed to his heart, it had been mortal: you know how Herod perished. Now this man gives a participation of divine omnipotence to kings; and though a part may seem to qualify, yet all doth seem again to fill up that qualification, and very dangerously, if we remember that God saith of himself, 'I am a 'jealous God.'

"He goes about to destroy the kingdom and commonwealth by his divinity; but do we find in Scripture such a destroying divinity? Surely I find there, that 'God is a God of order, and 'not of confusion:' and that 'the Son of God 'came to save, and not to destroy.' By which it seems he hath not his divinity from God, nor from the Son of God: and that we may be sure he went to hell for divinity, he names sundry Jesuits and friers, with whom he consulted and traded for his divinity. But not to bely hell itself, the Jesuits are honester than he: for if he had not brought more hell unto them than he found with them, he had not found this divinity in them which he hath brought forth; yea, in his quotations he hath used those shifts and falshoods, for which boys are to be whipt in schools, and yet by them he thinks to carry the cause of a kingdom.

"But, for a conclusion, to give the true character of this man, whom I never saw, I will shew it you by one whom I know to be contrary to him: Samuel we know all to be a true prophet; now we read of Samuel, that 'he writ the law of the kingdom in a Book, and 'laid it up before the Lord.' And this he did, as one of Mr. Manwaring's own authors affirms, that the king may know what to command, and the people what to obey; but Mr. Manwaring finding the law of this kingdom written in Books, tears it in pieces, and that in the presence of the Lord, in a pulpit, that the king may not know what to command, nor the people what to obey.

"Thus Mr. Manwaring being contrary to a true prophet, must needs be a false one, and the judgment of a false prophet belongs to him. I have shewed you an evil tree, that bringeth forth evil fruit; and now it rests with you to determine, whether the following Sentence shall follow, 'Cut it down, and cast it into 'the fire.'"

June 4. The commons proceeded with a Declaration against Dr. Manwaring; which was the same day presented to the lords at a Conference between the committees of both houses: and Mr. Pym was appointed by the Commons to manage that Conference.—The Declaration was as follows:

The DECLARATION of the Commons against Roger Manwaring, Clerk, D. D.

"For the more effectual prevention of the apparent ruin and destruction of this kingdom, which must necessarily ensue, if the good and fundamental laws and customs, therein established, should be brought into contempt and violated; and that form of government thereby

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altered, by which it hath been so long maintained in peace and happiness; and to the honour of our sovereign lord the king, and for the preservation of his crown and dignity, the commons in this present parliament assembled, do, by this their bill, shew and declare against Roger Manwaring, clerk, D. D. that whereas, by the laws and statutes of this realm, the free subjects of England do undoubtedly inherit this right and liberty, not to be compelled to contribute any tax, tallage, or aid, or to make any loans, not set or imposed, by common consent, by act of parliament: and whereas divers of his majesty's loving subjects, relying upon the said laws and customs, did, in all humility, refuse to lend such sums of money, without authority of parliament, as were lately required of them:

"Nevertheless he the said Roger Manwaring, in contempt, and contrary to the laws of this realm, hath lately preached in his majesty's presence, two several Sermons, that is to say, the 4th day of July last one of the said Sermons, and upon the 29th day of the same month the other of the said Sermons; both which Sermons he hath since published in print in a Book intituled, Religion and Allegiance; and with a wicked and malicious intention, to seduce and misguide the conscience of the king's most excellent majesty, touching the observation of the laws and customs of this kingdom, and of the rights and liberties of the subjects, to incense his royal displeasure against the good subjects so refusing, to scandalize, subvert, and impeach the good laws and government of this realm, and the authority of the high court of parliament, to alienate his royal heart from his people, and to cause jealousy, sedition, and division in the kingdom. He the said Roger Manwaring doth in the said Sermons and Book persuade the king's most excellent majesty,

1. "That his majesty is not bound to keep and observe the good laws and customs of this realm, concerning the rights and liberties of the subjects aforementioned: And that his royal will and command in imposing loans, taxes, and other aids upon his people, without common consent in parliament, doth so far bind the consciences of the subjects of this kingdom, that they cannot refuse the same without peril of eternal damnation.

2. "That those of his majesty's loving subjects which refuse the loan aforementioned, in such manner as is before cited, did therein offend against the law of God, against his majesty's supreme authority, and by so doing became guilty of impiety, disloyalty, rebellion, and disobedience, and liable to many other taxes and censures, which he in the several parts of his book doth most falsely and maliciously lay upon them.

3. "That authority of parliament is not necessary for the raising of aids and subsidies; that the slow proceedings of such assemblies are not fit for the supply of the urgent necessities of the state, but rather apt to produce sundry impediments, to the just designs of princes, and to give them occasion of displeasure and discontent.

"All which the commons are ready to prove, not only by the general scope of the same Sermons and Book, but likewise by several clauses, assertions, and sentences therein contained; and that he the said Roger Manwaring, by preaching and publishing the Sermons and Book aforementioned, did most unlawfully abuse his holy function, instituted by God in his church for the guiding of the consciences of all his servants, and chiefly of sovereign princes and magistrates, and for the maintenance of the peace and concord, betwixt all men, especially betwixt the king and his people, and hath thereby most grievously offended against the crown and dignity of his majesty, and against the prosperity and good government of this state and commonwealth. And the said commons, by protestation saving to themselves the liberty of exhibiting at any time hereafter, on any other occasion of impeachment against the said Roger Manwaring, and also of replying to the Answers which he the said Roger shall make unto any of the matters contained in this present Bill of Complaint, and of offering further proof of the premises, or any of them, as the cause, according to the course of parliament, shall require, do pray, that the said Roger Manwaring may be put to answer to all and every the premises; and that such proceeding, examination, trial, judgment, and exemplary punishment, may be thereupon had and executed, as is agreeable to law and justice.

Mr. *Pym's* Speech at the delivery of the Charge against Dr. Manwaring.

This Declaration, ingrossed in parchment, being read, Mr. Pym addressed himself to the lords in this manner:

"That he should speak to this cause with more confidence, because he saw nothing out of himself that might discourage him: If he considered the matter, the offences were of an high nature, of easy proof; if he considered their lordships, who were the judges of their own interest, their own honour, the example of their ancestors, the care of their posterity, would all be advocates with him in this cause on the behalf of the common-wealth; if he considered the king our sovereign (the pretence of whose service and prerogative might perchance be sought unto as a defence and shelter for this delinquent) he could not but remember that part of his majesty's Answer to the Petition of Right of both houses, that he held himself bound in conscience to preserve those liberties, which this man would persuade him to impeach: he said further, That he could not but remember his majesty's love to piety and justice, manifested upon all occasions; and he knew love to be the root and spring of all other passions and affections. A man therefore hates, because he sees somewhat in that which he hates contrary to that which he loves; a man therefore is angry because he sees somewhat in that wherewith he is angry, that gives impedi-

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ment and interruption to the accomplishment of that which he loves.—If this be so, by the same act of his apprehension, by which he believes his majesty's love to piety and justice, he must needs believe his hate and detestation of this man, who went about to withdraw him from the exercise of both.

"Then he proceeded to that which, he said, was the task enjoined him, to make good every clause of that which had been read unto them: which that he might the more clearly perform, he propounded to observe that order of parts, unto which the said declaration was naturally dissolved. 1. Of the Preamble. 2. The body of the Charge. 3. The Conclusion, or prayer of the commons. The Preamble consisted altogether of recital; first, of the inducements upon which the commons undertook this complaint. The second of those laws and liberties, against which the offence was committed. The third, of the violation of those laws which have relation to that offence.

"From the connexion of all those recitals, he said, there did result three positions, which he was to maintain as the ground-work and foundation of the whole cause.

"The first, That the form of government in any state could not be altered without apparent danger of ruin to that state. The second, the law of England, whereby the subject was exempted from Taxes, and Loans, not granted by common consent of parliament, was not introduced by any statute, or by any charter or sanction of princes, but was the ancient and fundamental law, issuing from the first frame and constitution of the kingdom. The third, that this Liberty of the Subject is not only most convenient and profitable for the people, but most honourable, most necessary for the king; yea in that point of supply for which it was endeavoured to be broken.

"The form of government is that which doth actuate and dispose every part and member of a state to the common good; and as those parts give strength and ornament to the whole, so they receive from it again strength and protection in their several stations and degrees. If this mutual relation and intercourse be broken, the whole frame will quickly be dissolved, and fall in pieces, and instead of this concord and interchange of support, whilst one part seeks to uphold the old form of government, and the other part to introduce a new, they will miserably consume and devour one another. Histories are full of the calamities of whole states and nations in such cases. It is true, that time must needs bring some alterations, and every alteration is a step and degree towards a dissolution; those things only are eternal which are constant and uniform: therefore it is observed by the best writers upon this subject, that those common-wealths have been most durable and perpetual, which have often reformed and recomposed themselves according to their first institution and ordinance; for by this means they repair the breaches, and counterwork the ordinary and natural effects of time.

"The second question is as manifest, there are plain footsteps of those laws in the government of the Saxons, they were of that vigor and force, as to over-live the Conquest, nay, to give bounds and limits to the Conqueror, whose victory gave him first hope; but the assurance and possession of the crown he obtained by composition, in which he bound himself to observe these, and the other ancient laws and liberties of the kingdom, which afterwards he likewise confirmed by oath at his coronation: from him the said obligation descended to his successors. It is true, they have been often broken, they have been often confirmed by charters of kings, by acts of parliaments; but the petitions of the subjects, upon which those charters and acts were founded, were ever petitions of right, demanding their antient and due liberties, not suing for any new.

"To clear the third Position (he said) may seem to some men more a paradox, That those Liberties of the Subject should be so honourable, so profitable for the king, and most necessary for the supply of his majesty. It hath been upon another occasion declared, that if those liberties were taken away, there should remain no more industry, no more justice, no more courage: who will contend, who will endanger himself for that which is not his own?

"But, he said, he would not insist upon any of those points, nor yet upon others very important; he said, that if those liberties were taken away, there would remain no means for the subjects, by any act of Bounty or Benevolence, to ingratiate themselves to their sovereign.—And he desired their lordships to remember what profitable prerogatives the laws had appointed for the support of sovereignty; as wardships, treasures-trove, felons goods, fines, amercements, and other issues of courts, wrecks, escheats, and many more, too long to be enumerated; which for the most part are now by charters and grants of several princes dispersed into the hands of private persons; and that besides the ancient demesnes of the crown of England, William the Conqueror did annex, for the better maintenance of his estate, great proportions of those lands, which were confiscate from those English which persisted to withstand him; and of these, very few remain at this day in the king's possession: And that since that time, the revenue of the crown had been supplied and augmented by attainders, and other casualties, in the age of our fathers, by the dissolution of monasteries and chantries near a third part of the whole land being come into the king's possession. He remembered further, that constant and profitable grant of the subjects in the act of tunnage and poundage. And all these, he said, were so alienated, anticipated, over-charged with annuities and assignments, that no means were left for the pressing and important occasions of this time, but the voluntary and free gift of the subjects in parliament.

"The hearts of the people, and their bounty in parliament, is the only constant treasure and revenue of the crown, which cannot be exhaust-

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ed, alienated, anticipated, or otherwise charged and incumbered."

In his entrance into the second part, he propounded these steps, by which he meant to proceed.

1. "To shew the state of the cause, as it stood both in the Charge and in the Proof, that so their lordships might the better compare them both together.

2. "To take away the pretensions of mitigations and limitations of his opinions, which the doctor had provided for his own defence.

3. "To observe those circumstances of aggravation, which might properly be annexed to his Charge.

4. "To propound some Precedents of former times, wherein, though he could not match the offence now in question (for he thought the like before had never been committed) yet he should produce such as should sufficiently declare, how forward our ancestors would have been in the prosecution and condemning of such offences, if they had been then committed.

"The Offence was prescribed in a double manner; First, by the general scope and intention, and by the matter and particulars of the fact, whereby that intention was expressed.

"In the description of the intention he observed six points, every one of which was a character of extreme malice and wickedness. 1. His attempt to misguide and seduce the conscience of the king. 2. To incense his royal displeasure against his subjects. 3. To scandalize, impeach, and subvert the good laws and government of the kingdom, and authority of parliaments. 4. To avert his majesty's mind from calling of parliaments. 5. To alienate his royal heart from his people. 6. To cause jealousies, sedition, and division in the kingdom. Of these particulars (he said) he would forbear to speak further, till he should come to those parts of the fact, to which they were most properly to be applied.

"The materials of the Charge were contrived into three distinct Articles; the first of these comprehended two clauses.

1. "That his majesty is not bound to keep and observe the good laws and customs of the realm, concerning the Right and Liberty of the Subject to be exempted from all Loans, Taxes, and other Aids laid upon them, without common consent in parliament.

"That his majesty's will and command in imposing any Charges upon his subjects without such consent, doth so far bind them in their consciences, that they cannot refuse the same without peril of eternal damnation.

"Two kinds of Proof were produced upon this Article. The first was from some assertions of the doctor's, concerning the power of kings in general, but by the necessary consequence to be applied to the king of England. The next kind of proof was from his censures, and determinations upon the particular case of the late Loan, which by necessity and parity of reason, were likewise applicable to all cases of the like nature. And lest by frailty of memory he might mistake the words, or invert the sense, he desired leave to resort to his paper, wherein the places were carefully extracted out of the book itself. And then he read each particular clause by itself, pointing to the page for proof, which we here forbear to mention, referring the reader to the book itself.

"Then he proceeded and said, That from this evidence of the fact doth issue a clear evidence of his wicked intention to misguide and seduce the king's conscience, touching the observation of the laws and liberties of the kingdom, to scandalize and impeach the good laws and government of the realm, and the authority of parliaments, which are two of those characters of malice which he formerly noted, and now inforced thus: If to give the king ill counsel, in some one particular action, hath heretofore been heavily punished in this high court; how much more heinous must it needs be thought by ill counsel to pervert and seduce his majesty's conscience, which is the sovereign principle of all moral actions, from which they are to receive warrant for their direction before they be acted, and judgment for their reformation afterwards? If *scandalum magnatum*, slander and infamy cast upon great lords and officers of the kingdom, have been always most severely censured; how much more tender ought we to be of that slander and infamy which is here cast upon the laws and government, from whence is derived all the honour and reverence due to those great lords and magistrates?

"All men (and so the greatest and highest magistrates) are subject to passions and partialities, whereby they may be transported into over-hard injurious crosses: which considerations may sometimes excuse, though never justify, the railing and evil speeches of men, who have been so provoked; it being a true rule, that whatsoever gives strength and inforcement to the temptation in any sin, doth necessarily imply an abatement and diminution of guilt in that sin. But to slander and disgrace the laws and government, is without possibility of any such excuse, it being a simple act of a malignant will, not induced nor excited by any outward provocation: the laws carrying an equal and constant respect to all, ought to be reverenced equally by all.—And thus he derived the proofs and inforcements, upon the first Article of the Charge.

"The second Article he said contained three clauses. 1. That these refusers had offended against the law of God. 2. Against the supreme authority. 3. By so doing, were become guilty of impiety, disloyalty, rebellion, disobedience, and liable to many other taxes.

"For proof of all these (he said) he needed no other evidence than what might be easily drawn from those places which he had read already; for what impiety can be greater, than to contemn the law of God, and to prefer human laws before it? What greater disloyalty, rebellion, and disobedience, than to depress supreme authority, to tie the hands and clip the wings of sovereign princes? yet he desired their

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lordships patience in hearing some few other places, wherein the stains and taint, which the doctor endeavoured to lay upon the refusers, might appear by the odiousness of their comparisons, in which he doth labour to rank them.

"The first comparison is with Popish Recusants; yet he makes them the worst of the two, and for the better resemblance, gives them a new name of Temporal Recusants. For this he alledgeth the 1st Sermon, p. 31, 32, and part of the fifth consideration, by which he would persuade them to yield to this loan.

"'Fifthly, If they would consider what advantage this their recusancy in temporals, 'gives to the common adversary, who for disobedience in spirituals, have hitherto alone inherited that name, for that which we ourselves 'condemn in them for so doing, and profess to 'hate that religion which teacheth them so to 'do; that is, to refuse subjection unto princes 'in spirituals; the same, if not worse, some of 'our side now (if ours they be) dare to practise.

"'We must needs be argued of less conscience, and more ingratitude, both to God and 'the king, if in temporal things we obey not: 'they in spirituals deny subjection, wherein they 'may perhaps frame unto themselves some reasons of probability, that the offence is not so 'heinous, if we in temporal shall be so refractory, what colour of reason can we possibly 'find to make our defence withal, without the 'utter shaming of ourselves, and laying a stain 'which cannot easily be washed out, upon that 'religion which his majesty doth so graciously 'maintain, and ourselves profess?'

"The second comparison is with Turks and Jews, in the 2d Sermon, p. 47. What a Paradox is, &c. What a Turk will do for a Christian, and a Christian for a Turk, and a Jew for both, &c. the same and much less Christian men should deny to a Christian king.

"The third comparison is with Corah, Dathan and Abiram, Theudas and Judas, which is taken out of the 2d Sermon, p. 49, where he labours to deprive those refusers of all merit in the sufferings for this cause.—Corah, Dathan and Abiram, whom for their murmurings God suddenly sunk into hell-fire, might as well alledge their sufferings had some resemblance with that of the three children in the Babylonian furnace; and Theudas and Judas, the two incendiaries of the people, in the days of Cæsar's tribute, might as well pretend their cause to be like the Maccabees.

"Thus he ended the second Article of the Charge, upon which, he said, were imprinted other two of these six characters of malice, formerly vented: that is, a wicked intention to increase his majesty's displeasure against his good subjects so refusing, and to alienate his heart from the rest of his people: both which were points so odious, that he needed not to add any further inforcement or illustration.

"The third Article conained three Clauses.

"1. That authority of parliament is not necessary for the raising of Aids and Subsidies.—2. That the slow proceedings of such assemblies, are not fit to supply the urgent necessity of the state.—3. That parliaments are apt to produce sundry impediments to the just designs of princes, and give them occasion of displeasure and discontent.

"For proof of all which he alledged two places, containing the two first of those six considerations, which are propounded by the doctor, to induce the refusers to yield to the Loan, in the first Sermon, p. 26, 27.

"'First, if they would please to consider, that 'though such assemblies as are the highest and 'greatest representations of a kingdom, be most 'sacred and honourable, and necessary also to 'those ends to which they were at first instituted; yet know we must, that ordained they 'were not to this end, to contribute any right to 'kings, whereby to challenge tributary aids and 'subsidiary helps; but for the more equal imposing, and more easy exacting of that which 'unto kings doth appertain by natural and original law and justice, as their proper inheritance annexed to their imperial crowns from 'their birth. And therefore if by a magistrate 'that is supreme, if upon necessity, extreme and 'urgent, such subsidiary helps be required, a 'proportion being held respectively to the ability of the persons charged, and the sum and 'quantity so required surmount not too remarkably the use and charge for which it was levied, 'very hard would it be for any man in the 'world, that should not accordingly satisfy such 'demands, to defend his conscience from that 'heavy prejudice of resisting the ordinance of 'God, and receiving to himself damnation; 'though every of those circumstances be not 'observed, which by the municipal law is required.

"'Secondly, if they would consider the importunities that often may be urgent, and 'pressing necessaries of state, that cannot stay 'without certain and apparent danger, for the 'motion and revolution of so great and vast a 'body as such assemblies are, nor yet abide their 'long and pausing deliberation when they are 'assembled, nor stand upon the answering of 'those jealous and over-wary cautions and objections made by some, who, wedded overmuch to the love of epidemical and popular 'errors, and bent to cross the most just and 'lawful designs of their wise and gracious sovereign; and that under the plausible shews of 'singular liberty and freedom, which, if their 'conscience might speak, would appear nothing 'more than the satisfying either of private humours, passions, or purposes.'

"He said, he needed not draw any arguments or conclusions from these places; the substance of the Charge appeared sufficiently in the words themselves: and to this 3d Article he fixed two other of these six characters of malice, that it is his wicked intention to avert his majesty's mind from causing of parliaments, and to cause jealousies, seditions, and divisions in the kingdom; which he shortly enforced thus: if parliaments be taken away, mischiefs and disorders must needs abound, without any

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possibility of good laws to reform them; grievances will daily increase, without opportunities or means to redress them; and what readier way can there be to distractions betwixt the king and people, to tumults and distempers in the state, than this?

"And so he concluded this third Article of the Charge.

"The limitations whereby the doctor had provided to justify (or at least to excuse) himself, were propounded to be three. 1. That he did not attribute to the king any such absolute power as might be exercised at all times, or upon all occasions, according to his own pleasure, but only upon necessity; extreme and urgent. 2. That the sum required must be proportionable to the ability of the party and to the use and occasion. 3. That he did not say, that the substance of the municipal or national laws might be omitted or neglected, but the circumstances only.

"To these were offered three Answers, the first general, the other two particular. The general Answer was this, That it is all one to leave the power absolute, and to leave the judgment arbitrary, when to execute that power; for although these limitations should be admitted, yet it is left to the king alone to determine, what is an urgent and pressing necessity, what is a just proportion, both in respect of the ability, and of the use and occasion: and what shall be said to be a circumstance, and what of the substance of the law; and the subject is left without remedy: the legal bounds being taken away, no private person shall be allowed to oppose his own particular opinion in any of these points to the king's resolution; so that all these limitations, though specious in shew, are in effect fruitless and vain.

"The first particular Answer applied to that limitation of urgent necessity, was taken from the case of Normandy, as it appears in the Commentaries of Guilme Jeremie, upon the customary laws of that duchy: they having been oppressed with some grievances, contrary to this franchise, made their complaint to Lewis the tenth, which by his charter, in the year 1314, acknowledging the right and custom of the country, and that they had been unjustly grieved, did grant and provide, that from thence-forward they should be free from all subsidies and exactions to be imposed by him and his successors; yet with this clause, 'si necessitie grand ne le requiret:' which small exception hath devoured all these immunities; for though these states meet every year, yet they have little or no power left, but to agree to such levies, as the king will please to make upon them.

"The second particular answer applied to the limitation and diminution of this power, which may be pretended to be made by this word, circumstances, as if he did acknowledge the king to be bound to the substance of the law, and free only in regard of the manner; whereas if the places be observed, it will appear, that he intends by that word, The assembly of parliaments, and assent of the people, such contribution, which is the very substance of the right and liberty now in question.

"The Circumstances of Aggravation observed to be annexed to this cause, were these. The first from the place where these sermons were preached; the court, the king's own family, where such doctrine was before so well believed, that no man needed to be converted. Of this there could be no end, but either simoniacal, by flattery and soothing to make way for his own preferment, or else extreme malicious, to add new afflictions to those who lay under his majesty's wrath, disgraced and imprisoned, and to enlarge the wound which had been given to the laws and liberties of the kingdom.

"The second was from the consideration of his holy function: he is a preacher of God's word; and yet he had endeavoured to make that which was the only rule of justice and goodness, to be the warrant for violence and oppression. He is a messenger of peace, but he had endeavoured to sow strife and dissension, not only amongst private persons, but even betwixt the king and his people, to the disturbance and danger of the whole state: he is a spiritual father, but like that evil father in the gospel, he hath given his children stones instead of bread; instead of flesh he hath given them scorpions. Lastly, he is a minister of the church of England, but he hath acted the part of a Romish Jesuit; they labour our destruction, by dissolving the oath of allegiance taken by the people; he doth the same work, by dissolving the oath of protection and justice taken by the king.

"A third point of aggravation was drawn from the quality of these authors, upon whose authority he doth principally rely, being for the most part friars and Jesuits, and from his fraud and shifting in citing those authors to purposes quite different from their own meanings.

"Touching which it was performed, that most of his places are such as were intended by the authors concerning absolute monarchies, not regulated by laws or contracts betwixt the king and his people; and in answer to all authorities of this kind, were alledged certain passages of a Speech from our late sovereign king James, to the lords and commons in parliament, 1609.

"In these our times we are to distinguish betwixt the state of kings in their first original, and between the state of settled kings and monarchs that do at this time govern in civil kingdoms, &c.

"Every just king in a settled kingdom, is bound to observe the paction made to his people by his laws, in framing his government agreeable thereunto, &c.

"All kings that are not tyrants or perjured, will be glad to bound themselves within the limits of their laws; and they that persuade them to the contrary are vipers and pests, both against them and the commonwealth.

"It was secondly observed, that in the 27 page of his first Sermon, he cites these words,

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Suarez de legibus, lib. 5, cap. 17. Acceptati-'onem populi non esse conditionem necessa-'riam ex vi juris naturalis aut gentium, neque 'ex jure communi.' 'The Jesuit adds, 'neque 'ex antiquo jure Hispaniæ;' which words are left out by the doctor, lest the reader might be invited to inquire what was 'antiquum jus His-'paniæ;' and it might have been learned from the same author in another place of that work, that about two hundred years since, this liberty was granted to the people by one of the kings, that no tribute should be imposed without their consent. And the author adds further, that after the law introduced and confirmed by custom, the king is bound to observe it. From this place he took occasion to make this short digression, That the kings of Spain being powerful and wise princes, would never have parted with such a mark of absolute royalty, if they had not found in this course more advantage than in the other, and the success and prosperity of that kingdom, through the valour and industry of the Spanish nation, so much advanced since that time, do manifest the wisdom of that change.

"The third observation of fraud, in perverting his authors, was this: In the twentieth page of the first Sermon, he cites these words out of the same Suarez, de legibus, lib. 5. c. 15. fol. 300. 'Tributa esse maxime naturalia, et præ 'se ferre justitiam, quæ exiguntur de rebus 'propriis;' this he produceth in proof of the just right of kings to lay tributes. And no man that reads it doubts, but that in Suarez's opinion, the king's interest and propriety in the goods of his subjects, is the ground of that justice; but the truth is, that Suarez in that chapter had distributed tributes into divers kinds, of which he calls one sort, 'Tributum reale,' and describes it thus, 'Solent ita vocari pensiones quædam 'quæ penduntur regibus et principibus exteris 'et agris, quæ à principio ad sustentationem 'illis applicata fuerunt, ipsi vero in feodum in 'aliis ea donarunt sub certa pensione annua, 'quæ jure civili canon appellari solet, quia cer-'ta regula et lege præscripta erat;' so that the issue is, this, which Suarez affirms for justification of one kind of tribute, which is no more than a fee-farm of rent due by reservation in the grant of the king's own lands, the Dr. herein, worse than a Jesuit, doth wrest to the justification of all kinds of tribute exacted by imposition upon the goods of the subjects, wherein the king had no interest or propriety at all.'

4. "The last aggravation was drawn from his behaviour since these Sermons preached, whereby he did continue still to multiply and increase his offence, yea, even since the sitting of the parliament, and his being questioned in parliament; upon the 4th of May last he was so bold, as to publish the same doctrine in his own parish-church of St. Giles; the points of which Sermons are these:

"That the king had right to order all, as to him should seem good, without any man's consent. That the king might require, in time of necessity, aid; and if the subjects did not supply, the king might justly avenge it. That the propriety of estates and goods was ordinarily in the subject; but extraordinarily, that is, in case of the king's need, the king hath right to dispose them.

"These assertions in that Sermon, he said, would be proved by very good testimony, and therefore desired the lords that it might be carefully examined, because the commons held it to be a great contempt to the parliament for him to maintain that so publicly, which was here questioned.

"They held it a great presumption for a private divine to debate the right and power of the king, which is a matter of such a nature, as to be handled only in this high court, and that with moderation and tenderness.—And so he concluded that point of aggravation.

"In the last place, he produced some such precedents as might testify what the opinion of our ancestors would have been, if this case had fallen out in their time; and herein, he said he would confine himself to the reigns of the first three Edwards, two of them princes of great glory: He began with the eldest, Westm. 1. c. 33.

"By this statute, 3 Ed. 1, provision was made against those who should tell any false news or device, by which any discord or scandal may arise betwixt the king, his people, and great men of the kingdom.

"27 Edw. 3, Rot. Parl. n. 20. It was declared by the king's proclamation, sent into all the counties of England, That they that reported that he would not observe the Great Charter, were malicious people, who desired to put trouble and debate betwixt the king and his subjects, and to disturb the peace and good estate of the king, the people, and the realm.

"5 Edw. 2. Inter novas ordinationes, Henry de Beamond, for giving the king ill counsel against his oath, was put from the council, and restrained from coming into the presence of the king, under pain of confiscation and banishment.

"19 Edw. 2. Clause Minidors. Commissions were granted to inquire upon the statute of W. 1. touching the spreading of news, whereby discord and scandal might grow betwixt the king and his people.

"10 Edw. Clause M. 26. Proclamation went out to arrest all them who had presumed to report, that the king would lay upon the wools certain sums, besides the ancient and due customs, where the king calls these reports, 'Exquisita mendacia, &c. quæ non tantum in 'publicam læsionem, sed in nostrum cedunt 'damnum, et dedecus manifestum.'

"12 Edw. 3. Rot. Almaniæ. The king writes to the archbishop of Canterbury, excusing himself for some impositions which he had laid, professing his great sorrow for it, desires the archbishop by indulgences and other ways to stir up the people to pray for him, hoping that God would enable him by some satisfactory benefit to make amends and comfort his subjects for these pressures.

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"To these temporal precedents of ancient times which were alledged, he added an ecclesiastical precedent out of a book called Pupilla Oculi, being published for the instruction of confessors, in the title 'de participantibus cum excommunicatis,' fol. 59. All the articles of Magna Charta are inserted with this direction, 'Hos articulos ignorare non debent quibus incumbit confessiones audire infra provinciam Cantuariensem.'

"He likewise remembered the proclamation 8 Jac. for the callings in and burning of doctor Cowel's book, for which these reasons are given, For mistaking the true state of the parliament of the kingdom, and fundamental constitution and privileges thereof: for speaking irreverently of the common law, it being a thing utterly unlawful for any subject to speak or write against that law under which he liveth, and which we are sworn and resolve to maintain.

"From these precedents he collected, that if former parliaments were so careful of false rumours and news, they would have been much more tender of such doctrines as these, which might produce true occasions of discord betwixt the king and his people.

"If those who reported the king would lay impositions, and break his laws, were thought such heinous offenders, how much more should the man be condemned, who persuaded the king he is not bound to keep those laws? If that great king was so far from challenging any right in this kind, that he professed his own sorrow and repentance for grieving his subjects with unlawful charges: If confessors were enjoined to frame the consciences of the people to the observances of these laws, certainly such doctrine, and such a preacher as this, would have been held most strange, and abominable in all these times?

"The third general part was the conclusion or prayer of the commons, which consisted of three clauses. 1. They reserved to themselves liberty of any other accusation, and for this, he said, there was great reason, that as the doctor multiplied his offences, so they may renew their accusations. 2. They save to themselves liberty of replying to his Answer, for they had great cause to think that he who would shift so much in offending, would shift much more in answering. 3. They desire he might be brought to examination and judgment; this they thought would be very important for the comfort of the present age, for the security of the future against such wicked and malicious practices; and so he concluded, that seeing the cause had strength enough to maintain itself, his humble suit to their lordships was, That they would not observe his infirmities and defects, to the diminution or prejudice of that strength."

June 9. The Lord Keeper having reported the Declaration before mentioned, and the substance of Mr. Pym's Speech on the delivery of it, the lords ordered, that the said Manwaring should be taken into custody, and brought to answer the Charge exhibited against him.

June 10. The lords examined several witnesses in Dr. Manwaring's cause.

June 11th. Roger Manwaring, doctor in divinity, being this day brought to the bar, the Declaration of the commons against him was read. Then Mr. Serjeant Crew and Mr. Attorney-General did charge him with the offences contained in the said Declaration: and opened the Proofs of the said Offences out of the several places of his two Sermons, which he preached before the king in July last. And they did further charge the said Roger for preaching a third Sermon the 4th of May last, sitting the parliament, in his own parish church of St. Giles in the Fields; wherein he delivered three Articles to this effect, viz. 1. "That in matters of Supplies, in cases of necessity, the king had right to order all, as seemed good to him, without consent of his people. 2. That the king might require Loans of his people, and avenge on such as should deny. 3. That the subject hath property of his goods in ordinary; but, in extraordinaries, the property was in the king."—And they charged the said Manwaring with great presumption, to dispute the right of the king and liberty of the subject, and the right of the parliaments, in his ordinary Sermons.

The Charge being ended, the Lord-Keeper demanded of Dr. Manwaring, Whether he did acknowledge the 3 tenets to be preached by him in his Sermons 4th of May: this he absolutely denied. Whereupon the Clerk read the Examination of H. Clayton, esq. and sir D. Norton, knt. who had affirmed some parts thereof upon their oaths. Then Dr. Manwaring being admitted to speak for himself, protested before God, upon his salvation, "That he never had any meaning to persuade the king to alter the fundamental laws of the kingdom: his only ends were to do his majesty service; and to persuade a supply in cases of extreme necessity; he desired favour and justice to explain himself; and, because his book consists of many conclusions, that the spiritual lords might be judges of the inferences and logical deductions therein." He further humbly besought their lordships to allow him counsel to speak for him, in point of law; time to answer the particulars; a copy of the Charge in writing; and recourse to his books at home, upon caution to attend again, when their lordships shall appoint.

The prisoner being withdrawn, and, after some debate on his requests, brought to the bar again, the Lord-Keeper, by direction of the house, blamed him for that he divided his judges; by requiring a part of his Charge against him to be referred to the lords the bishops; whereas the whole matter belongs to all the lords jointly.—Then his lordship told him, That the house had considered of his other requests, and granted him these, viz. 1. To have a copy of his Charge. 2. To have time till Friday morning to make his Answer. 3. To have leave to go to his own house, and to abide there with a keeper. And his lordship further told him, That if, upon recollecting him-

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self, he shall desire access to their lordships to-morrow morning, it shall be granted him.

June 12. A Message from the commons, by sir Edw. Coke and others.

The 2nd part of which Message was concerning Dr. Manwaring's Book; They said they found his majesty's command set upon the first leaf, to warrant the printing of that book; but that this they had cause to suspect, because, though they found those words struck out in the original, they still stood in the printed book. And, as they conceive, the printer durst not do it without warrant, they therefore desired their lordships to examine by what means this special command was derived, from his majesty to the printer? And when their lordships have found the party, or parties, who gave the warrant, the commons demand to have him or them punished, with as much severity or more, as Manwaring himself.—*Answ.* "The lords do, unanimously, agree, That his majesty's said Message for the entering, enrolling, and printing of the said Petition and Answer, shall be entered here, as is desired: and, as concerning the examination who gave the warrant for printing of Dr. Manwaring's Book, their lordships will take it into consideration; and do that therein, which shall be fit."

The same day, upon another Message of the commons to the upper house, it was ordered by their lordships, That Rd. Badger, who printed Dr. Manwaring's Book, be presently brought before their lordships; who, being brought to the bar, sworn and examined, answered, That Dr. Manwaring, himself, delivered him his two Sermons to be printed, with the bishop of London's signification to that effect, under his lordship's hand: and that when the book was fully printed, Dr. Manwaring brought the title of his said book, written with his own hand, as it is now printed. Hereupon the said printer was dismissed at this time; and the earl of Essex and the bishop of Lincoln were sent, from the house, to the bishop of London, to understand, from his lordship, what authority he had for signifying his majesty's special command for the printing of Dr. Manwaring's Book.

June 13. Dr. Manwaring being this day brought to the bar before the lords, and admitted to speak for himself unto the Charge of the commons against him, answered in effect as followeth; "First, he shewed that he was under a great burthen of sorrow and weakness here to present himself unto their lordships: and then rendered them humble thanks, for giving him leave and time to recollect himself before he made his Answer: and craved a favourable interpretation of what he was now to speak. As touching his two Sermons complained of by the commons, he said, 'That he was induced to preach them by a public remonstrance of the necessities of the state at that time: and that he printed them at his majesty's special command. That the grounds of his positions, in those two Sermons, are in the holy scriptures, and in the interpreters of the scriptures, and are not complained of by the commons, but the inferences only, drawn from those grounds, are questioned by them. He craved leave to explain himself in two of those positions: The first where he says, 'That kings partake of omnipotence with God,' he said, that he meant no more by this than is meant by the holy scriptures, and by the laws of the land: for the Psalms say, 'Dii estis'; and Mr. Calvin saith, 'Reges a Deo imperium habere, 'et divinam potestatem in regibus residere;' wherefore to offend against kings he thought it sacrilege; and, by the laws of the kingdom, a great image of God is in the king. The other position, which he desired to explain, was touching the king's justice; where he says, in his second Sermon, p. 25. 'That justice intercedes not between God and man, nor between the prince, being a father, and the people, as children:' he said, 'That he meant thereby, that as man cannot requite God, nor the child the father; so the king, being dispenser of God's power, cannot be requited; but his meaning was not, that the king should not have laws.'—And touching those inferences, made by the commons out of his two Sermons complained of, which they impute either to sedition or malice, or to the destroying of the municipal laws of the land, or slighting of parliaments, he protested, before God and his holy angels, that they were never in his thoughts. He only thought to persuade those honourable gentlemen, who refused to conform themselves, to yield a supply unto the present and imminent necessities of the state. And, in the conclusion of his speech, he expressed his great sorrow to be thus accused: and begged pardon and mercy of their lordships, and of the commons, even for God's sake; for the king's sake, whom they so much honoured; for religion's sake; and for his calling's sake; humbly beseeching them to accept of this submission."

This being spoken by Dr. Manwaring, and he willed to withdraw; the lord archbishop of Canterbury, (Dr. George Abbot) called to him to stay; and having desired leave of the house that he might say somewhat unto him, which was granted; his grace then told him, 'That he might have made some better use of the great favour which they did him, in giving him time to recollect himself before his Answer: but he saw in him (as St. Bernard saith) 'That there are some men who are *miseri sed non miserendi!*' and that he was sorry to hear such an Answer to the accusation of the commons:' but, God be thanked, the king had now wiped away what was intended by his two Sermons: which Sermons, his grace said, he both misliked and abhorred, and was sorry that he came only to extenuate his fault. Touching the participation, which Dr. Manwaring gave the king with God, his grace told him, 'That it was very blasphemy; and that those words in the Psalms, *Dii estis*, do warrant no such matter:' and touching his other assertion, that there is no justice but between equals, and not between God and man; the parent and his children;

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nor between the king and his people; his grace told him, 'It was impious and false; and that he had thereby drawn an infamy upon us and our religion; and had given an occasion to the Jesuits to traduce us:' and shewed him, 'That the scriptures do plainly declare and prove a justice from God to man, from a parent to his children, and from a king to his people:' and further, 'That, by the laws of God and man, there was ever a communitive justice between the king and his people, for matter of coins, and a distributive justice for government.' Then putting him in mind of Anaxarchus the philosopher, whom the king of Cyprus caused to be brayed in a brazen mortar for his base flattery (as a just reward for all flatterers of princes) he blamed him much for citing of Suarez, and other Jesuits in his sermons: and willed him to read the Fathers, the antient interpreters of the scriptures."

The Archbishop having ended his grave admonition, Dr. Manwaring made a short reply touching his said two assertions: and said, 'That he denied not justice and law to be between king and people; but affirmed that the king's justice could not be requited: and excused himself for citing of Suarez, for in those places he spake for the king.'

The prisoner being withdrawn, the lords considered of their censure against him; and their lordships thought him worthy of severe punishment, for attributing unto the king a participation of God's omnipotence, and an absolute power of government; for his scandalous assertions against parliaments; and for branding those gentlemen, who refused the late Loans, with damnation; but, for that he so deeply protested that he had no intention to seduce the king's conscience; nor to sow sedition between his majesty and his people; nor to incense his majesty against parliaments; nor to abrogate the municipal laws, as was objected by the commons; and in regard that the king himself had protested (as was affirmed by some lords of the privy-council) that he understood him not in that sense; and for that his majesty's gracious Answer unto the Petition of Right exhibited this parliament, hath removed those jealousies, which otherwise the subjects might justly have feared, by the assertions in those Sermons: and also for that he, the said Dr. Manwaring, had shewed himself very penitent and sorry for the same: their lordships agreed of a milder Sentence against him than otherwise they would.—This Sentence, being first argued by parts, was afterwards read and assented unto by the general and unanimous vote of the whole house.

June 14. A Message was sent to the commons, 'That the lords were ready to proceed to Judgment against Dr. Manwaring; if they, with their Speaker, will come to demand the same.' *Answ.* 'They will come presently.' The lords being in their robes, Dr. Manwaring was brought to the bar by the serjeant at arms; and the commons with their Speaker being come, Mr. Speaker said:—"My lords; the knights, citizens, and burgesses, of the commons house of parliament, have impeached before your lordships Roger Manwaring, clerk, doctor in divinity, of divers enormous crimes; for which your lordships have convened him before you, and examined the said offences: and now, the commons have commanded me, their Speaker, to demand Judgment against him for the same."

The JUDGMENT against Dr. Manwaring.

Then the Lord Keeper pronounced the Judgment against him in these words, viz.

"Whereas Roger Manwaring, doctor in divinity, hath been impeached by the house of commons for misdemeanors of a high nature, in preaching two Sermons before his majesty in summer last; which are since published in print, in a Book intituled, 'Religion and Allegiance;' and in a third Sermon preached in the parish church of St. Giles in the Fields, the 4th of May last; and their lordships have considered of the said Dr. Manwaring's Answer thereunto, expressed with tears and grief for his offence, most humbly craving pardon therefore of the lords and commons: yet nevertheless, for that this can be no satisfaction for the great offences wherewith he is charged by the said declaration, which do evidently appear in the very words of the said two Sermons, their lordships have proceeded to judgment against him; and therefore this high court doth adjudge,—1. That Roger Manwaring, doctor in divinity, shall be imprisoned during the pleasure of the house. 2. That he shall be fined at 1,000*l.* to the king. 3. That he shall make such submission and acknowledgment of his offences, as shall be set down by a committee in writing, both here at the bar, and in the house of commons. 4. That he shall be suspended for the term of three years, from the exercising of the ministry; and in the mean time a sufficient preaching minister shall be provided out of the profits of his living to serve the cure: this suspension, and this provision of a preaching minister, shall be done by the ecclesiastical jurisdiction. 5. That he shall be disabled for ever to preach at the court hereafter. 6. That he shall be for ever disabled to have any ecclesiastical dignity or secular office. 7. That the said Book is worthy to be burnt: and that for the better effecting of this, his majesty may be moved to grant a proclamation to call in the said Books, that they may be all burnt accordingly, in London, and in both the universities; and for the inhibiting the printing thereof, hereafter, upon a great penalty. And this is the Judgment of the lords."

Then the commons departed, and Dr. Manwaring was sent prisoner to the Fleet.—After this the bishop of Lincoln (Dr. John Williams) reported the Answer of the bishop of London, unto the Message sent him by the house the 12th of June, to this effect, viz. That the bishop of London (Dr. George Mountaigne) answered, 'That he received a letter from the bishop of Bath and Wells (Dr. W. Laud) the last sum-

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mer, for the printing and publishing of Dr. Manwaring's two Sermons, by his majesty's command: and thereupon his lordship did give way for the printing thereof, without further examination: and caused these words, 'Published by his Majesty's Special Command,' to be put on the front of the said book; that it might appear to be printed by his majesty's authority, and not by his lordship's approbation.' Hereupon the said bishop of Bath and Wells, being present, said, 'He could give no sudden Answer unto this report; but acknowledged that he wrote the said letter unto the bishop of London, by his majesty's express commandment, that the said two Sermons should be printed: which letter, he said, he wrote last summer from Woodstock, when his majesty was there.' And the earl of Montgomery affirmed, upon his honour, 'That he was then present at Woodstock, and heard his majesty command the bishop of Bath and Wells to cause the said Book to be printed; and that the said bishop desired his majesty to think better of it, for there were many things therein which would be very distasteful to the people.' —The duke of Bucks, also, and the earls of Suffolk and Dorset, protested, on their honours, 'That they have since heard his majesty affirm as much.'

June 16. The House of Lords ordered to be delivered to the king by the Lord-Keeper two Messages, one against Dr. Manwaring's Books; desiring his majesty to put out his Proclamation to call in the said Books, that they might be all burnt in London and Westminster, and at both the universities. Also to inhibit the reprinting of them under severe penalties, &c.

June 18. The Lord Keeper reported the king's Answer to the two Messages, concerning the cancelling the commission of Excise, and about Dr. Manwaring's Books. As to Dr. Manwaring, his majesty said, "That he was well pleased with their request, and would order the attorney-general to prepare a proclamation accordingly."

Dr. Manwaring's SUBMISSION.

June 21. Dr. Manwaring was brought to the bar, in order to read and subscribe the following Submission, which a committee of lords had drawn up for that purpose: viz.

"May it please this honourable house, I do here, in all sorrow of heart and true repentance, acknowledge the many errors and indiscretions which I have committed; in preaching and publishing those two Sermons of mine, which I called 'Religion and Allegiance,' and my great fault in falling upon this theme again, and handling the same rashly and unadvisedly, in my own parish church of St. Giles in the Fields, the 4th of May last past. I do fully acknowledge those 3 Sermons of mine, to have been full of many dangerous passages, inferences, and scandalous aspersions in most parts of the same: and I do humbly acknowledge the justice of this honourable house, in that Judgment and Sentence passed upon me for my great offence: and I do, from the bottom of my heart, crave pardon of God, the king, and this honourable house, the church, and this commonwealth in general, and those worthy persons adjudged to be reflected upon by me in particular, for these great errors and offences.

"ROGER MANWARING."

After this, the Doctor was led into the house of commons by the warden of the Fleet prison, where he made the same Submission, on his knees, at their bar.*

* Doctor Manwaring's Sermons, intituled, "Religion and Allegiance," were suppressed by proclamation, the king declaring, that though the grounds thereof were rightly laid to persuade obedience from subjects to their sovereign, and that for conscience sake; yet in divers passages, inferences, and applications thereof, trenching upon the laws of this land, and proceedings of parliaments, whereof he was ignorant, he so far erred, that he had drawn upon himself the just censure and sentence of the high court of parliament, by whose judgment also that Book stands condemned: Wherefore being desirous to remove occasions of scandal, he thought fit that those Sermons, in regard of their influences and applications, be totally suppressed.

Moreover bishop Montague, and doctor Manwaring, procured a royal Pardon of all errors heretofore committed by them, either in speaking, writing, or printing, for which they might be hereafter questioned: And doctor Manwaring, censured by the lords in parliament, and perpetually disabled from future ecclesiastical preferments in the church of England, was immediately presented to the rectory of Stamford Rivers in Essex, and had a dispensation to hold it, together with the rectory of St. Giles's in the Fields.

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132. The Case of HUGH PINE, esq. upon an Accusation of Treason, for Words spoken in Contempt of the King: 4 CHARLES I. 1628. [Croke, Car. 117.]

In Serjeants-Inn Hall, at a Meeting of the Twelve Judges, viz.

The King's Bench.—Sir Nicholas Hyde, knt. Chief Justice; sir John Doderidge, knt.; sir Wm. Jones, knt.; sir James Whitlock, knt. Justices.

The Common Pleas.—Sir Tho. Richardson, knt. Chief Justice; sir Richard Hutton, knt.; sir Francis Harvey, knt.; sir George Croke, knt.; sir Henry Yelverton, knt. Justices.

The Exchequer.—Sir Jn. Walter, knt. Chief Baron; sir Edward Bromley, knt.; sir John Denham, knt.; sir George Vernon, knt.; sir Thomas Trevor, knt. Barons.

WILLIAM Collier, attending Mr. Pine at his house in the country, was demanded of him, Whether he had seen the king at Hinton, or no? Collier answered, That he had seen the king there. Mr. Pine replied, "Then hast thou seen as unwise a king as ever was, and so governed as never king was; for he is carried as a man would carry a child with an apple; therefore I and divers more did refuse to do our duties to him."

After which words spoken, William Collier, meeting with Richard Collier his brother, asked him, "Whether the king were not a wise king?" who answered, "Yes, he was a wise and temperate king."

After which, at another time, Monsieur Sebiza being at Mr. Pawlett's house, at Hinton, Mr. Pine asked Collier; whether the king was there, or no? who answered, that he heard he was. Mr. Pine replied, That he could have had him at his house, if he would, as well as Mr. Pawlett.

At another time one George Morley, a locksmith, being at Mr. Pine's house, he asked him, "What news?" whereunto he answered, That he heard the king was at Mr. Pawlett's at Hinton. Then Mr. Pine said, "That is nothing; for I might have had him at my house, as well as Mr. Pawlett, for he is to be carried any whither." And then Mr. Pine said aloud, "Before God, he is no more fit to be king than Hickwright?" This Hickwright was an old simple fellow who was then Mr. Pine's shepherd.

These words being thus proved by William Collier and George Morley, all the judges were commanded to assemble themselves, to consider and resolve what offence the speaking of those words were.

Whereupon sir Nicholas Hyde, chief justice of the king's bench; sir Thomas Richardson, chief justice of the common pleas; sir John Walter, chief baron of the exchequer; sir William Jones, one of the justices of the king's bench; sir Henry Yelverton, one of the justices of the common pleas; sir Thomas Trevor and George Vernon, barons of the exchequer, none other of the judges being then in town, met at Serjeants-Inn, in Fleet-street, where they debated the case amongst themselves, in the presence of sir Robert Heath, the attorney-general; and divers precedents were then produced, viz.

The Case of Juliana Quick, (Kanc.). Anno vicesimo primo Henrici Sexti.

Juliana filia Willielmi Quick, et alii falsi proditores incogniti in occulto machinantes mortem regis, &c. prædicta Juliana ex assensu Willielmi, et aliorum proditorum ignotorum, eidem domino regi, ut fuit equitans in via adhesit, et dixit eidem domino regi: 'Harry of Windsor, 'ride soberly, thy horse may stumble and break 'thy neck.' And when the noble John Beauchamp then said to her, 'To whom speakest 'thou?" she answered, 'To that proud boy in 'red, riding on horseback,' pointing with her hand to the said king. And further calling out to the said king, said, 'It becometh thee better to ride to thy uncle, than that thy uncle 'should ride to thee; thou wilt kill him, as thou 'hast killed thy mother: send to thy uncle's 'wife, whom thou keepest from him. Thou 'art a fool, a known fool throughout the whole 'kingdom of England.' She had *pain fort et dure* because she would not plead.*

Thomas Kerver's Case, (Berkshire). In the twenty-first year of Hen. 6.

Thomas Kerver indictatur, pro eo quod ipse proditorie dixit verba sequentia, 'Woe to the 'kingdom where a child is king.' Et iterum dixit, 'It had been better for the kingdom of 'England by an hundred thousand pounds, if 'the said king had been dead twenty years be-'fore.' Et iterum, 'It had been better for the 'said kingdom by an hundred thousand pounds, 'if the said king never had been born.' And, 'That the Dauphin of France was in Aquitain 'and Gascoyn, with a great power, and va-'liantly fighting, possessing himself of the land 'of the king of England in Aquitain and Gas-'coyn. And if the said king were but of as 'much humanity as the Dauphin, who is of his 'age, the said king might quietly and peaceably 'hold and enjoy his said lands.' To this he pleaded Not Guilty, and was committed to the constable of the Tower of London; and afterward recommitted to Wallingford castle.—Ideo nil ultra apparet.

John Clipsham's Case, (Sussex). In the twenty-ninth year of Hen. 6.

Johannes Clipsham indictatur, pro eo quod

* A prisoner standing mute in high-treason is *ipso facto* attainted: 2 Hale, 286, 4 Bl. Com. 348. And in felony and piracy such obstinacy amounts to a conviction, by 12 Geo. 3, c. 20. See 2 Hawk. P. C. ch. 30, 8vo. edit.

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ipsi et alii dixerunt, quod dominus rex non fuit de potestate, nec scientia, ad regnum Angliæ gubernandum, et quod noluerunt ulterius obedire regi, nec gubernationi suæ, infra idem regnum; minantesque inter se veros populos domini regis de comitatu Kanciæ, pro eo quod ipsi noluerunt resistere ipsum regem de justitia sua infra eundem comitatum, ac similiter insurrexerunt, &c.

The Mirfields' Case, (Sussex). In the twenty-ninth year of Hen. 6.

Johannes Mirfield et Willielmus Mirfield indictantur, pro eo quod dixerunt,' 'That the 'king was a natural fool, and would often-'times hold a staff in his hand, with a bird over 'the end, playing therewith as a fool; and that 'another king must be ordained to rule the 'land; saying, That the king was not a person 'able to rule the land.' Et ulterius dixerunt, 'That the charter that the king made at the 'first insurrection was false; and that he and 'his fellowship would arise again; and when 'they were up, they would not leave any gen-'tleman alive but such as they list, &c.'—Per indictam. session. Sussex.

Bretenham's Case, (Norfolk). In the thirty-first year of Hen. 6.

Willielmus Bretenham generosus indictatur, pro proditoriis verbis, viz. quod 'Richardus 'dux Eborum extra terram Hiberniæ infra 'quindecem dies tunc proxime sequentes ve-'niret et coronam dicti domini regis de eodem 'rege auferret, et illud super caput ejusdem 'ducis infra brevi poni facerit.'—Notatur in margine indictamenta sic, trespas enormia, contempt. et alia offence. Tamen in indictamento est 'proditorie loquebatur, &c.'

William Ashton's Case, (Suffolk). In the thirty-first year of Hen. 6.

Willielmus Ashton miles indictatur, pro eo quod ipse et alii proditorie diversas billas et scripturas in rythmis et balladis factas et fabricatas, super ostia et fenestras diversorum hominum posuerunt, recitantes in eisdem, quod dominus rex, per consilium ducis Suffolciæ, episcopi Sarum, episcopi Cicestriæ domini de Say, et aliorum de concilio domini regis existent. vendidit regna Angliæ et Franciæ; et quod rex Franciæ, avunculus regis, regnaret super dictum regem, dicentes et scribentes hæc omnia et singula. Et similiter miserunt literas hominibus de Kanc. ad insurgendum erga regem, ad adjuvandum ducem Eborum, &c. ad guerram levandum. Per indictamentum Suff. anno 31 H. 6.

John Gayle's Case, (Essex). In the thirty-fourth year of Hen. sexti.

Johannes Gayle indictatur, pro eo quod ipse et alii dixerunt, quod 'dictus rex, et omnes 'domini sui circa personam suam, et consi-'lium suum, falsi sunt, et quod ipsi petitiones 'suas, in ultimo parliamento dicti regis, apud 'Westmonasterium tentum, per ipsos et totam 'communitatem Kanciæ petitionat. &c. invitis 'dentibus dicti regis habere voluerunt: et quod 'non licet episcopis dicti regni ullam potesta-'tem, nec aliquam congregationem populi erga 'ipsos ad perturbandum de bonis propositis 'suis perimplendis, assemblare, nec retinere. 'Quodque presbyteri totius Angliæ nulla bona 'nec catalla, præter cathedram et candela-'brum, ad inspiciendum super libros suos ha-'berent et possiderent. Ac quod Johannes 'Mortimer, alias Cade, est vivens; et quod 'ipse esset eorum capitalis capitaneus in om-'nibus propositis suis perimplend. credentes, 'et dicentes, quod ipsi essent infra tres dies 'quinque millia hominum armatorum: et si-'militer guerram erga regem levarent.'—Habuerunt chartam allocationis eodem termino.

Oliver Germaine's Case, (Wiltshire). In the second year of Edw. 4.

Oliverus Germaine, taylor, et alii falsi proditores, machinantes et proponentes quomodo regem Edvardum, &c. destruere potuerunt; et Henricum sextum, nuper de facto, et non de jure, regem Angliæ, inimicum regis Angliæ, authoritate parliamenti reputat. et approbat. infra regnum Angliæ, extra regnum Scotiæ reducere, et regem Edvardum deponere, &c. mortem regis compasser, &c. credentes et dicentes inter se, in prophesiis, ut falsi heretici, quod dominus Henricus, nuper rex, infra breve esset eorum rex in regno Angliæ sicut prius, et coronam suam in eodem regno haberet et retineret, dicentes hæc omnia ea intentione, quod veri populi domini regis cordialem amorem extraherent.—Judgment, to be hanged, drawn, and quartered.

William Belmyn's Case, (Norfolk). Anno nono Edvardi quarti.

Willielmus Belmyn, de Norwico, mercer, indictatur, quod cum Robertus de Ryddesdale, à diuturno tempore proponens statum et dignitatem regis Edvardi quarti, &c. adnihillare, &c. et ipsum regem per guerram, &c. de regali, &c. privare, &c. inter alias falsas proditiones, &c. diversos articulos proditorum, &c. fabricavit, publicavit, et proclamavit. Et quod prædictus Willielmus quandam scedulam tenorem prædictorum articulorum continent. apud N. &c. monstravit et publicavit, et eosdem articulos pro bonis articulis, et communi utilitate regni expedientes affirmavit, et quamplures personas ad ipsos articulos manutenendum et approbandum excitavit.—Nota, Non dicitur proditorie in eodem indictamento.

The Case of Thomas Burdet, (Warwick). Anno decimo septimo Edvardi quarti.

Juratores præsentant, quod Thomas Burdet, nuper de Arrow, in comitatu Warwici, armiger, Deum præ oculis non habens, et debitum legianciæ suæ minime ponderans, ex malitia præcogitata, diabolica instigatione seductus, vicesimo die Aprilis, anno regni regis Edvardi quarti, post conquestum decimo quarto, et per diversas vices postea, apud villam Westmonasterii, in comitatu Middlesexiæ, falso et proditorie, contra legianciæ suæ debitum, mortem et destructionem ipsius regis imaginavit compassus fuit et circuivit, ac ipsum regem falso

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et proditorie adtunc et ibidem interficere proposuit, et ad illud falsam nefandum propositum suum perimplendum, falso et proditorie laboravit et procuravit quosdam Johannem Stacy, nuper de Oxonia, in comitatu Oxon, generosum, et Thomam Blake, nuper de Oxon, in comitatu Oxon, clericum, apud villam Westmonasterii prædictam duodecimo die Novembris tunc proxime sequent. ad calculandum et laborandum de et circa nativitatem dicti domini regis et Edvardi filii sui primogeniti, principis Walliæ, et de morte eorundem domini regis ac principis ad sciendum quando iidem rex et Edvardus filius ejus morientur. Dictique Johannes Stacy et Thomas Blake, scientes illud falsum et nefandum propositum prædicti Thomæ Burdet, ipsi Johannes Stacy et Thomas Blake, dicto duodecimo die Novembris, apud villam Westmonasterii prædictam, falso et proditorie mortem ipsorum regis et principis imaginaverunt et compassi fuerunt, ac ipsos regem ac principem adtunc et ibidem interficere proposuerunt. Et postea, sexto die Februarii, dicto anno decimo quarto, apud villam Westmonasterii prædictam, prædicti Johannes Stacy ac Thomas Blake eorum falsum et proditorium propositum perimplendum, falso et proditorie laboraverunt et calculaverunt per artem magicam, nigromanciam, et astronomiam, in mortem et finalem destructionem ipsorum regis ac principis. Et postea, scilicet, vicesimo die Maii, anno regni dicti regis decimo quinto, apud villam Westmonasterii prædictam, prædicti Johannes Stacy et Thomas Blake, falso et proditorie artibus prædictis laboraverunt; licet juxta determinationem sacram sanctæ ecclesiæ ac doctrinam diversorum doctorum, cuilibet ligeo domini regis, de intromittendo de regibus et principibus, in formâ prædictâ, absque eorum voluntate, et præceptis inhibitum fuit. Et postea, iidem Johannes Stacy et Thomas Blake, ac prædictus Thomas Burdet, apud prædictam villam Westmonasterii, vicesimo sexto die Maii, eodem anno decimo quinto, cuidam Alexandro Russeton, et aliis de populo domini regis, falso et proditorie manifestaverunt et dixerunt, 'quod per calculationem et 'artes prædictas, per ipsos Johannem Stacy et 'Thomam Blake, in formâ prædictâ factas, 'iidem rex et princeps non diu viverent, sed 'infra breve obierent;' ad intentionem quod per detectionem et hujusmodi materiæ manifestationem, populi ipsius regis magis ab ipso rege cordialem amorem retraherent; et idem dominus rex per notitiam illarum detectionis et manifestationis, tristitiam inde caperet et abbreviationem vitæ suæ. Ac quod prædictus Thomas Burdet, mortem et destructionem ipsius regis supremi dicti domini sui et prædicti domini principis, ac subversionem legum suarum per guerram et discordiam inter ipsum regem et ligeos suos in regno prædicto movendum, sexto die Martii, anno regni dicti regis decimo septimo, apud Holborn, in comitatu Middlesexiæ, falso et proditorie imaginavit, compassus fuit, et circuivit, ac ipsos regem ac principem interficere proposuit. Et ad illud falsum nefandum propositum suum finaliter perimplendum, prædictus Thomas Burdet diversas billas et scripturas in rythmis et balladis de murmurationibus seditionibus et proditoriis excitationibus, factas et fabricatas apud Holborn, et villam Westmonasterii prædict. falso et proditorie dispersit, projecit, et seminavit dicto sexto de Martii, ac quinto et sexto diebus Maii, dicto anno decimo septimo, ad intentionem quod populi domini regis cordialem amorem ab ipso rege retraherent ac ipsum relinquerent, ac erga ipsum regem insurgerent, et guerram erga ipsum regem levarent, in finalem destructionem ipsorum regis ac domini principis, et contra ligeanciam suum, necnon contra coronam et dignitatem ipsius regis.—Judgment, to be hanged, drawn, and quartered.

The Case of John Alkerter, (Banc.). Anno decimo octavo Edvardi quarti.

Johannes Alkerter, yeoman, nuper serviens Richardi comitis Warwici et Sarum, à diuturno tempore proponens statum regis pejorare et de regimine, &c. quantam in se fuit proditorie; per diversa verba nefanda, et alia dicta sua venenosa, de diversis murmurationibus seditionibus proditorum excitationibus factis et fabricatis, à gubernatione privare, &c. ad intentionem quod populi ejusdem regis cordialem amorem retraherent, per discordiam inter regem et populum suum movendum, proditorie dixit Willielmo Pend, Willielmo Fowle, et Sampsoni Halk, sub hac forma, viz. quod Willielmus Pend et Johannes Alkerter olim servientes dicti Richardi comitis Warwici fuerunt, et nunc quod idem comes diem suum clausit extremum; et hoc non obstante infra breve haberent comitem Oxoniæ (qui superstes est) infra hoc regnum Angliæ, qui in futuro parcellam hujus patriæ gubernet; affirmandoque ulterius verba sua cuidam Gulfrido Peke, quod Edvardus quem vos vocatis regem Angliæ falso fuit, &c.; dicendo, quod idem Edvardus per subtilem artem suam eundem comitem Warwici interfecit et murdravit, ac fratrem suum, nuper ducem Clarenciæ, ad mortem simili modo traxit, non habens causas nec aliquam veritatem; et dicendo, quod quicunque inheritabilis sit directe post mortem naturalem Henrici sexti (nunc de facto, et non de jure, regis Angliæ), ad coronam Angliæ ille tantummodo sineret et suus homo esset. Et multa alia hujusmodi verba proditorie dixit.—Utlagatus fuit, prout patet per rotul. session. Banc. anno 18 Ed. 4.

Thomas Hever's Case, (Cancellariæ). Anno decimo octavo Edvardi quarti.

Thomas Hever indictatur, pro eo quod proditorie dixit, 'quod ultimum parliamentum do-'mini regis, apud Westmonasterium tentum, 'magis simplex et insufficiens fuit quam un-'quam antea.' Et ulterius, 'Quod dominus 'rex proposuit moram suam infra comitatum 'Cancellariæ trahere et amorem ligeorum suorum 'ibidem habere, quia amorem cordialem infra 'eandem civitatem non habuit, nec in futuro 'habebit: et quod si episcopus Bathoniensis

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'morietur, quod tunc immediate Thomas ar-
'chiepiscopus Cantuariensis et cardinalis An-
'gliæ caput suum amitteret.' Et multa diver-
simoda verba proditoria de rege quam alia
verba malitiosa de dominis suis, tam spiritualibus quam temporalibus.—Utlagatus, prout patet per rotul. sessionis.

Collingbourn's Case, (London). Hilar. an. secun. Richardi tertii.

Willielmus Collingbourn, nuper de Lydyard, in comitatu Wilts, armiger, et alii falsi proditores, mortem regis et subjectionem regni proditorie imaginaverunt et compassi fuerunt: et ad illud perimplendum, excitaverunt, &c. quendam Tho. Yate ei offerendo octo libras ad partes transmarinas exire, ad loquendum ibidem cum Henrico nuncupante se comit. Richmundiæ, et aliis, &c. proditorie attinct. per parliamentum, &c. ad dicendum, quod ipsi cum omni potestate, &c. revenirent in Angliam citra festum Sancti Lucæ evangelistæ, et totum integrum redditum totius regni Angliæ, de termino Sancti Michaelis, &c. in eorum relevamen haberent. Et ulterius, ad demonstrandum eis, quod per concilium ipsius Willielmi Collingbourn, si dictus comes Richmundiæ, et alii, &c. ad terram Angliæ, apud Poole, in comitatu Dorcestriæ, arrivare voluerunt, ipse Willielmus Collingbourn et alii proditores, eis associando commotionem populi ipsius regis, insurrectionem et guerram erga ipsum regem interim levare causarent; et partem ipsorum falsorum proditorum contra regem in omnibus acciperent; et omnia infra regnum Angliæ ad eorum dispositionem essent. Et ulterius, ad dicendum et demonstrandum dictis proditoribus, &c. ad destinandum Johannem Cheyney usque ad regem Franciæ, ad demonstrandum sibi, quòd ambassiatores sui in Angliam à dicto rege Franciæ venientes defraudari debeant; et quòd rex Angliæ nullum promissum eis custodiret sed solummodo ad deponendum seu ad respectuandum guerram inter dominum regem tempore hyemali, eò quod in principio temporis æstivalis Anglica potestas in omnibus preparari possit ad bellum dicto domino regi Franciæ præbendum, et eundem regem et terram suam adtunc finaliter destruendo. Et ulteriùs ad advisandum ipsum regem Franciæ ad auxilium dictorum proditorum pecuniis, &c. ut ipse iter regis Angliæ usque terram Franciæ impedire proponet. Et sic prædictus Willielmus Collingbourn et alii fuerunt proditorie adhærentes, &c. Et quòd prædictus Willielmus Collingbourn, et alii falsi proditores, Deum præ oculis, &c. à diuturno tempore intendens per covinam assensum et voluntatem diversorum aliorum proditorum eisdem proditoribus adhærentium, &c. associaverunt, et mortem regis per guerram, commotionem, et discordiam inter regem et ligeos suos infra regnum Angliæ levandum, compassi fuerunt, &c. Et ad illud perimplendum, prædictus Willielmus Collingbourn, et alii, diversas billas et scripturas in rythmis et balladis de murmurationibus, seditionibus, et loquelis, et proditoriis excitationibus, falsò et proditoriè fecerunt, scripserunt, et fabricaverunt, et illas per ipsos sic factas, scriptas, et fabricatas, die, &c. super diversa ostia ecclesiæ cathedralis Sancti Pauli, London. proditoriè posuerunt, et publicè ibidem fixerunt, ad movendum et excitandum ligeos regis billas et scripturas illas legentes et intelligentes, commotionem et guerram erga ipsum regem facere et levare, contra ligeanciæ suæ debitum, et finalem destructionem regis, et subversionem regni, &c.—Judgment, to be hanged, drawn, and quartered.

Bagnall's Case, (London). Anno nono Henrici septimi.

Thomas Bagnall et alii mortem regis imaginaverunt, &c. et ad intentionem prædictam, quòd populi regis cordialem amorem retrahere, &c. diversas billas et scripturas in rythmis et balladis de murmurationibus, seditionibus, et proditoriis excitationibus, tam versus regem quàm alios magnates de consilio suo tangent. proditoriè fecerunt, &c. super ostium ecclesiæ sancti Benedicti in Gracious-street, et super le Standard in Cheap, ac super ostium ecclesiæ Pauli posuerunt, &c. et quod ipsi fuerunt adhærentes cuidam Petro Warbeck, inimico regis, in partibus transmarinis existent. ad levandum guerram ad deponendum regem.—Judgment, to be hanged, drawn, and quartered.

Stanley and Clifford's Case, (Middl.). Decimo Henrici septimi.

Willielmus Stanley, miles, et Robertus Clifford, miles, ad invicem inter se communicaverunt et interlocuti fuerunt de quodam Petro Warbeck de Thornaco sub obedientiâ archiducis Austriæ et Burgundiæ, inimico domini regis, &c. falsò nuncupante se fore Richardum secundum filium domini Edvardi nuper regis Angliæ quarti, in partibus exterioribus ultra mare existent. ac mortem, &c. regis, ac subversionem regni Angliæ, proditorie conspiraverunt, &c. et eundem regem per guerram, &c. in regno Angliæ, levandum de coronâ, &c. deponendum, &c. Et ad illud perimplendum, &c. prædicti Willielmus Stanley et Robertus Clifford proditoriè, &c. inter se aggreati fuerunt, quòd ipse Robertus ad partes exteras prædictas ad præfatum Petrum Warbeck, &c. transfretaret, et in ipsius Petri adventum ad guerram levandum expectaret; et ipsum Petrum in regnum Angliæ cum toto posse suo introduceret, ipsum in regem erigeret, &c. Et ulteriùs dictus Willielmus Stanley præfato Roberto Clifford proditoriè promisit, &c. ad quodcunque et quotiescunque ipse Robertus Clifford aliquos ad domum Willielmi Stanley à partibus exterioribus, per privatum signum inter ipsos habitum, destinaret, pro ipsius ac dicti Petri Warbeck, inimicorum regis, &c. adjuvamine; ipse Willielmus Stanley eo toto posse adjuvare vellet, &c. quorum, &c. prætextu dictus Robertus Clifford iter suum ad partes exteras, præfato Petro Warbeck arripuit, &c. Et sic fuerunt adhærentes, &c.—Judgment, to be hanged, drawn, and quartered.

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March and Carew's Case, (Surrey). Anno tricesimo Henrici octavi.

Henricus Marchio, Exon, proditoriè dicebat, 'I like well of the proceedings of Cardinal 'Pool:' et ulteriùs, 'But I like not the pro-'ceedings of this realm;' and 'I trust to see a 'change in the world:' et ulteriùs 'I trust 'once to have a fair day upon those knaves 'which rule about the king:' et ulteriùs, 'I 'trust to give them a buffet one day.' Et quòd Nicholaus Carew, miles, malitiosè et proditoriè murmuravit, et indignatus fuit, et dicebat hæc verba Anglicana, 'I marvel greatly that 'the indictment against the lord marquis was 'so secretly handled, and to what purpose? for 'the like was never seen.'—Per bagam sessionis tent. coram Thom. Audley, cancellar. et alias, 30 Hen. 8.

The Case of John Rugg, (Berkshire). In the thirty-first year of Henry 8.

John Rugg, chivaler, for these words, 'The 'king's highness cannot be supreme head of the 'church of England by God's law.' Hugo, abbot of Reading, superinde dixit, 'What did 'you for saving your conscience when you were 'sworn to take the king for supreme head?' Et superinde prædictus Joh. Rugg dixit, 'I 'added this condition in my mind, to take him 'for supreme head in temporal things, but not 'in spiritual things.'—Per indictam. Mich. 31 Hen. 8.

The Case of Robert Rumwick, (Kent). In the thirty-first year of Henry 8.

Robertus Rumwick indictatur, quòd cum diversi fuerunt comedentes et compotantes, &c. Thomas Brook, tenens quendam ciphum cervisiæ impletum, &c. dixit, 'God save the king! 'here is good ale.' Ad quod prædictus Robertus dixit proditoriè, &c. desiderans mortem regis, &c. 'God save the cup of good ale! for 'king Henry shall be hanged when twenty 'others shall be saved.' Cui prædictus Thomas dixit, 'Knowest thou what thou sayest?' Prædictus Robertus iterum dixit ut supra, 'God, &c.'

The Case of Lionel Haughton, (Leicester). Anno tricesimo tertio Henrici octavi.

Lionellus Haughton, nuper de Ormeskirk, in comitat. Lancastriæ, taylor, pro verbis, viz. being shooting at the butts, said, 'I would the 'king's body had been there as the arrow did 'light;' and, 'By the mass I would it had 'been in his body.'—Per indictament. Mich. 33 H. 8.

The Case of Edward Peacham.

Edward Peacham was indicted of treason for divers treasonable passages in a sermon which was never preached, or intended to be preached, but only set down in writings, and found in his study: He was tried and found guilty, but not executed.—Note, That many of the judges were of opinion, that it was not treason. [See vol. 2. p. 870.]

Challercomb's Case.

Henry Challercomb was also indicted of treason for words, and was found guilty, and executed.

The Case of John Williams.

John Williams was also indicted, found guilty, and executed, for writing a treasonable book, called Balaam's Ass. [See v. 2. p. 1086.]

Upon consideration of all which precedents, and of the statutes of treason, it was resolved by all the Judges before-named, and so certified to his majesty, that the speaking of the words before-mentioned, though they were as wicked as might be, were not treason.

For they resolved, that unless it were by some particular statute, no words will be treason; for there is no treason at this day but by the statute 25 Edw. 3, c. 2, for imagining the death of the king, &c. and the indictment must be framed upon one of the points in that statute: and the words spoken here can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them.

To charge the king with a personal vice, as to say of him, 'That he is the greatest whore-'monger or drunkard in the kingdom,' is no treason; as Yelverton said it was held by the Judges, upon debate of Peacham's Case.

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133. Proceedings against John Felton,* for the Murder of the Duke of Buckingham: 4 Charles I. A. D. 1628. [Rushw. Coll. 635. Whitel. Mem. 11. May's Hist. of the Parl. 10. 1 Clar. Hist. of the Rebellion, (Oxford ed. of 1707) 28, 42. 3 Kennet, 45. 4 Carte's Hist. 195.]

THE town of Rochel was at this time straitly beleaguered by the French king, and the king of England had prepared a fleet to relieve it, under the command of the duke of Buckingham,

* "This Felton," says May, "was a soldier of a low stature, and no promising aspect; of disposition serious, and melancholy, but religious in the whole course of his life and conversation; which last I do not mention out of purpose to countenance his unlawful act, as supposing him to

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who being advanced as far as Portsmouth, on Saturday August 23, 1628, being Bartholomew Eve, was suddenly slain * in his own lodgings there, by one lieutenant Felton, about nine in the morning, who with one blow, having got a knife for the purpose, struck the duke under the left rib, and up into the heart, leaving the knife in his body, and got away undiscovered. In the fall to the ground, the duke was heard to say, 'The villain hath killed me.' Company coming presently in, found him weltering in his blood; and each person looking upon another, marvelled who should do so horrid an act: a jealousy was presently had of Monsieur Sobiez, who was then there labouring for speedy relief to be sent to Rochel; but he protesting his innocency, Felton immediately stept out, and said, 'I am the man that have done the deed, 'let no man suffer that is innocent.' Whereupon he was immediately apprehended, sent to London, and there imprisoned. The king was within four miles of Portsmouth, when the news was brought him of the death of the duke: he bid secure the murderer: and bishop Laud had advertisement of his death the 24th of Aug. being then at Croydon, with bishop Neal and other bishops, consecrating bishop Montague for Chichester.

Whilst Felton remained a prisoner at London, great was the resort of people to see the man who had committed so bold a murder, others came to understand what were the motives and inducements thereunto; to which the man for the most part answered, that he did acknowledge the fact, and condemned himself for the doing thereof. Yet withal, confessed he had long looked upon the duke as an evil instrument in the common-wealth, and that he was convinced thereof by the remonstrance of parliament. Which considerations, together with the instigation of the evil one (who is always ready to put sinful motions into speedy actions) induced him to do that which he did; He was a person of a little stature, of a stout and revengeful spirit, who having once received an injury from a gentleman, he cut off a piece of his little finger, and sent it with a challenge to the gentleman to fight with him, thereby to

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have had (as some did then talk) any inspiration or calling of God to it: His confessions to his friends, both public and private, were, That he had often secret motions to that purpose, which he had resisted and prayed against, and had almost overcome, until he was at last confirmed in it, by reading the late dissolved parliament's Remonstrance against the duke: That then his conscience told him it was just and laudable, to be the executioner of that man, whom the highest court of judicature, the representative body of the kingdom, had condemned as a traitor. But, let posterity censure it as they please; certain it is, that Felton did much repent him of the unlawfulness of the fact, out of no fear of death, or punishment here, for he wished his hand cut off before the execution, which his judges could not doom by the laws of England."

* James Howell, in a letter to the countess of Sunderland, dated Aug. 5th 1628, gives the following Account of this transaction:

"Upon Saturday last, which was but next before yesterday, being Bartholomew eve, the duke did rise up in a well-disposed humour out of his bed, and cut a caper or two, and being ready, and having been under the barber's hand, (where the murderer had thought to have done the deed, for he was leaning upon the window all the while) he went to breakfast, attended by a great company of commanders, where Mons. Soubize came to him, and whispered him in the ear that Rochel was relieved: the duke seemed to slight the news, which made some think that Soubize went away discontented. After breakfast, the duke going out, col. Fryer stept before him, and stopping him upon some business, and lieut. Felton being behind, made a thrust with a common tenpenny knife over Fryer's arm at the duke, which lighted so fatally, that he slit his heart in two, leaving the knife sticking in the body. The duke took out the knife, and threw it away; and laying his hand on his sword, and drawing it half out, said, 'The villain hath killed me,' (meaning, as some think, col. Fryer) for there had been some difference betwixt them; so reeling against a chimney he fell down dead. The dutchess being with child, hearing the noise below, came in her night-geers from her bed-chamber, which was in an upper room, to a kind of rail, and thence beheld him weltering in his own blood. Felton had lost his hat in the crowd, wherein there was a paper sowed, wherein he declared, that the reason which moved him to this act, was no grudge of his own, though he had been far behind for his pay, and had been put by his captain's place twice, but in regard he thought the duke an enemy to the State, because he was branded in parliament; therefore what he did was for the public good of his country. Yet he got clearly down, and so might have gone to his horse, which was tyed to a hedge hard by; but he was so amazed that he missed his way, and so struck into the pastry, where, although the cry went that some Frenchman had done it, he thinking the word was Felton, boldly confessed, it was he that had done the deed, and so he was in their hands. Jack Stamford would have run at him, but he was kept off by Mr. Nicholas; so being carried up to a tower, captain Mince tore off his spurs, and asking how he durst attempt such an act, making him believe the duke was not dead, he answered boldly, that he knew he was dispatched, for it was not he, but the hand of Heaven that gave the stroke; and though his whole body had been covered over with armour of proof, he could not have avoided it.' Captain Charles Price went post presently to the king four miles off, who being at prayers on his knees when it was told him, yet never stirred, nor was he disturbed a whit till all divine service was done."

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let him know that he valued not the exposing his whole body to hazard, so he might but have an opportunity to be revenged.

Afterwards Felton was called before the council, where he confessed much of what is before mentioned concerning his inducement to the murder: the council much pressed him to confess who set him on work to do such a bloody act, and if the Puritans had no hand therein; he denied they had, and so he did to the last, that no person whatsoever knew any thing of his intentions or purpose to kill the duke, that he revealed it to none living. Dr. Laud, bishop of London, being then at the council-table, told him if he would not confess, he must go to the rack, Felton replied, if it must be so he could not tell whom he might nominate in the extremity of torture, and if what he should say then must go for truth, he could not tell whether his lordship (meaning the bishop of London) or which of their lordships he might name, for torture might draw unexpected things from him: after this he was asked no more questions, but sent back to prison. The council then fell into debate, whether by the law of the land they could justify the putting him to the rack: The king being at council said, before any such thing should be done, let the advice of the judges be had therein, whether it be legal or no, and afterwards his majesty the 13th of November, 4 Car. propounded the question to sir Tho. Richardson, lord chief justice of the common pleas, to be propounded to all the justices, (viz.) Felton now a prisoner in the Tower having confessed that he had killed the duke of Buckingham, and said he was induced to this, partly for private displeasure, and partly by reason of remonstrance in parliament, having also read some books, which, he said, defended that it was lawful to kill an enemy to the republic, the question therefore is, whether by the law he might not be racked, and whether there were any law against it, (for said the king) if it might be done by law, he would not use his prerogative in this point, and having put this question to the lord chief justice, the king commanded him to demand the resolutions of all the judges.

First the Justices of Serjeants Inn in Chancery-lane did meet and agree, that the king may not in this case put the party to the rack. And the 14th of November all the justices being assembled at Serjeants Inn in Fleet-street, agreed in one, that he ought not by the law to be tortured by the rack, for no such punishment is known or allowed by our law *.

And this in case of treason was brought into this kingdom in the time of Henry the 6th; note Fortescue for this point, in his book 'de 'laudibus legum Angliæ,' see the preamble of the act 28 H. 8. for the trial of felony, where treasons are done upon the sea, and statute 14 Ed. 3, ca. of jailors or keepers, who by duress make the prisoners to be approvers.

On Thursday the 27th of November, Felton was removed from the Tower to the Gate-house, in order to his trial, and was the same day brought by the sheriffs of London to the King's-bench bar, and the indictment being read, he was demanded whether he were guilty of the murder therein mentioned: He answered, he was guilty in killing the duke of Buckingham, and further said, that he did deserve death for the same, though he did not do it out of malice to him. So the court passed sentence of death upon him; whereupon he offered that hand to be cut off that did the fact; but the court could not, upon his own offer, inflict that further punishment upon him: Nevertheless the king sent to the judges to intimate his desire, that his hand might be cut off before execution. But the court answered, that it could not be; for in all murders, the judgment was the same, unless when the statute of 25 E. 3, did alter the nature of the offence, and upon a several indictment, as it was in queen Elizabeth's time, when a felon at the bar flung a stone at a judge upon the bench, for which he was indicted, and his sentence was to have his hand cut off; which was accordingly done. And they also proceeded against him upon the other indictment for felony, for which he was found guilty, and afterwards hanged. And Felton was afterwards hung up in chains, in manner as is usual upon notorious murders *.

* See the Note to the countess of Shrewsbury's Case, vol. 2. p. 774. and the Articles there cited.

* "All the historians abound with testimonies of the king's fondness for Buckingham. It appears that to shew his affection to the duke's memory, he gave command for a magnificent funeral, till the thrifty treasurer diverted the project by telling his majesty, 'Such pomp 'would but prove but an hour's show: and it 'would be more for his glory to erect him a 'stately monument that might be done for half 'the cost.' Upon which his body was privately interred, on September 25. And when the king afterwards talked of a costly monument, the treasurer is said to have used this other evasion: 'Sir, I am loth to tell your majesty what 'the world will say both here and abroad, if 'you should raise a monument for the duke 'before you erect one for your father.'" See 3 Kennet, 45.

Lord Clarendon relates the strange story of Buckingham's father appearing three times to an Officer of the King's Wardrobe, and directing him to tell the Duke, that if he did not conciliate the people, he would be suffered to live but a short time. 1 Clar. Hist. of the Rebellion, 42.

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134. Proceedings against Mr. RICHARD CHAMBERS, in the Star-Chamber, for seditious Speeches before the Privy-Council: 5 CHARLES I. 1629.* [1 Rushw. Collections, 670.]

IN the year 1629, sir *Robert Heath*, the king's Attorney-General, preferred an Information in the Star-Chamber against Richard Chambers of the city of London, merchant. Wherein, first, he did set forth the gracious government of the king, and the great privileges which the merchants have in their trading, by paying moderate Duties for the goods and merchandizes exported and imported; and setting forth, that the raising and publishing of undutiful and false speeches, which may tend to the dishonour of the king or the state, or to the discouragement or discontentment of the subject, or to set discord or variance between his majesty and his good people, are offences of dangerous consequence, and by the law prohibited, and condemned under several penalties and punishments. That nevertheless the said Richard Chambers, the 28th day of September last, being, amongst other merchants, called to the Council-board at Hampton-Court, about some things which were complained of in reference to the Customs, did then and there, in an insolent manner, in the presence or hearing of the lords and other of his majesty's privy-council, then sitting in council, utter these undutiful, seditious, and false words, 'that the merchants 'are in no part of the world so screwed and 'wrung as in England; that in Turkey they 'have more encouragement.' By which words, he the said Richard Chambers, as the Information setteth forth, did endeavour to alienate the good affection of his majesty's subjects from his majesty, and to bring a slander upon his just government: and therefore the king's Attorney prayed process against him.

To this Mr. *Chambers* made answer, That having a case of silk grogerams brought from Bristol by a carrier to London, of the value of 400*l.* the same were, by some inferior officers, attending on the Custom-House, seized without this defendant's consent, notwithstanding he offered to give security to pay such customs as should be due by law; and that he hath been otherwise grieved and damnified, by the injurious dealing of the under-officers of the Custom-House; and mentioned the particulars wherein: and that being called before the lords of the Council, he confesseth, that out of the great sense which he had of the injuries done him by the said inferior officers, he did utter these words, 'that the merchants in England 'were more wrung and screwed than in foreign 'parts.' Which words were only spoken in the presence of the privy-council, and not spoken abroad, to stir up any discord among the people; and not spoken with any disloyal thought at that time of his majesty's government, but only intending by these words to introduce his just complaint against the wrongs and injuries he had sustained by the inferior officers; and that as soon as he had heard a hard construction was given of his words, he endeavoured by petition to the lords of the council, humbly to explain his meaning, that he had not the least evil thought as to his majesty's government; yet was not permitted to be heard, but presently sent away prisoner to the Marshalsea: and when he was there a prisoner, he did again endeavour by petition to give satisfaction to the lords of the council; but they would not be pleased to accept of his faithful explanation, which he now makes unto this honourable court upon his oath; and doth profess from the bottom of his heart, 'that his speeches only aimed 'at the abuses of the inferior officers, who in 'many things dealt most cruelly with him and 'other merchants.'

There were two of the clerks of the Privy-Council examined as witnesses to prove the words, notwithstanding the defendant confessed the words in his Answer as aforesaid, who proved the words as laid in the information. And on the 6th of May, 1629, the cause came to be heard in the Star-Chamber, and the court were of opinion, that the words spoken were a comparing of his majesty's government with the government of the Turks; intending thereby to make the people believe, that his majesty's happy government may be termed 'Turkish ty-'ranny;' and therefore the Court fined the said Mr. Chambers in the sum of 2,000*l.* to his majesty's use, and to stand committed to the prison of the Fleet, and to make submission for his great offence, both at the council-board, in court of Star-Chamber, and at the Royal Exchange.

There was a great difference of opinion in the Court about the Fine: and because it is a remarkable case, here followeth the names of each several person who gave sentence, and the fine they concluded upon, viz.

Sir *Francis Cottington*, chancellor of the Exchequer, his opinion was for 500*l.* fine to the king, and to acknowledge his offence at the council-board, the Star-Chamber Bar, and the Exchange.

Sir *Thomas Richardson*, lord chief justice of the Common Pleas, 500*l.* fine to the king, and to desire the king's favour.

Sir *Nicholas Hyde*, lord chief justice of the King's-Bench, 500*l.* and to desire the king's favour.

* Laud was accused of having aggravated the matter against Chambers, and of having said to the king, "If your majesty had many such Chambers, you would soon have no Chamber left to rest in." Hist. of the Trial and Troubles of Abp. Laud.

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Sir *John Cook*, secretary of state, 1,000*l.*
Sir *Humphrey May*, chancellor, 1,500*l.*
Sir *Thomas Edmonds*, 2,000*l.*
Sir *Edward Barret*, 2,000*l.*
Dr. *Neal*, bishop of Winchester, 3,000*l.*
Dr. *Laud*, bishop of London, 3,000*l.*
L. *Carlton*, principal secretary of state, 3,000*l.*
Lord ——, chancellor of Scotland, 3,000*l.*
Earl of *Holland*, 1,500*l.*
Earl of *Doncaster*, 1,500*l.*
Earl of *Salisbury*, 1,500*l.*
Earl of *Dorset*, 3,000*l.*
Earl of *Suffolk*, 3,000*l.*
E. of *Mountgomery*, lord chamberlain, 1,500*l.*
Earl of *Arundel*, lord high marshal, 3,000*l.*
Lord *Montague*, lord privy seal, 3,000*l.*
Lord *Conway*, 2,000*l.*
Lord *Weston*, lord treasurer, 3,000*l.*
L. *Coventry*, lord k. of the great seal, 1,500*l.*

So the fine was settled to 2,000*l.*—And all (except the two chief justices) concurred for a Submission also to be made. And accordingly the copy of the Submission was sent to the Warden of the Fleet, from Mr. Attorney-General, to shew the said Richard Chambers, to perform and acknowledge it; and was as followeth:

"I Richard Chambers, of London, merchant, do humbly acknowledge, that whereas upon an information exhibited against me by the king's attorney-general, I was in Easter term last sentenced by the honourable court of Star-Chamber, for that in September last, 1628, being convented before the lords and others of his majesty's most honourable privy-council-board, upon some speeches then used concerning the merchants of this kingdom, and his majesty's well and gracious usage of them; did then, and there, in insolent, contemptuous, and seditious manner, falsly and maliciously say and affirm, 'that they,' meaning the merchants, 'are in no parts of the world so screwed and 'wrung as in England; and that in Turkey 'they have more encouragement.' And whereas by the sentence of that honourable court, I was adjudged, among other punishments justly imposed upon me, to make my humble acknowledgment and submission of this great offence at this honourable board, before I should be delivered out of the prison of the Fleet, whereto I was then committed, as by the said decree and sentence of that court, among other things, it doth and may appear: now I the said R. Chambers, in obedience to the sentence of the said honourable court, do humbly confess and acknowledge the speaking of these words aforesaid, for the which I was so charged, and am heartily sorry for the same; and do humbly beseech your lordships all to be honourable intercessors for me to his majesty, that he would be graciously pleased to pardon this great error and fault so committed by me."

When Mr. Chambers read this draught of Submission, he thus subscribed the same:

'All the abovesaid contents and Submission, 'I Richard Chambers do utterly abhor 'and detest, as most unjust and false; 'and never till death will acknowledge 'any part thereof. RICH. CHAMBERS.'

Also he under-writ these texts of Scripture to the said Submission, before he returned it.

'That make a man an offender for a word, 'and lay a snare for him that reproveth in the 'gate, and turn aside the just for a thing of 'nought.

'Blame not before thou hast examined the 'truth; understand first, and then rebuke: 'answer not before thou hast heard the cause, 'neither interrupt men in the midst of their 'talk.

'Doth our law judge any man before it hear 'him, and know what he doeth?

'King Agrippa said unto Paul, Thou art permitted to speak for thyself.

'Thou shalt not wrest the judgment of the 'poor in his cause, thou shalt not respect persons, neither take a gift: for a gift doth blind 'the eyes of the wise, and perrert the eyes of 'the righteous.

'Woe to them that devise iniquity, because 'it is in the power of their hand, and they covet 'fields, and take them by violence; and 'houses, and take them away: so they oppress 'a man and his house, even a man and his heritage.

'Thus saith the Lord God, let it suffice you, 'O princes of Israel: remove violence and 'spoil, and execute judgment and justice, take 'away your exactions from my people, saith 'the Lord God.

'If thou seest the oppression of the poor, 'and violent perverting of judgment and justice 'in a province, marvel not at the matter: for 'he that is higher than the highest regardeth, 'and there be higher than they. Per me,

RICHARD CHAMBERS.'

Afterwards in the term of Trinity, the 5th year of king Charles, it is found in the great Roll of this year, that there is demanded there, of Richard Chambers of London, merchant, 2,000*l.* for a certain Fine, imposed on him, hither sent by virtue of a writ of our said lord the king, under the foot of the great seal of England, directed to the treasurer and barons of this Exchequer, for making execution thereof to the use of the said lord the king, as is there contained; and now, that is to say, in the octab of the blessed Trinity, this term, comes the said Richard Chambers in his own proper person, and demands *oyer* of the demand aforesaid, and it is read unto him; and he demands *oyer* also of the writ aforesaid, under the foot of the great seal of England, hither sent, and is read unto him in these words:

"Charles by the grace of God, of England, Scotland, France and Ireland, king, defender of the faith, &c. to his treasurer and barons of his Exchequer, health. The extrete of certain fines taxed and adjudged by us and our council, in our said council, in our court of Star-Chamber, in the term of St. Michael, the term of St.

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Hilary, and the term of Easter last past, upon Thomas Barns, of the parish of St. Clement Danes in the county of Middlesex, carpenter, and others, severally and dividedly, as they be there severally assessed; we send unto you included in these presents, commanding, that looking into them, you do that which by law you ought to do against them, for the levying of those fines. Witness ourself at Westminster, the 21st of May, in the year of our reign the 5th."

And the tenor of the Schedule to the said Writ annexed, as to the said Richard Chambers, followeth in these words:

"In the term of Easter, the fifth year of king Charles, of Richard Chambers of London, merchant, 2,000*l.* which being read, heard, and by him understood, he complains, that he is grievously vexed and inquieted by colour of the premises; and that not justly, for that protesting, that the great roll, and the matter therein contained, is not in law sufficient, to which he hath no need, nor is bound by law to answer. Yet for plea the said Richard Chambers saith, that he, of the demand aforesaid, in the great roll aforesaid mentioned, and every parcel thereof, ought to be discharged against the said lord the king, for that he said, that he from the time of the taxation of the aforesaid fine, and long before, was a freeman and a merchant of this kingdom; that is to say, in the parish of the blessed Mary of the Arches, in the ward of Cheap, London: and that by a certain act in the parliament of the lord Henry, late king of England, the third, held in the ninth year of his reign, it was provided by authority of the said parliament, that a freeman shall not be amerced for a little offence, but according to the manner of the said offence; and for a great offence, according to the greatness of the offence, saving to him his contenement or freehold; and a merchant in the same manner, saving unto him his merchandize; and a villain of any other than the king after the same manner to be amerced, saving his wainage; and none of the said amerciaments to be imposed but by the oaths of good and lawful men of the neighbourhood: and by a certain other act in the parliament of the lord Edward, late king of England, the first, held in the third year of his reign, it was and is provided, that no city, borough, or town, nor any man, shall be amerced, without reasonable cause, and according to his trespass; that is to say, a freeman, saving to him his contenement; a merchant, saving to him his merchandize; and a villain, saving to him his wainage: and this by their peers: and by the same act in the parliament of the said lord Henry, late king of England, the third, held in the 9th year of his reign aforesaid, it was and is provided by the authority of the said parliament, that no freeman should be taken or imprisoned, or disseized of his freehold, or liberties, or free-customs, or out-lawed, or banished, or any way destroyed: and that the lord the king should not go upon him, nor deal with him, but by a lawful judgment of his peers, or by the law of the land: and by a certain act in parliament of the lord Edward, late king of England, the third, held in the fifth year of his reign, it was and is provided by the authority of the said parliament, that no man henceforward should be attached by reason of any accusation, nor prejudged of life or member, nor that his lands, tenements, goods or chattels should be seized into the hands of the lord the king against the form of the Great Charter, and the law of the land: and by a certain act in the parliament of the lord Henry, late king of England, the seventh, held in the third year of his reign, reciting, that by unlawful maintenances given of liveries, signs, and tokens, and retainders by indentures, promises, oaths, writings, and other imbraceries of the subjects of the said lord the king, false demeanors of sheriffs, in making of pannels, and other false returns, by taking of money by jurors, by great riots and unlawful assemblies, the policy and good government of this kingdom was almost subdued; and by not punishing of the said inconveniencies, and by occasion of the premisses, little or nothing was found by inquisition; by reason thereof, the laws of the land had little effect in their execution, to the increase of murders, robberies, perjuries, and insecurities of all men living, to the loss of their lands, and goods, to the great displeasure of Almighty God; it was ordained for reformation of the premisses, by authority of the said parliament, that the chancellor and treasurer of England for the time being, and the keeper of the privy-seal of the lord the king, or two of them, calling to them one bishop, one lord temporal of the most honourable council of the lord the king, and the two chief justices of the King's-bench and Common Pleas for the time being, or two other justices in their absence, by bill or information exhibited to the chancellor for the king, or any other, against any person, for any other ill behaviours aforesaid, have authority of calling before them, by writ of privy-seal, such malefactors, and of examining them and others by their discretion, and of punishing such as they find defective therein, according to their demerits, according to the form and effect of the statutes thereof made, in the same manner and form as they might and ought to be punished, if they were thereof convinced according to the due course of law: and by a certain other act in the parliament of the lord Henry, late king of England, the eighth, held in the 21st year of his reign, reciting the offences in the foresaid statute of the said late king Henry the seventh, before-mentioned, by authority of the said parliament, it was and is ordained and enacted, that henceforward the chancellor, treasurer of England, and the president of the most honourable privy-council of the king, attending his most honourable person for the time being, and the lord keeper of the privy-seal of the lord the king, or two of them, calling to them one bishop, and one temporal

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lord, of the most honourable council of the lord the king, and two chief justices of the king's-bench, and Common Pleas for the time being, or two justices in their absence, by any bill or information then after to be exhibited to the chancellor of England, the treasurer, the president of the most honourable council of the lord the king, or the keeper of the privy-seal of the lord the king for the time being, for any misdemeanor in the aforesaid statute of king Henry the seventh aforesaid before recited, from henceforth have full power and authority of calling before them, by writ or by privy-seal, such malefactors, and of examining of them and others by their discretion, and of punishing those that are found defective according to their demerits, according to the form and effect of the said statute of the aforesaid lord king Henry the seventh, and of all other statutes thereupon made not revoked and expired, in the same manner and form as they might and ought to be punished, if they were convicted according to the due order of the laws of the said lord the king. And by the aforesaid writ, under the foot of the great seal, it manifestly appears, that the said fine was imposed by the lord the king and his council, and not by the legal peers of the said Richard Chambers, nor by the law of the land, nor according to the manner of the pretended offence of the said Richard Chambers, nor saving unto him his merchandize, nor for any offence mentioned in the said statutes. All and singular the which, the said Richard Chambers is ready to verify to the court, &c. and demands judgment; and that he be discharged of the said 2,000*l.* against the said lord, the now king; and that as to the premisses he may be dismissed from this court.

WATERHOUSE."

With this Plea, he annexed a Petition to the lord chief baron, and also to every one of the barons, humbly desiring the filing of the plea, with other reasons in the manner of a motion at the bar, because he said, counsel would not move, plead, nor set hand to it, as further appeareth.

The copy of the Order upon Mr. Attorney's motion in the Exchequer, the 17th of July, 1629, after the Plea put in, and order to file it. Per the lord chief baron.

"Touching the Plea put into this court by Richard Chambers, to discharge himself of a fine of 2,000*l.* set on him in the Star-Chamber, forasmuch as sir Robert Heath, knight, his majesty's attorney-general, informed this court, that the said Chambers in his said plea recites divers statutes, and Magna Charta, and what offences are punishable in the Star-Chamber, and how the proceedings ought to be; and upon the whole matter concludes, that the said fine was imposed by the king and his council, and not by a legal judgment of his peers, nor by the laws of the land, nor according to the manner of his offence, nor saving his merchandize, nor for any offence mentioned in the said statutes; which plea, Mr. Attorney conceiving it to be very frivolous and insufficient, and derogatory to the honour and jurisdiction of the court of Star-Chamber, humbly prayeth might not be allowed of, nor filed: it is therefore this day ordered, that the said plea shall be read on Saturday next; and then upon hearing the king's counsel, and the counsel of the said Richard Chambers, this court will declare their further order therein; and in the mean time the said plea is not to be filed nor delivered out."

In Michaelmas term following, Mr. Chambers was brought by a Habeas Corpus out of the Fleet; and the warden did return,

"That he was committed to the Fleet by virtue of a decree in the Star-Chamber, by reason of certain words he used at the council-table, viz. that the merchants of England were screwed up here in England more than in Turkey. And for these and other words of defamation of the government, he was censured to be committed to the Fleet, and to be there imprisoned until he had made his submission at the council-table, and to pay a fine of 2,000*l.* And now at the bar he prayeth to be delivered, because this sentence is not warranted by any law or statute: for the statute of 3 H. 7, which is the foundation of the court of Star-Chamber, doth not give them any authority to punish for words only. But all the court informed him, that the court of Star-Chamber was not erected by the statute of 3 H. 7, but was a court many years before, and one of the most high and honourable courts of justice; and to deliver one who was committed by the decree of one of the courts of justice, was not the usage of this court; and therefore he was remanded."

As a concurrent proof of these proceedings concerning Mr. Chambers, we shall insert here a Petition of his (though out of time) to the Long Parliament.

To the Parliament of the Commonwealth of England, Scotland, and Ireland.

The brief Remonstrance and humble Petition of Richard Chambers, merchant, late alderderman and sheriff of the city of London:

"Shewing; That in the parliament held in the years 1627 and 1628, it was voted and declared by the honourable house of commons, that whosoever shall counsel or advise the taking or levying of the subsidy of Tunnage and Poundage, not granted by parliament, or shall be any actor or instrument therein, shall be reputed an innovator in the government, and a capital enemy to the kingdom and commonwealth; and if any merchant or person whatsoever shall voluntarily yield or pay the said subsidy of Tunnage and Poundage, not being granted by parliament, they shall likewise be reputed betrayers of the liberties of England, and enemies to the same, as may appear by the said Order upon record.

"In submission and obedience whereunto, the petitioner first opposed and withstood the payment of Tunnage and Poundage, until they

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were settled by parliament, and all other illegal taxes; for which submission and obedience, in the years 1628 and 1629, the petitioner had 7,060*l.* of his goods wrongfully taken and detained from him by the late king's officers and farmers of the Custom-house of London, for pretended duties, and a heavy sentence and fine in the Star-Chamber, which was imposed upon him in the year 1629. Besides which losses, the petitioner further suffered in his person by six whole years imprisonment in the Fleet, for not submitting to that sentence and fine; and in the year 1637, nine months imprisonment in Newgate for withstanding Ship-money; by which losses and imprisonments, the petitioner was put by the exercise of his calling, and was wounded in his credit and reputation.

"Which sufferings the honourable house of commons (upon the petitioner's complaint in the year 1640,) taking into their grave considerations, were pleased to refer the examination thereof to a committee of fifty members, wherein were included the committee for the navy and customs; who being well satisfied of the truth thereof, by oath, and other good sufficient proofs upon record, drew up their report, that the petitioner ought then to have 13,680*l.* in part of reparation, leaving the rest of those reparations to the further judgment of the honourable house, as by the annexed copy of that report may further appear.

"In pursuit of which report, the parliament then levied and received from the old farmers and officers of the customs 50,000*l.* for wrongs and abuses done to the petitioner, chiefly, and other merchants, intending first to give to the petitioner satisfaction out of the same, because he was the first man that opposed the pretended duties, and the greatest sufferer.

"Whereupon in the year 1642, the petitioner was chosen alderman, and in the year 1644 sheriff of the city of London: which places the petitioner earnestly endeavoured to shun; but such were the earnest importunities, and persuasive encouragements of divers members of the honourable house, (who then desired to have the petitioner in place of trust, for his former service to the commonwealth) that the petitioner was constrained to accept not only of the place of alderman, but further underwent the office and charge of sheriff of London, which stood the petitioner in 4,000*l.* that year.

"But notwithstanding the aforesaid promises and intents of the parliament to give the petitioner satisfaction, such were the great compulsive exigents, and urgent necessities of those times, caused by the public distractions, that the said monies were converted to the public use. Therefore the parliament desired the petitioner to have a little patience, promising him speedy satisfaction as well for the forbearance as for the principal debt. But the distractions continuing, the petitioner had neither interest nor any part of his principal. The parliament in the year 1648, in part of satisfaction, settled the petitioner in the office of surveyor and check in the Custom House of London, then worth at least 600*l.* per annum; but the petitioner having enjoyed that place only eight months, was causelessly ousted by sinister information of intruders, who have enjoyed that office and divided the profit thereof between them ever since that intrusion.

"Moreover, the late king, by privy seal, owes to the petitioner's wife (who is the relict of Mr. Thomas Ferrer) for linen cloth 5,000*l.* and for money lent 1,200*l.* for which she was assigned satisfaction out of the customs of tobacco. Besides, she was further assigned out of sir Thomas Dawes' office 100 marks per annum. All which debts likewise lie wholly unsatisfied, to the petitioner's great prejudice.

"Besides the aforesaid losses, hinderances, expences, sufferings, and forbearances of the profit of the said office, the petitioner from time to time hath laid out himself for the common good, in acting, lending, spending, (and serving) when others refused; exposed himself to that imminent danger at Brentford, by leading out a troop of horse for the privileges, liberties, and rights of the city of London and commonwealth, insomuch, that thereby, and for want of his satisfaction aforesaid, the petitioner, having consumed his estate, hath been constrained to sell and mortgage some part of his lands to pay creditors, and to maintain his family, having a wife and nine children; and is likely to be undone for obeying the parliament's commands, unless by the justice and commiseration of this honourable assembly he be speedily relieved and righted; for that ever since the said reported sum, the petitioner from time to time hath made his humble addresses to the supreme powers for the time being, for satisfaction thereof, and to be restored to the said office, but could not prevail.

"The petitioner therefore humbly prays, that he may not perish for acting for the public good according to the declaration of parliament; but that now after 26 years suffering, whereof 12 years in fruitless and wearisome waitings, this honourable assembly would now be pleased to take the unparalleled sufferings of the petitioner into their grave considerations, for some speedy course for the petitioner's satisfaction, to pay his debts, and redeem his lands, by ordering him the one moiety of his debt in ready money out of the daily customs of London, (from whence his first losses and sufferings sprang) and the other moiety to be discompted upon such goods as the petitioner shall make entries of by exportation or importation in the Custom House, London, until his debt with the interest be fully satisfied and paid; or any other speedy way, as in your grave wisdoms shall seem meet: and in like manner for his wife's debt, which is to pay debts and legacies: and that the petitioner may forthwith be restored to, and settled in the said office, and have reparations from the intruders. And the petitioner, with his, shall in all duty ever pray, &c. RICHARD CHAMBERS."

Sept. 6, 1654.

The petitioner being wearied out with 12

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year's attendance upon one parliament, in hopes of reparation for his imprisonment, troubles, and losses, during the 11 years former interval of parliament, in standing for the liberty of the subject, grew infirm; and being not relieved, was reduced to a low estate and condition. He died in summer 1658, being about the age of 70 years.

135. Proceedings in the Star-Chamber against Dr. ALEXANDER LEIGHTON, for a Libel: 6 CHARLES I. A. D. 1630.

[" The following report of this Case is extracted from 2 Rushworth, 55. Mrs. Macaulay, in her history, comments on the proceedings against Dr. Leighton with great severity. 2 Macaul. Hist. 91. Indeed, the cruelty of the Sentence is beyond excuse." Hargrave.]

AN Information formerly exhibited in the Star-Chamber against Alexander Leighton, a Scotsman born, and a doctor of divinity, came to be heard the 4th of June in the court of Star-Chamber, for framing a book entitled, 'An 'Appeal to the Parliament, or a Plea against 'Prelacy,' which he printed and published, during the sitting of the last parliament: and delivered it to diverse persons in a way of presenting just complaints (as he gave out) to the then commons house of parliament, 4 Car. 1.

The defendant was charged by the said Information with framing, publishing, and dispersing a scandalous book against King, Peers, and Prelates, wherein amongst other things he sets forth these false and seditious assertions and positions following:

1. "That we do not read of greater persecution and higher indignity done upon God's 'people in any nation professing the gospel, 'than in this our island, especially since the 'death of queen Elizabeth.

2. "He terms the Prelates of this realm ''men of blood,' and enemies to God and the 'state, and saith, that the maintaining and 'establishing of bishops within this realm is a 'main and master-sin established by law, and 'that ministers should have no voices in council deliberative and decisive.

3. "He avowed the prelacy of our Church 'to be 'antichristian and satanical;' and terms 'the bishops, 'ravens and magpies,' that prey 'upon the state.

4. "He terms the canons of our church, 'made anno 1603, 'nonsense canons.'

5. "He disallowed and contemned the ceremony of kneeling in the receiving of the sacrament, alleging that the suggestion of false 'fears to the king by the prelacy, and the seeking of their own unlawful standing, brought 'forth that received spawn of the beast, kneeling at the receiving of the sacrament.

6. "He affirms that the prelates did corrupt 'the king, forestalling his judgment against 'God and goodness; and most audaciously and 'wickedly calleth his majesty's royal consort, 'our gracious queen, 'the daughter of Heth.'

7. "He most impiously seems to commend 'him that committed the barbarous and bloody 'act of murdering the late duke of Buckingham; and to encourage others to second him 'in the like wicked and desperate attempt, to 'the destruction of others.

8. "He layeth a most seditious scandal 'upon the king, state, and kingdom, wickedly 'affirming, 'that all that pass by us spoil us, and ''we spoil all that rely upon us;' and amongst 'other particulars, instanceth the black pining 'death of the famished Rochelers, to the number of 15,000 in four months: by which passages and wicked positions and assertions, he 'did, as much as in him lay, scandalize his majesty's sacred person, his religious, wise and 'just government, the person of his royal consort the queen, the persons of the lords and 'peers of this realm, especially the reverend 'bishops.

9. "That in another place of the said Book, 'endeavouring to slander not only his majesty's 'sacred person and government, but also to 'detract from his royal power, in making laws 'and canons for government ecclesiastical, and 'in matters concerning the church, he saith, 'that the church hath her laws from the scripture, and that no king may make laws in the 'house of God: for if they might, then the 'scripture might be imperfect.

10. "And further charged, that in another 'place of the said book, thinking to salve all 'with an expression of his sacred majesty, he 'hath these words following; 'what pity it is ''and indelible dishonour it will be to you the ''states representative, that so ingenuous and ''tractable a king should be so monstrously ''abused, to the undoing of himself and his ''subjects?'"

The defendant in his Answer confessed the writing of the Book, but with no such ill intention, as by the said information is suggested; his end therein being only to remonstrate certain Grievances in church and state, under which the people suffered, to the end the parliament might take them into consideration, and so give such redress, as might be for the honour of the king, the quiet of the people, and the peace of the church.

At the hearing of the cause (June 4), the defendant's Answer was read at large, and the aforesaid particulars charged in the Information as seditious and scandalous, were also read out of the Book. After which the court proceeded to give Sentence, and did there declare, that it evidently appeared upon proof, That the defendant had printed 5 or 600 of the said books, and that in their opinions he had committed a most odious and heinous offence, deserving the severest punishment the court could inflict, for

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framing and publishing a book so full of most pestilent, devilish and dangerous assertions, to the scandal of the king, queen and peers, especially the bishops.

The two Lord Chief Justices being present, delivered their opinions, that they would without any scruple have proceeded against the defendant as for treason committed by him, if it had come before them; and other lords expressly affirmed, that it was his majesty's exceeding great mercy and goodness, that he was brought to receive the censure of this court, and not questioned at another tribunal as a traitor.

And their lordships by an unanimous consent adjudged and decreed, That Dr. Leighton should be committed to the prison of the Fleet, there to remain during life, unless his majesty shall be graciously pleased to enlarge him; and he shall pay a fine of 10,000*l.* to his majesty's use.

And in respect the defendant hath heretofore entered into the ministry, and this court for the reverence of that calling, doth not use to inflict any corporal or ignominious punishment upon any person, so long as they continue in orders, the court doth refer him to the High-commission, there to be degraded of his ministry; and that being done, he shall then also for further punishment and example to others, be brought into the pillory at Westminster, (the court sitting) and there whipped, and after his whipping be set upon the pillory for some convenient space, and have one of his ears cut off, and his nose slit, and be branded in the face with a double S S, for a Sower of Sedition; and shall then be carried to the prison of the Fleet, and at some other convenient time afterwards shall be carried into the pillory at Cheapside, upon a market-day, and be there likewise whipt, and then be set upon the pillory, and have his other ear cut off, and from thence be carried back to the prison of the Fleet, there to remain during life, unless his majesty shall be graciously pleased to inlarge him.

This Sentence being given toward the end of Trinity-term, and the court not usually sitting after the term, unless upon emergent occasions, and it requiring some time in the Ecclesiastical court, in order to the degradation of the defendant, it was Michaelmas-term following before any part of the Sentence could be put in execution; but Nov. 4th he was accordingly degraded, and on Wednesday Nov. 10th (being a Star-Chamber day) he was to have undergone the execution of this sentence; but the evening before he escaped out of the Fleet, where he had been kept a close prisoner, and information hereof being given to the lords of the privy-council, they ordered this hue and cry to be printed to retake him.

A Hue and Cry against Dr. Leighton, by order of the Privy-Council.

'Whereas Alexander Leighton, a Scottish 'man born, who was lately sentenced by the 'honourable court of Star-Chamber, to pay a 'great fine to his majesty, and to undergo corporal punishment, for writing, printing, and 'publishing a very libellous and scandalous 'book against the king, and his government, 'hath this 11th day of November escaped out 'of the prison of the Fleet, where he was a 'prisoner: these are in his majesty's name to 'require and command all justices of peace, 'mayors, sheriffs, bailiffs, customers, searchers 'and officers of the ports, and all other his majesty's loving subjects, to use all diligence for 'the apprehending of the said Alexander Leighton; and being apprehended, safely to keep 'him in custody, until his majesty shall receive 'notice thereof, and shall give further direction 'concerning him. He is a man of low stature, 'fair complexion: he hath a yellowish beard, a 'high forehead, between forty and fifty years of 'age.'

This hue and cry followed him to Bedfordshire, where he was apprehended, and brought again a prisoner to the Fleet. Concerning whose escape, and executing of the Sentence upon him afterwards, the bishop of London in his Diary, on the 4th of November, makes this memorial, viz.

'Leighton was degraded at the High-Commission, Tuesday the 9th of November; 'that night Leighton broke out of the Fleet, 'the warden says he got or was helped over 'the wall, and moreover professed he knew 'not this till Wednesday noon, he told it not 'me till Thursday night. He was taken again 'in Bedfordshire, and brought back to the 'Fleet, within a fortnight. Friday November the 16th, part of his sentence was executed upon him in this manner, in the new 'palace at Westminster, in term time: 1. He 'was severely whipt before he was put in the 'pillory. 2. Being set in the pillory, he had 'one of his ears cut off. 3. One side of his 'nose slit. 4. Branded on one cheek with a 'red hot iron, with the letters S S, signifying a 'Stirrer up of Sedition, and afterwards carried 'back again prisoner to the Fleet, to be kept 'in close custody.

'And on that day seven-night, his sores upon 'his back, ear, nose, and face being not cured, 'he was whipt again at the pillory in Cheap-'side, and there had the remainder of his sentence executed upon him, by cutting off the 'other ear, slitting the other side of the nose, 'and branding the other cheek.'

The severe punishment of this unfortunate gentleman many people pitied, he being a person well known both for learning, and other abilities; only his untempered zeal (as his countrymen then gave out) prompted him to that mistake, for which the necessity of affairs at that time required this severity from the hand of the magistrate, more than perhaps the crime would do in a following juncture.

Afterwards those who procured his escape were taken and brought into the Star-Chamber, and proceeded against, viz. The defendants practising with one Leighton, a notable offender, to procure his escape out of the Fleet,

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Levingston put off his cloak, hat and breeches, being all of a grey colour, and Anderson his doublet, and Leighton put theirs on, and in that disguise they all went out of the Fleet unsuspected; but were afterwards taken again, and for these offences, and respect had of their penitency, they were only fined 500*l.* a-piece, and committed to the Fleet during the king's pleasure*.

* "In 1641 the house of commons came to several Resolutions in condemnation of the proceedings against Dr. Leighton. Particularly, they resolved, that the fine and corporal punishment and imprisonment by the sentence of the Star-Chamber were illegal, and that he ought to have satisfaction for his sufferings and damages. Journ. Comm. 21 April 1641." Hargrave.

136. Proceedings in the Star-Chamber against the Earl of BEDFORD, the Earl of CLARE, the Earl of SOMERSET, Sir ROBERT COTTON, JOHN SELDEN, esq. OLIVER ST. JOHN, esq. and others, for publishing a seditious and scandalous Writing: 26th May, 6 CHARLES I. A. D. 1630. [Rushw. Hist. Coll. Tanner's MSS. in the Bodleian Library.]

["The written piece, which gave occasion to these Proceedings, was a most unconstitutional Project* for advancing the king's Prerogative and Revenue. It appears to have been sent over from Italy by the famous sir Robert Dudley, son of queen Elizabeth's favourite the earl of Leicester; and sir Robert is supposed to have been the author; though if that was really so, it highly reflects on one, who on other accounts is transmitted to us with high encomiums for his mental endowments and accomplishments, as the reader will see by consulting sir William Dugdale. See 2 Dugd. Baron. 222. It is probable, that the prosecution was commenced, in order to exculpate both James and Charles the first, with their respective ministers, from the imputation of approving of the Project. It may seem surprizing to the reader, that such persons as Mr. Selden, and the other defendants named, except the earl of Somerset, should lie under a suspicion of countenancing Propositions so irreconcilable with their political professions and conduct at the time. But, as there can be no reason for supposing that they gave their approbation to such arbitrary proposals, perhaps they were included in the prosecution from a suspicion of having encouraged a belief, that the king secretly favoured the scheme and meditated to execute it. On consulting the Book intitled the "Annals of James and

* On this matter Kennet thus expresses himself, "On the same day [May 29, 1630; on which he just before mentions that the prince, afterwards king Charles 2. had been born] a great cause was brought to hearing in the Star-Chamber concerning a Discourse, intituled, 'A Proposition for his Majesty's Service to bridle 'the Impertinency of Parliaments,' which had given so much offence and jealousy about the time of the last dissolution, that the king ordered his Attorney-General to prefer an information against the earls of Bedford, Clare, and Somerset, sir Robert Cotton, Mr. Selden, Mr. St. John, and others, for spreading the said libel. The earl of Somerset by his counsel pleaded that this discourse was either the same that was shewed him in the time of his attendance upon his late majesty king James, or had the same things in it, and finding no cause of concealing such a former project, and imagining it to be of no scandal to the present government, he had casually imparted it to the earls of Bedford and Clare, who after perusal thereof, delivered this opinion of it at their next meeting, 'that it was a fantastic project 'of some brain-sick traveller, who had made col-'lections of some princes in Italy, and other fo-'reign states, no way suitable to the government 'of this kingdom.' And upon the depositions of sir David Fowlis, it appeared that the very original manuscript was penned by sir Robert Dudley, at Florence, and sent over hither in the time of king James, by one Mr. Tates, who sent it in a letter to the deponent, and he delivered it to the earl of Somerset, and the earl communicated it to the king.—While this cause was hearing in a great presence of the nobility and gentry, the king sent word to the Lord Keeper, "that in respect of the great joy upon the birth of his son, he should immediately order the proceedings to be stopped and the defendants to be discharged." Accordingly, the keeper acquainted the court with his majesty's special command, and upon which the said writing was ordered to be burned, as seditious, and scandalous, and the proceedings were taken off the file. And here, though the project was proved to have been a private essay in a former reign, and in a foreign country, and though the stopping of process hereupon was a generous act of favour, upon a proper season of public joy, yet those persons who had the art, and the ill-nature, to turn every thing as a disgrace and a disadvantage upon the court, knew how to insinuate as if the king and the ministry had really formed that scheme against the use of future parliaments, and therefore would not suffer it to be examined to the bottom."

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Charles the First," we observe that the author adopts a like construction, adding that the piece in question was written by sir Robert Dudley at Florence, in 1613. See p. 361.—We shall now lay before the reader, first the writing which was the cause of the Prosecution; and secondly the account of the Proceedings in the Star-Chamber; for both of which we are obliged to Mr. Rushworth." Hargrave.]

Extract from Rushworth's Appendix to his Historical Collections, vol. 1. p. 12.

A PROPOSITION FOR HIS MAJESTY'S SERVICE TO BRIDLE THE IMPERTINENCE OF PARLIAMENTS.

THE Proposition for your majesty's service, containeth two parts: the one to secure your State, and to bridle the Impertinency of Parliaments: the other, to increase your majesty's Revenue, much more than it is.

1. Touching the first, having considered divers means, I find none so important to strengthen your majesty's regal authority, against all oppositions and practises of troublesome spirits, and to bridle them, than to fortify your kingdom, by having a fortress in every chief town, and important place thereof, furnished with ordnance, munition, and faithful men, as they ought to be, with all other circumstances fit for to be digested in a business of this nature; ordering withal, the trained soldiers of the country to be united in one dependency with the said fort, as well to secure their beginning as to succour them in any occasion of suspect; and also to retain and keep their arms for more security, whereby the countries are no less to be brought in subjection, than the cities themselves, and consequently the whole kingdom; your majesty having by this course the power thereof in your own hands. The reasons of the suggests are these. 1. That in policy, there is a greater tie of the people by force and necessity, than merely by love and affection; for by the one, the government resteth always secure; but by the other, no longer than the people are contented. 2. It forceth obstinate subjects to be no more presumptuous, than it pleaseth your majesty to permit them. 3. That to leave a state unfurnished, is, to give the bridle thereof to the subjects; when, by the contrary, it resteth only in the prince's hands. 4. That modern fortresses take long time in winning, with such charge and difficulty, as no subjects in these times have means probable to attempt them. 5. That it is a sure remedy against rebellion, and popular mutinies, or against foreign powers; because they cannot well succeed, when by this course the apparent means is taken away to force the king and subject upon a doubtful fortune of a set battle, as was the cause that moved the pretended invasion against the land, attempted by the king of Spain in the year 1588. 6. That your majesty's government is the more secure, by the people's more subjection; and by their subjection, your parliament must be forced consequently to alter their style, and to be conformable to your will and pleasure; for their words and opposition import nothing, where the power is in your majesty's own hands, to do with them what you please; being indeed the chief purpose of this discourse, and the secret intent thereof, fit to be concealed from any English at all, either counsellors of state or other.

For these, and divers other weighty reasons, it may be considered in this place, to make your majesty more powerful and strong, some orders be observed, that are used in fortified countries, the government whereof imports as much as the states themselves, I mean, in times of doubt or suspect, which are these. Imprimis, that none wear arms or weapons at all, either in city or country, but such as your majesty may think fit to privilege, and they to be enrolled. 2. That as many highways as conveniently may be done, be made passable through those cities and towns fortified, to constrain the passengers to travel through them. 3. That the soldiers of fortresses be sometimes chosen of another nation, if subject to the same prince; but howsoever, not to be born in the same province, or within 40 or 50 miles of the fortress, and not to have friends or correspondency near it. 4. That at all the gates of each walled town be appointed officers, not to suffer any unknown passengers to pass, without a ticket, shewing from whence he came, and whither to go. And that the gates of each city be shut all night, and keys kept by the mayor or governor. 5. Also innkeepers to deliver the names of all unknown passengers that lodge in their houses; and if they stay suspiciously at any time, to present them to the governor: whereby dangerous persons seeing these strict courses, will be more wary of their actions, and thereby mischievous attempts will be prevented. All which being referred to your majesty's wise consideration, it is meet for me withal to give you some satisfaction of the charge and time to perform what is purposed, that you may not be discouraged in the difficulty of the one, or prolongation of the other; both which doubts are resolved in one and the same reason, in respect that, in England, each chief town commonly hath a ruinated castle, well seated for strength, whose foundation and stones remaining, may be both quickly repaired for this use, and with little charge and industry made strong enough, I hope, for this purpose, within the space of one year; by adding withal bulwarks and rampiers for the ordnance, according to the rules of fortification. The ordnance for these forts may be of iron, not to disfurnish your majesty's navy, or be at a greater charge than is needful.

To maintain yearly the fort, I make account an ordinary pay, 3,000 men will be sufficient, and will require 40,000*l.* charge per annum, or thereabouts, being an expence that inferior princes undergo, for their necessary safety. All which prevention, added to the invincible seaforce your majesty hath already, and may have, will make you the most powerful and obeyed king of the world: which I could likewise con-

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firm by many examples, but I omit them for brevity, and not to confuse your majesty with too much matter. Your majesty may find by the scope of this discourse, the means shewed in general to bridle your subjects, that may be either discontent or obstinate. So likewise am I to conclude the same intent particularly, against the perverseness of your parliament, as well to suppress that pernicious humour, as to avoid their oppositions against your profit, being the second part to be discoursed on: and therefore have first thought fit, for better prevention thereof, to make known to your majesty the purpose of a general Oath your subjects may take, for sure avoiding of all rubs, that may hinder the conclusion of these businesses. It is further meant, that no subject, upon pain of high treason, may refuse the same oath, containing only matter of allegiance, and not scruples in points of conscience, that may give pretence not to be denied. The effect of the oath is this, that all your majesty's subjects do acknowledge you to be as absolute a king and monarch within your dominions, as is among the Christian princes; and your prerogative as great; whereby you may and shall of yourself, by your majesty's proclamation, as well as other sovereign princes doing the like, either make laws, or reverse any made, with any other act so great a monarch as yourself may do, and that without further consent of a parliament, or need to call them at all in such cases; considering, that the parliament in all matters, excepting causes to be sentenced at the highest court, ought to be subject unto your majesty's will, to give the negative or affirmative conclusion, and not be constrained by their impertinencies to any inconvenience, appertaining to your majesty's regal authority; and this, notwithstanding any bad pretence or custom to the contrary in practise, which indeed were fitter to be offered a prince elected, without other right, than to your majesty, born successively king of England, Scotland, and Ireland, and your heirs for ever; and so received, not only of your subjects, but also of the whole world. How necessary the dangerous supremacy of parliament's usurpation is to be prevented, the example of Lewis the 11th, king of France, doth manifest, who found the like opposition as your majesty doth, and by his wisdom suppressed it. And to the purpose here intended, which is not to put down altogether Parliaments and their authority, being in many cases very necessary and fit; but to abridge them so far, as they seek to derogate from your majesty's regal authority, and advancement of your greatness; the caution in offering the aforesaid Oath, may require some policy, for the easier passage at first, either by singular or particular tractation; and that so near about one time over the land, as one government may not know what the other intendeth; so it may pass the easier, by having no time of combination or opposition. There is another means also more certain than this, to bring to pass the oath more easily, as also your profit and what else pretended; which here I omit for brevity, requiring a long discourse by itself, and have set it down in particular instructions to inform your majesty.

2. The second part of this discourse is, touching your majesty's profit, after your state is secured: wherein I should observe both some reasonable content to the people, as also consider the great expences that princes have now-a-days, more than in times past, to maintain their greatness, and safety of their subjects, who, if they have not wit or will to consider their own interest so much indifferently, your majesty's wisdom must repair their defects, and force them to it by compulsion; but I hope there shall be no such cause, in points so reasonable, to increase your majesty's revenue, wherein I set down divers means for your gracious self to make choice of, either all or part at your pleasure, and to put it in execution by such decrees and cautions, as your great wisdom shall think fit in a business of this nature.

Imprimis, the first means or course intended to increase your majesty's revenues or profits withal, is of greatest consequence, and I call it a *decimation*, being so termed in Italy, where in some part it is in use, importing the tenth of all subjects estates, to be paid as a yearly rent to their prince, and as well monied-men in towns, as landed-men in the countries, their value and estates esteemed justly as it is to the true value, though with reason; and this paid yearly in money: which course applied in England for your majesty's service, may serve instead of subsidies, fifteens, and such like, which in this case are fit to be released, for the subjects benefit and content, in recompence of the said *decima*, which will yield your majesty more in certainty, than they do casually, by 500,000*l.* per annum at the least.

Item, that when your majesty hath gotten money into your hands by some courses to be set down, it would be a profitable course to encrease your *entrada*, to buy out all estates and leases upon your own lands, in such sort, as they be made no losers; whereby having your lands free, and renting it out to the true value, as it is most in use, and not employed as heretofore, at an old rent, and small fines, you may then rent it out for at least four or five times more money than the old rent comes unto. So as if your majesty's lands be already but 60,000*l.* per annum, by this course it will be augmented at the least 200,000*l.* per annum: and to buy out the tenants estates will come to a small matter by the course, to make them no losers, considering the gain they have already made upon the land: and this is the rather to be done, and the present course changed, because it hath been a custom used merely to cozen the king.

Item, whereas most princes do receive the benefit of salt in their own hands, as a matter of great profit, because they receive it at the lowest price possible, and vent it at double gain yearly; the same course used by your majesty, were worth at least 150,000*l.* per annum. It is likewise in other parts, that all

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weights and measures of the land, either in private houses, shops, or public markets, should be viewed to be just, and sealed once a year, paying to the prince for it; which in England, applied to your majesty, with order to pay 6*d.* for the sealing of each said weight or measure, would yield near 60,000*l.* per annum.

Item, though all countries pay a *gabella* for transportation of cloth, and so likewise in England; yet, in Spain, there is impost upon the wools, which in England is so great a wealth and benefit to the sheep-masters, as they may well pay you 5*l.* per cent. of the true value at the shearing, which I conceive may be worth 140,000*l.* per annum.

Item, whereas the lawyers fees and gains in England be excessive, to your subjects prejudice: it were better for your majesty to make use thereof, and impose on all causes sentenced with the party, to pay 5*l.* per cent. of the true value that the cause hath gained him; and for recompence thereof, to limit all lawyers fees and gettings, whereby the subject shall save more in fees and charges, than he giveth to your majesty in the *gabella*, which I believe may be worth, one year with another, 50,000*l.*

Item, whereas the inns and victualling-houses in England are more chargeable to the travellers than in other countries, it were good for your majesty to limit them to certain ordinaries, and raise besides a large imposition, as is used in Tuscany, and other parts; that is, a prohibiting all inns and victualling-houses, but such as shall pay it; and to impose upon the chief inns and taverns, to pay 10*l.* a-year to your majesty, and the worst 5*l.* per annum, and all ale-houses 20*s.* per annum, more or less, as they are in custom. Of all sorts there are so many in England, that this impost may well yield 100,000*l.* per annum to your majesty.

Item, in Tuscany, and other parts, there is a *gabella* of all cattle, or flesh, and horses sold in markets, paying three or four per cent. of what they are sold for, which by conjecture may be worth in England, 200,000*l.* per annum; using the like custom upon fish, and other victuals, (bread excepted) and for this cause, flesh, and fish, and victuals in the markets, to be prised and sold by weight, whereby the subject saveth more in not being cozened, than the imposition impaireth them.

Item, in Tuscany is used a taxation of 7 per cent. upon all alienation of lands to the true value. As also 7 per cent. upon all dowries, or marriage-monies. The like, if it be justly used in England, were worth at least 100,000*l.* per annum; with many other taxations upon meal, and upon all merchandises in all towns, as well as port-towns, which here I omit, with divers others, as not so fit for England. And in satisfaction of the subject for these taxes, your majesty may be pleased to release them of ward-ships, and to enjoy all their estates at 18 years old; and in the mean time, their profits to be preserved for their own benefit. And also in forfeitures of estate by condemnation, your majesty may release the subject, as not to take the forfeiture of their lands, but their goods, high treason only excepted; and to allow the counsel of lawyers in case of life and death; as also not to be condemned without two witnesses, with such like benefit, which importeth much more their good than all the taxations named can prejudice them.

Item, some of the former taxations, used in Ireland and in Scotland, as may easily be brought about by the first example thereof used in England, may very well be made to increase your revenue there, more than it is, by 200,000*l.* per ann.

Item, all offices in the land, great and small, in your majesty's grant, may be granted, with condition, to pay you a part yearly, according to the value: this, in time, may be worth, as I conceive, 100,000*l.* per annum: adding also notaries, attornies, and such like, to pay some proportion yearly towards it, for being allowed by your majesty to practise, and prohibiting else any to practise in such places.

Item, to reduce your majesty's household to board-wages, as most other princes do, reserving some few tables; this will save your majesty 60,000*l.* per annum, and ease greatly the subject besides, both in carriages and provision, which is a good reason, that your majesty in honour might do it.

Item, I know an assured course in your majesty's navy, which may save at least 40,000*l.* per annum, which requiring a whole discourse by itself, I omit; only promise you to do it, whensoever you command.

Item, whereas your majesty's laws do command the strict keeping of fasting-days, you may also prohibit on those days to eat eggs, cheese, and white-meats, but only such as are contented to pay eighteen pence a year for the liberty to eat them, and the better sort ten shillings. The employment of this may be for the defence of the land, in maintaining the navy, garrisons, and such like, much after the fashion of a Crusado in Spain, as your majesty knoweth, being first begun there under the pretence to defend the land against the Moors. And the same used in England, as aforesaid, may very well yield, one year with another, 100,000*l.* without any disgust to any, because it is at every one's choice to give it or no. Lastly, I have a course upon the Catholics, and very safe for your majesty, being with their good-liking, as it may be wrought, to yield you presently at least 200,000*l.* per annum, by raising a certain value upon their lands, and some other impositions; which requiring a long discourse by itself, I will omit it here, setting it down in my instructions. It will save your majesty at least 100,000*l.* per annum, to make it pain of death and confiscation of goods and lands, for any of the officers to cozen you, which now is much to be feared they do, or else they could not be so rich; and herein to allow a fourth part benefit to them that shall find out the cozenage. Here is not meant officers of state, as the lord treasurer, &c. being officers of the crown.

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The sum of all this account amounteth unto two millions, or 2,000,000*l.* per ann.: suppose it to be but one million and a half, as assuredly your majesty may make by these courses set down, yet it is much more than I promised in my letter for your majesty's service. Besides, some sums of money in present, by the courses following: imprimis, by the prince's marriage, to make all the earls in England grandees of Spain, and principi, with such like privileges, and to pay 20,000*l.* a-piece for it. 2. As also, if you make them fœditaries of the towns belonging to their earldoms, if they will pay for it besides, as they do to the king of Spain in the kingdom of Naples. And so likewise barons, to be made earls and peers, to pay 19,000*l.* a-piece, I think might yield 500,000*l.* and oblige them more sure to his majesty. 3. To make choice of 200 of the richest men of England in estate, that be not noblemen, and make them titulate, as is used in Naples, and paying for it; that is, a duke 30,000*l.* a marquis 15,000*l.* an earl 10,000*l.* and a baron or viscount 5,000*l.* It is to be understood, that the ancient nobility of barons, made earls, are to precede these as peers, though these be made marquises or dukes; this may raise a million of pounds and more unto your majesty. To make gentlemen of low quality, and francklins, and rich farmers, esquires, to precede them, would yield your majesty also a great sum of money in present. I know another course to yield your majesty at least 300,000*l.* in money, which as yet the time serveth not to discover, until your majesty be resolved to proceed in some of the former courses, which till then I omit. Other courses, also, that may make present money, I shall study for your majesty's service, and, as I find them out, acquaint you withal.

Lastly, to conclude all these discourses by the application of this course used for your profit, that it is not only the means to make you the richest king that ever England had, but also the safety augmented thereby to be most secure, besides what was shewed in the first part of this discourse; I mean, by the occasion of this taxation, and raising of monies, your majesty shall have cause and means to imploy in all places of the land so many officers and ministers, to be obliged to you for their own good and interest, as nothing can be attempted against your person, or royal state, over land, but some of them shall, in all probability, have means to find it out, and hinder it. Besides, this course will detect many disorders and abuses in the public government, which were hard to be discovered by men indifferent. To prohibit gorgeous and costly apparel to be worn, but by persons of good quality, shall save the gentry of the kingdom much more money, than they shall be taxed to pay unto your majesty. Thus withal I take my leave, and kiss your gracious hands, desiring pardon for my error I may commit herein.

Extract from Rushworth, vol. 2, p. 51.

On the 29th of May, 1630, a great cause was brought to hearing in the Star-Chamber, concerning a Discourse, intituled, 'A Proposition 'for his Majesty's Service to bridle the Imper- 'tinency of Parliaments.' Wherein the king's Attorney-General was plaintiff, the earl of Bedford, the earl of Clare, the earl of Somerset, sir Robert Cotton, John Selden, Oliver St. John, and others, defendants. Here now followeth the Answers of the Defendants, and the Judgment of the court thereupon, viz.

After the king's Attorney-General opened the aforementioned Information, the Answer of Robert earl of Somerset to the said Information, was also opened by his council, to this effect:

That the Discourse, as he believed, was either the same that was shewed him in the time of his attendance near his late majesty king James, or had many of the same things in it: and finding no cause of concealing a Proposition made in a former king's time, and having no apprehension, that scandal to his majesty, or the present government, might thereby happen, he casually imparted it to the earls of Bedford and Clare, who, after perusal thereof, delivered their opinion concerning it, at their next meeting; 'that it was a phantastic pro- 'ject of some brain-sick traveller, who had 'made collections of some princes in Italy, and 'other foreign states, no way suitable to the 'government of this kingdom.'

And further said, that, besides that one time, there was never any conference, nor any passage by letter or otherwise, betwixt them concerning it, or with any other person, and denied that he either contrived the Proposition, or knew of the contriving thereof, or ever imagined that his majesty would innovate the antient form of government, dispose of the estates of his subjects without their consents, make or repeal laws by proclamation without consent of parliament, plant garrisons in his principal cities and towns, or put in execution any part of the said discourse: and the reason why he did not present the discourse to his majesty, or some of the lords of the council, or some magistrate, was, because he did not conceive the same did in any sort concern the time of his majesty's government, but was contrived in some former time, as appeared manifestly, by the particulars therein contained; and that about 16 or 17 years ago, sir David Fowles shewed him the project, to whom he replied, 'That he was satisfied no use could be made thereof, and so he redelivered it, and concluded that the divulging thereof was in his opinion pardoned by the general pardon granted upon his now majesty's coronation.'

The rest of the Defendants denied any their contrivance thereof, alledging the author, as they were informed, was living beyond sea, and that they ought not to be questioned for it, being writ in the time of king James, and not in reference to his now majesty's government, denying that they had the least thought or intention to scandalize the government; for that they rejected the discourse as soon as they

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read it, as a foolish and impertinent issue of some projecting brain; and they averred their detestation of such a project, and that they bore loyal hearts to his majesty, and blessed God for the happy and peaceable government under him.

After the publication of the Cause in order to a hearing, it appeared by the Depositions of sir David Fowles, that he received the said Writing from one Mr. Yates, in the time of king James, who brought it from sir Robert Dudley at Florence, together with a Letter, desiring him to deliver it to the earl of Somerset, that he might communicate it to king James, which was done accordingly, and that in his hearing the earl signified a dislike thereof; and that he received it back from the earl, being the original, and kept it by him till the lords of the council sent for it, and that he made no copy thereof.

It appeared also by the Depositions of other witnesses, that this Discourse, nine years ago, was bought by them in Little-Britain amongst other manuscripts.

So this Cause coming to hearing, a great presence of nobility being in court, the attorney-general opened the Charge. But before much proceeding, his majesty sent word unto the lord keeper Coventry, then in court, that the queen was brought to bed of a son, and a private message also was delivered to him from the king; whereupon the Lord-Keeper declared in court, that his most sacred majesty had taken this matter into his most serious consideration, and athough the same was of so high a nature, as it was necessary to be brought in question, (being contrary to many laws and statutes, and the common law itself) yet his majesty balancing the same in the scales of justice and mercy, the Author of the Discourse being discovered to live beyond the seas, found these Defendants rather fitting to be objects of his mercy, than justice, they being some of them noblemen, and such as his majesty did and doth well esteem and like of, in his royal opinion: and that his majesty was the rather inclined to extend his goodness, in regard of the time; it having now pleased the great justice of heaven to bless his majesty and his kingdom with a royal issue of his body, a hopeful prince, the great joy and long expectation both of the king and kingdom.

Upon this declaration of the king's pleasure the Lord-Keeper made known, that the court by his majesty's special command was to proceed no further in the hearing of this cause; but ordered the Project, or Book, to be burnt, as seditious and scandalous, both to his majesty, the state, and government of this kingdom. And ordered the Proceedings to be taken off the file.

An Account of this Proposition is contained in a volume in the hand-writing of archbishop Sancroft among Tanner's MSS. in the Bodleian Library at Oxford. It begins with the Attorney-General's Information as follows:

"To the King's most excellent Ma'ty.

"Humbly complayning enformeth your most excellent ma'ty, sir Rob. Heath kt. your ma'ties Attorney-Gen'all, that whereas your sacred ma'tie ever since your happy accesse to the imperiall crowne of this realm hath gov'ned your people with soe much justice, and moderation, that all your good subjects do beare that rev'ence and love to your sacred person, as is justly due to so gracious a soveraigne; and your ma'ty, next to the service of Almighty God, and the maintenance of his true religion, hath preserved and maintained the ancient and fundamentall laws of this kingdom without innovation: Yet so it is, may it please your most excellent majesty, That some malicious persons who are as yet unknowne to your said Attorney, being ill affected to your ma'ty, and to your happy gov'nement, and intending to raise false scandalls, and seditious rumours against your ma'ty, and your gracious governem't, have of late wickedly and seditiously framed, contrived, and written, a false, seditious, and pestilent discourse in these words following."

Then follows the Proposition as printed above, ending with a formal request to the king, to call on the defendants for trial, signed by the Attorney-General. Then follows:

The ANSWER of Francis, Earle of Bedford, one of the Def'ts, to the Information exhibited against him, and others, by Sir R. Heath, kt. his Ma'ties Attorney-Gen'all.

The said Def't, saving, &c. with all duty and thankfullnesse, doth acknowledge y't his ma'ty hath with great justice and moderation governed his people, for which among the rest of his loving subjects, this def't hath alwaies had and ever shall have a speciall love and reverence of his sacred person, as due to so gracious a sov'aigne. He doth also acknowledge his ma'ties gracious care to preserve and maintaine the ancient, and fundamentall lawes of this kingdome, without innovation; insomuch that the said def't nev'r had thought, that his most excellent majesty did entend to innovate his lawes in any thing: for his gov'ment hath been so moderate as this def't hath alwaies conceived it to be a speciall happiness to his people, neither did he, this def't, ever raise any rumours at all against his ma'ty, or his gov'ment. And concerning the discourse in the information mentioned, the said def't saith that he did not name, write, or contrive the same, nor doth know who did name, write, or contrive the same, but for declaration of the def't's knowledge and thoughts concerning the same, saith that he never did see or heare the said discourse until the month of July or August, in the 5th year of his ma'ty's happy reigne, about which time, a writing conteyning the said discourse was sent to this def't, he then being at his house in Whoborne in Bedfordshire; which was sent, as the def't was informed, from one Mr. Oliver St. John, of Lincoln's Inne, who

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then and formerly was of this def't's councell in his law businesse, and within two or three weeks after, the s'd Mr. St. John repaired to this def't's house, and there this def't and the s'd Mr. St. John, had some speech and conferenſce concerning the said discourse, upon which conference the s'd Mr. St. John did declare to this def't, that he had the said discourse from s'r Rob. Cotton, kt. and baronett, and that he was enformed and told, that it was written about the 12th year of the late k. James, of blessed memory, which this def't easily believed, for that he observed it could not be applied to his ma'ties time, y't now is, as well for that there is in the same discourse mention made of the king's son the prince, to be married for raising of present monies, as for some other passages therein, w'ch this def't doth still beleeve; neither did this def't think, or beleeve, or can be perswaded, that it was presented, or meant or intended to be presented to his gracious ma'ty, y't now is, for that he hath observed his ma'ties aversness from such courses. And he this def't further s'th that he this def't kept the same discourse by him, till the end of Sept'r or beginning of Oct'b'r in the said year, at w'ch time this def't repaired to his house in the parish of Chiswick in the county of Middlesex, in w'ch parish the earle of Som'sett, and other of the def'ts named in the same information both then and before dwelt, and after some time of this def't's being at Chiswick aforesaid, meeting with the said earle of Som'sett, and conferring of divers matters happening in such time, as the earle of Som'sett had been in grace and favour with his s'd late ma'tie, among other speeches, they had communication of sev'all ways then propounded both for preservation, as also for increase of his s'd late ma'ties revenues. W'ch said earle of Som'sett then related, that div'se waies had been offered unto him about those times, and among others he mentioned some *like* these waies y't are expressed in the said discourse, in the information specified. Whereupon this def't did aske of his l'ds'p, whether he had seen a discourse tending to such purpose, mentioning an army and gabells, and he answered, y't he had then a notion of some such matter, but did not then perfectly call the particulars thereof to mind, but if he might see it, he should then better remember it, and thereupon this def't did send, or deliv'd unto him the said copy, w'ch was sent unto this def't, w'ch when the s'd earle had read, he returned to this def't, and told him, that he remembred that in the time of the s'd late king, Heads, or Propositions of like effect, had been tendred unto his l'd'p. And this def't s'th he nev'r did write, or cause any topic thereof to be written, nor did he co'municate, shew, or publish the same otherwise than as aforesaid, saving to *some* of the l'ds of his majesties most ho'ble privy-councell by their co'mand in this M'ch'mas terme. And the said def't saith, that the said discourse doth not concerne the present time of his ma'ty, or his gov'nem't; neither did he ev'r say, affirme, or believe, that there ev'r was any purpose to int'taine it: neither did this def't disperse, or divulge the same, to the intent that the same, or any thing conteyned therein should be divulged, or dispersed, as if the same had been intirtained by his most excellent ma'ty, or by any other, or with purpose to put in executio', or to raise fears, or jealousies in any w'tsoever, or that his sacred ma'ty had any purpose to alter, or innovate any laws of this kingdom, or the ancient manner of the gov'nem't thereof, or to draw things to be disposed of at his will, or dispose of the states, revenues, or goods of his ma'ties subjects; or to make or repeale statutes by his ma'ties proclamation, or that he purposed to place, or maintaine garrisons or fortified places for any such end, as in the s'd information is declared, and he is fully assured, y't his ma'ty nev'r did, nor will give the least intertainment to any such design, and the said def't confesseth, y't he did not shew or deliv'r the said wrighting to any of his ma'ties most ho'ble privy-councell, or other magistrate otherwise than as afores'd, for what [qu. that] he did not, nor yet doth conceive, that it had any relation to his ma'ties gov'nem't, or that he ever had purpose, or disposition to give care to such projects, or devices, or that any would so believe. And as to all and every the misdemeano's and offences in the information laid to the charge of this def't, he is thereof not guilty in manner and forme, as by the said information is supposed. W'ch matters the said def't doth, and will aver and prove, as this ho'ble court shall award, and praieth to be dismissed without further attending, because of the said suit, &c. . . .

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137. The Trial of MERVIN Lord AUDLEY, Earl of CASTLEHAVEN, for a Rape and Sodomy: 7 CHARLES I. A. D. 1631. [2 Rushw. Coll. 93. Hutt. Rep. 115.]

THERE were three Indictments found at Salisbury in Wiltshire against the earl, the Wednesday preceding Easter, before the Lord Chief Justice Hyde, the L. C. J. Richardson, and baron Denham, Justices of Assize for that circuit, and special commissioners in that matter. One Indictment was for a Rape upon his own wife; for holding her by force, while one of his minions forcibly, against her will, had carnal knowledge of her: so that he was indicted as *Præsens, Auxilians* and *Confortans* *; and therefore a principal. The other two Indictments were for Buggery with a man.

The Judges, on Friday morning before the trial, being sent for, all but Denham being met at Serjeants-Inn in Fleet-street, these Questions were proposed them by sir Robert Heath, the king's Attorney General; a Memorial of which a learned judge, sir James Whitlock, one of the eight hereafter mentioned, set down in writing; to the effect following.

1. Whether a peer of the realm might wave his Trial by peers, and plead he will be tried by God and the country? *Answ.* He might not: for his Trial by peers was no privilege, but the law declared by Magna Charta: which if he would not plead to by a trial of his peers, it was standing mute.

2. Whether a peer might challenge his peers, as in the case of common Jurats? *Answ.* He might not, (which I think is so, said that Judge) because they were not upon their oath, but upon their honour, and a challenge is tried whether he stands indifferent, as unsworn.

3. Whether a peer might not have counsel any more than a commoner? *Answ.* If matter of law appeared, he might; not for matter of fact.—Certain Examinations having been taken by the lords without an oath: It was resolved, Those could not be used until they were repeated upon oath, unless of the party to be tried; which might be read without an oath.

4. Whether the Wife in this case might be a witness against her husband for the rape? *Answ.* She might: for she was the party wronged; otherwise she might be abused *. In like manner a villain (vassal) might be a witness against his lord in such cases.

5. Whether, if he stood mute, he could demand his clergy? *Answ.* If he stood † mute in the case of Rape or Buggery, he might have his clergy ‡ in either.

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* Britton, c. 9. says, that sodomites, sorcerers, and some other offenders, were to be burned. The Mirrour says they were to be buried alive; in conformity with which Ld. Co. 3 Inst. c. 10, quotes Fleta b. 1. c. 35, where I cannot find any such matter: however, it seems likely that afterwards they had ceased to be punished capitally; which occasioned the statute of 25 Hen. 8. c. 6, passed in the year 1534, which was about six years after H. 8, had begun upon the suppression of Monasteries, [See 14 Rymer's Fœd. 258] and about the time when the general suppression of them seems to have been resolved on. About a year afterwards (1536) the lesser monasteries were suppressed. And in four years more (1540) the work was completed by the final dissolution of all manner of abbies, priories, monasteries, &c. and the transfer of their revenues and estates to the crown, by st. 31 H. 8, c. 13. See 1 Cobbett's Parl. Hist. 526, 537, 1 Rapin 782, 807—821. fol. ed. and Burnet's Hist. of the Reformation. The st. 25 H. 8, c. 6, was repealed by the general st. 1 E. 6, c. 12, and by 2 E. 6, c. 29, the crime was made felony without benefit of clergy, but without forfeiture of lands or goods, or corruption of blood, which st. of 2 E. 6, c. 29, was repealed by st. 1 Mar. c. 1, so both acts stood repealed until the statute 5 Eliz. c. 17, by which the whole act 25 H. 8, c. 6, is revived and re-enacted. Mr. Barrington in the first edition of his "Observations on the Statutes," p. 31, "Assisa panis et cerevisiæ," made a remarkable mistake in quoting by memory a passage from Tacitus. He seems to have thought it likely that the custom of pelting criminals in the pillory was derived from the antient Germans, "Infames," says he, "luto ac cœno aspergunt." The passage which he had in his mind is doubtless the following in Tacitus de Mor. Germ. s. 12. "Distinctio pœnarum ex delicto. Proditores et transfugas arboribus suspendunt: ignavos et imbelles et corpore infames cœno ac palude, injectâ in super crate, mergunt. Diversitas supplicii illuc respicit; tanquàm scelera ostendi oporteat dum puniuntur, flagitia abscondi." The passage in the Mirrour, c. 4, s. 14, p. 252, is "Le mortal peché de majesté vers le roy celestre de sodomy soy fornist per enfover les pecheurs touts vifs profond en terre; issint que memoire soit restrainé pour la grande abomination del fait." The words in Britton are, "Soit enquis de ceux que felonisement en temps de pees eient autre blees ou autre mesons ars. Et ceux que serrount de ceo atteynts soient ars, issint que eux soient punys par mesme cele chose dount ils pecherent; et mesme cel jugement eyent sorcers et sorceresses et sodomites et mescreaunts appertement atteynts." Britton fo. xvi.

* East's P. C. ch. x. s. 6.

† See the Note to Weston's Trial, vol. 2. p. 914. See also Barrington's Obs. on St. West. 1st. c. 12.

‡ The statute of 25 H. 8, c. 6, in case of Buggery, and of 18 Eliz. c. 7, in case of a Rape, take away Clergy only from such as are convicted by verdict, outlawry, or confession:

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6. Then if he might not be put to a trial on the other Indictment, might not he be for a later Buggery, and be denied the clergy? *Answ.* On that he might by 18 Eliz. 7.

7. Whether, in case one stood mute, Evidence might be opened by the court's command concerning the fact, though the delinquent was to be pressed to death for his contempt? *Answ.* That was a matter which lay in the discretion of the court.

8. Whether in cases wherein clergy was allowable, the party might pray it before he answered, and deny to answer otherwise? *Answ.* This was a confession.

9. Whether in a Rape there must be penetration? The Answer was in the affirmative.

10. The prisoner having petitioned to be bailed, whether it might not be granted? *Answ.* The king, as king, was to advise about it: The Judges acquainted the Lord Keeper he could not in justice require it; yet he might be bailed *ex gratia*, which was not fit in that odious case.

At a second meeting of the Judges in Serjeants Inn, there were other things considered of concerning this matter. They made a difference between Buggery and a Rape, in point of having the clergy if he stood mute: for it was argued he might have his clergy if he stood mute in a Rape, but not in Buggery; because by the statute 25 H. 8, Buggery was made felony, which by the common law was not. And in the very creation of the offence, clergy was taken away; whereas clergy lay for a rape until it was (should be) taken away by statute.

It was concluded the Lords might eat and drink before they were agreed, but that they could not separate nor adjourn till they gave their Verdict: That this appeared out of the lord Dacres of Greystock's Case*, who was tried for Treason, and acquitted by his peers in 26 Hen. 8. It was agreed by the Justices in that case of the lord Dacres, That verdict could not be given by a lesser number of lords than 12; and that if 12 were for the king, and 13 for the prisoner, the prisoner should be acquitted: That in an Appeal, if the Defendant should be mute, he should be hanged; and it was an Attainder, it being not within the statute of Westminster, cap. 12. De Peine fort et Dure.† No more was Treason.

It was also agreed, That a lord of parliament was within the statute of Westminster 1, in case of Felony, and should be pressed to death.

Farther, That if the lord Audley should have his clergy upon his being mute, yet he might be tried upon the other Indictments of Rape and Buggery, and should not have his clergy, by the statute of 18 Eliz. because the admitting him to his clergy would be a supersede as to all indictments of offences within clergy, not of those without, by that statute: For by the common law, he that was admitted to his clergy was discharged from answering any other offence; for by indictment of that law he was taken out of the power of the secular judge, and put into the hands of the ordinary, whose prisoner he was all his life after.

It was resolved, from the lord Dacres's Case, That the Lord Steward, after Verdict given, might take time to advise upon it, for any point of law; that his office continued to him till his Judgment and Resolution; and it was but a commission *pro hac vice* notwithstanding.

The ARRAIGNMENT.

The lord Coventry, Lord Keeper of the Great Seal of England, was appointed Lord High Steward for that day; who, having orders for the said Trial from his majesty, gave directions for the same.

The lords the peers took their places about 8 of the clock in the morning, and were seated on benches on each side of a large table, covered with green cloth; and below them were the Judges placed, and the king's learned counsel, and the officers of the court. And having disposed of themselves in their several places, the Lord Steward about 9 of the clock entered the hall uncovered, with seven maces carried before him by seven Serjeants at Arms, and was attended upon by sir John Burroughs, garter principal king at arms, and Mr. James Maxwell, usher of the black rod.

After the Lord Steward had saluted all the lords the peers, (who saluted him again) he presently ascended the state; and being seated in the chair, he was presented with his majesty's Commission by one of the masters of the Chancery, which bore date the 13th of April, 1631.

After he had received the said Commission, he commanded an O Yes to be made, by one of the Serjeants at Arms, for a general silence; and then delivered the said Commission to sir Thomas Fenshaw, Clerk of the Crown, to be openly read. Which being done, Mr. Maxwell kneeled down and presented his lordship with a white staff verge of state, which he gave to one of the Serjeants at Arms, who held the same up by the cloth of state on the right hand thereof. And after the Commission was read, and the staff received as aforesaid, his grace commanded a solemn O Yes to be made; and then gave leave to all the lords, the peers, and the judges, and to all privy counsellors there present, to be covered; and command was given, that none under that degree should keep on their hats upon pain of imprisonment. And then the peers were severally called by their names, and each of them answered particularly, viz. 1. Lord Weston, Lord High Treasurer of England; 2. Earl of Manchester, Lord Privy Seal; 3. Earl of Arundel and Surrey, Earl Marshal; 4. Earl of Pembroke and Montgomery, Lord Chamberlain; 5. Earl of Kent; 6. Earl of Worcester; 7. Earl of Bedford; 8. Earl of Essex; 9. Earl

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which do not extend to those who stand mute, 11 Co. Rep. 30. 6, Poulter's case; but by the 3 et 4 of Wil. et Mar. c. 9, all who would be excluded in case of conviction by verdict or confession, are excluded in case of standing mute.

* Kely, 56. † S. P. C. Lib. 3, c. 60.

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of Dorset; 10. Earl of Salisbury; 11. Earl of Leicester; 12. Earl of Warwick; 13. Earl of Carlisle; 14. Earl of Holland; 15. Earl of Berks; 16. Earl of Denbigh; 17. Viscount Wimbleton; 18. Visc. Conway; 19. Visc. Dorchester; 20. Visc. Wentworth; 21. Lord Percy; 22. Lord Strange; 23. Lord Clifford; 24. Lord Petre; 25. Lord North; 26. Lord Goring; 27. Lord Howard.

The Judges present: sir Nicholas Hyde, L. C. J. of the King's-Bench; sir Thomas Richardson, L. C. J. of the Common-Pleas; sir Humphrey Davenport, L. C. B. of the Exchequer; Baron Denham; Judge Jones; Judge Hutton; Judge Whitlocke; Judge Croke.

The King's Counsel: sir Robert Heath, Attorney-General; sir Richard Shelton, Solicitor-General; sir John Finch, queen's Attorney-General; sir Thomas Crew, king's Serjeant at Law.

Officers of the Court: sir Thomas Fenshaw, Clerk of the Crown; Mr. John Keeling, his Deputy or Assistant.

This done, the Lord Steward, after a solemn precognizance, commanded the Indictments to be certified and brought in; and then, by a serjeant at arms, the lieutenant of the Tower was called to bring forth the Prisoner, (who until that time was kept in a little room by the Common-Pleas) and the lieutenant brought him to the bar, with divers of the guard attending on him, where he had a place in manner of a pew, lined with green, in which he stood; and the lieutenant had another of the same form for him to rest in, adjoining to it. And when he had done his obeisance to the Lord-High Steward and the peers, (who all re-saluted him again) the Lord-High-Steward spake to him in the manner following:

The Lord-High-Steward's Speech.

My lord Audley; the king hath understood, both by report and the verdict of divers gentlemen of quality in your own country, that you stand impeached of sundry crimes of a most high and heinous nature; and to try whether they be true or not, and that justice may be done accordingly, his majesty brings you this day to your Trial, doing herein like the mighty King of Kings, in the 18th of Genesis, ver. 20, 21, who went down to see whether their sins were so grievous as the cry of them: 'Because 'the cry of Sodom and Gomorrah is great, and 'their sins be grievous, I will go down (saith 'the Lord) and see whether they have done al-'together according to the cry of it.' And kings on earth can have no better pattern to follow than the King of Heaven; and therefore our sovereign lord the king, God's vicegerent here on earth, hath commanded that you shall be here tried this day, and to that end, hath caused these peers to be assembled: and the desire of his maj. is, that your trial shall be as equal as equity and justice itself; and therefore these noble men your peers (whose hearts are as full of integrity, justice, and truth, as their veins full of noble blood) are this day to try you. Wherefore, if you be innocent, speak boldly and confidently, and fear not to justify yourself; and be assured that those that accuse you (if you be free yourself) shall not escape free. But if you be guilty of those crimes, I advise you to give honour to God and the king, and confess your fault; for it is not vain confidence, nor subtilty, nor standing out in denial, that can hide the truth; and all shifts and subtilties against it are but 'Concilia adversus Domi-'num.' Therefore, if truth touch you at the heart, and your conscience, which is a thousand witnesses, and God's grace, which is greater than both, stand not out against it: And if you do, God will put it into the hearts of these noble persons to find it out, and to do that which is just.

The Lord Audley's Answer.

May it please your grace; I have been close prisoner these six months, without friends, without counsel or advice: I am ignorant of the advantages and disadvantages of the law, and am but weak of speech at the best, and therefore I desire to have the liberty of having Counsel to speak for me.

The Lord-High-Steward's Reply.

For your so long imprisonment, it hath been to you a special favour; for you have had time enough to bethink yourself, and more than ever any man had that hath been committed for such an offence, and more favour than ever any had that came to this bar; and you shall demand nothing, which the law can allow, but you shall have it. But for your demand, I must move it to the lords the Judges, and they shall satisfy you in it, or any other thing you desire.

Then his grace desired to be resolved of the Judges, Whether this demand of my lord Audley, to have Counsel to plead for him, might be granted or not?

The Judges answered, That, in criminal cases, counsel is not to be admitted for matter of fact; but for matter of law they may.

Then the Lord Steward proceeded to the Charge, commanded the three Indictments to be read by sir Thomas Fenshaw, Clerk of the Crown; two for Sodomy with Lawrence Fitz-Patrick, his footman; the third for a Rape committed on his own wife, the countess of Castlehaven: viz.

The THREE INDICTMENTS.

The following are Copies of the said Indictments: viz.

1. *Rex versus Dominum* AUDLEY, *for a Rape. 7 Car.* I.

'Wilts, ss. Juratores pro domino rege super 'sacramentum suum præsent', quod Martinus 'dominus Audley, nuper de Fountell Gifford 'in comitatu Wilts, et Ægidius Broadway de 'Fountell Gifford prædict' in comitatu prædicto 'generosus, timorem Dei præ oculis suis non

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'habentes, sed instigatione diabolica moti et 'seducti, vicesimo die Junii, anno regni domi- 'ni nostri Caroli, Dei gratia Angliæ, Scotiæ, 'Franciæ, et Hiberniæ regis, fidei defensoris, 'sexto, apud Fountell Gifford prædict' et in et 'super Annam dominam Audley, uxorem præ- 'fati domini Martini Audley, in pace Dei et 'dicti domini regis ibidem existent' insult' fe- 'cerunt. Et prædictus Ægidius Broadway 'prædictam Annam dominam Audley, vi et 'armis, contra voluntatem ipsius Annæ ad 'tunc et ibidem violenter et felonice rapuit, ac 'ipsam Annam ad tunc et ibidem contra vo- 'luntatem suam violenter et felonice carnaliter 'cognovit, contra pacem domini regis nunc, 'coron', et dignitat' suas, et contra formam 'statuti in hujusmodi casu edit' et provis'.

'Et ultra, juratores prædicti dicunt super 'sacramentum suum prædict', quod prædictus 'Martinus dominus Audley prædicto vicesimo 'die Junii ann' sexto supradicto; apud Foun- 'tell Gifford prædictam, in comitatu prædicto, 'felonice fuit præsens, auxilians, et confortans, 'abettans, procurans, adjuvans, et manutenens 'prædictum Ægidium Br. ad feloniam prædic- 'tam, in forma prædicta felonice faciend' et 'perpetraud', contra pacem dicti domini regis 'nunc, coronam et dignitatem suas, ac contra 'formam statuti prædicti.'

2. *Rex versus Dominum* AUDLEY, *for Sodomy.* 7 *Car.* 1.

'Wilts, ss. Juratores pro domino rege su- 'per sacramentum suum præsent', quod Mar- 'tinus dominus Audley, nuper de Fountell Gif- 'ford in comitatu Wilts', Deum præ oculis non 'habens, nec naturæ ordinem respiciens, sed 'instigatione diabolica motus et seductus, pri- 'mo die Junii, an' regni domini nostri Caroli, '&c. sexto, apud Fountell Gifford prædict' in 'dicto comitatu Wilts, in domo mansionali 'ejusdem Martini domini Audley, ibidem vi et 'armis in quendam Florence Fitz-patrick, yeo- 'man, insult' fecit, et cum eodem Florence F 'ad tunc et ibidem nequit', diabolice, felonice, 'et contra naturam rem veneream habuit, ip- 'sumque F. ad tunc et ibidem carnaliter cog- 'novit, peccatumque illud sodomiticum detes- 'tabile et abominandum, Anglicè vocat' bug- 'gery (inter Christianos non nominandum) ad 'tunc et ibidem cum eodem Florence F. nequit 'diabolice, felonice, et contra naturam com- 'misit et perpetravit in magnam Dei omnipo- 'tentis displicentiam, ac totius humani generis 'dedecus, ac contra pacem dicti dom' reg' 'nunc, coronam et dignitat' suas, et contra for- 'mam statuti in hujusmodi casu edit' et provis'.

3. *Rex versus Dominum* AUDLEY, *for Sodomy.* 7 *Car.* 1.

'Wilts, ss. Juratores pro domino rege su- 'per sacramentum suum præsent', quod Mar- 'tinus dominus Audley, nuper de Fountell 'Gifford in comitatu Wilts', Deum præ oculis 'non habens, nec naturæ ordinem respiciens, 'sed instigatione diabolica motus et seductus, 'primo die Junii, an' regni domini nostri Ca- 'roli, &c. sexto, apud Fountell Gifford prædict' 'in dicto comitatu Wilts, in domo mansionali 'ejusdem Martini domini Audley, ibidem vi et 'armis in quendam Florence Fitz-patrick, yeo- 'man, insult' fecit, et cum eodem Florence F. 'ad tunc et ibidem nequit', diabolice, felonice, 'et contra naturam rem veneream habuit, ip- 'sumque F. ad tunc et ibidem carnaliter cog- 'novit, peccatumque illud sodomiticum detes- 'tabile et abominandum, Anglicè vocat' bug- 'gery (inter Christianos non nominandum) ad 'tunc et ibidem cum eodem Florence F. ne- 'quit' diabolice, felonice, et contra naturam 'commisit et perpetravit in magnam Dei omni- 'potentis displicentiam, ac totius humani ge- 'neris dedecus, ac contra pacem dicti dom' 'reg' nunc, coronam et dignitat' suas, et contra 'formam statuti in hujusmodi casu edit' et pro- 'vis'.'

Then being asked, whether he was Guilty of them, or Not Guilty? He answered, Not Guilty. Then he was asked how he would be tried? The earl said, By God and my Peers. Whereupon the peers put off their hats; and thereupon the issue was joined.

The Lord High Steward's Speech to the Lords.

My Lords; The prisoner stands indicted for a Rape by one Indictment, and of Sodomy* by two; and he hath pleaded Not Guilty to them all: it is my duty to charge you with the Trial of it, and you are to judge of it. The offences wherewith he stands charged, are to be proved by Evidence; and the crimes that come this day before us, may in some breed detestation, and the person of his lordship in others may breed compassion; I desire your lordships to set these two aside, and let your reason sway your judgment, and let that rule your affections, and your hearts your heads; for neither of these ought to be put into the balance, for a grain on either side may sway the scale. You are to give attentive hearing, and then to weigh equally, that the scale may lean the right way. The Judges will assist you in the points of law, which if you doubt of you are to expound it to me, and I to them. And this you are to do without corporal oath; for the law conceiveth you of such integrity, that you will do that for justice, which others do upon their oaths; and therefore admits of no challenge: and God direct you to do as you ought.

Then Sir Tho. Crew gave the first Charge; and after him Mr. Attorney said as followeth:

My Lord Steward; May it please your grace, there are three Indictments against Mervin lord Audley; the first for a Rape, the other two for Sodomy. The person is honourable; the crimes of which he is indicted dishonourable; which if it fall out to be true, which is to be left to trial, I dare be bold to say, never

* See in Coke's Ent. 352, a precedent of this kind in Stafford's Case, which in Co. 3 Inst. 59, is said to have been drawn by great advice.

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poet invented, nor historian writ of any deed so foul. And although Suetonius hath curiously set out the vices of some of the emperors who had absolute power, which might make them fearless of all manner of punishment, and besides were heathens, and knew not God; yet none of these came near this lord's crimes. The one is a crime, that, I may speak it to the honour of our nation, is of such rarity, that we seldom or never knew of the like; but they are all of such a pestilential nature, that, if they be not punished, they will draw from Heaven a heavy judgment upon this kingdom.

Whereupon (Mr. Attorney digressing from the matter) the lord Audley would have interrupted him, and required to hold him to the points in the Indictments. But the Lord High Steward desired his lordship to be patient, and assured him he should be heard in fit time at full. Whereupon Mr. Attorney proceeded again in his Charge as followeth:

May it please your Grace; I can speak it with joy and comfort, during all my time of service, both in his majesty's father's time, and since he came to the crown, I had never the like occasion to speak in this place against a peer of the realm before now; and God knows I do it now with sorrow, and I hope I shall never have the like occasion to do so much again. But his majesty, who is the pattern of virtue, not only as king, but in his person also; in whom it is hard to judge whether he most excels in justice or mercy, but I rather think in mercy, would have my lord Audley the prisoner at the bar, heard with as much favour as such a crime can admit: and when he first heard of it, he gave strict command, that the truth should be searched out, that his throne and people might be cleared from so heavy and heinous sins; and thereupon he was indicted in his own country, according to the law, and by gentlemen of worth and quality. The Bill was found; and now he is personally brought to the bar to be tried by these his honourable peers, such of whose wisdom and sincerity there can be no question, but that he shall have just and honourable trial. And first, I shall begin with the Indictment of Rape. Bracton tells us of king Athelstane's Law before the Conquest: 'If the party were of no chaste life, but a 'whore, yet there may be a ravishment; but it 'is a good plea to say she was his concubine.'

In an Indictment of Rape, there is no time of prosecution necessary; for 'nullum tempus 'occurrit regi:' but in case of an Appeal of Rape, if the woman did not prosecute in convenient time, it will bar her. If a man take away a maid by force, and ravish her, and afterwards she give her consent and marry him, yet it is a Rape.

For the *crimen sodomiticum*, our law had no knowledge of it till the 25th of Henry 8, by which statute it was made Felony: and in this there is no more question, but only, whether it be *crimen sodomiticum sine penetratione;* and the law of 15 Eliz. sets it down in general words; and where the law doth not distinguish, neither must we. And I know you will be cautious how you will give the least mitigation to so abominable a sin, which brought such plagues after it, as we may see in Gen. xvii. Levit. xviii. Judg. xix. Rom. i. But, my lord, it seemed to me strange at the first, how a nobleman of his quality should fall to such abominable sins; but when I found he hath given himself over to lust, and that 'Nemo repentè fit pessimus,' and if once men habit themselves in ill, it is no marvel if they fall into any sins, and that he was constant to no religion, but in the morning he would be a Papist and go to mass, and in the afternoon a Protestant and go to a sermon. When I had considered these things, I easily conceived, and shall be bold to give your grace a reason why he became so ill. He believed not God, he had not the fear of God before his eyes; he left God, and God left him to his own wickedness: and what may not a man run into? What sin so foul, what thing so odious, which he dares not adventure? But I find in him things beyond all imagination: for I find his ill imagination and intentions bent to have ever his wife naught with the wickedest man that I heard of before: for who would not have his wife virtuous and good, how bad soever himself be? And I find him bawd to his own wife. If she loved him, she must love Skipwith, whom he honoured above all, and not any honest love, but in a dishonest love; and he gives his reason by Scripture, 'She was now made subject to 'him;' and therefore if she did ill at his command, it was not her fault but his, and he would answer it. His irregular bounty toward Skipwith was also remarkable. He lets this Skipwith, whom he calls his favourite, spend of his purse 500*l.* per annum; and if his wife or daughter would have any thing, though never so necessary, they must lie with Skipwith, and have it from him, and not otherwise; also telling Skipwith and his daughter-in-law, he had rather have a child by him than any other. But for these things, I had rather they should come of the Witnesses mouths than from me: and thereupon desired that the Proofs might be read.

The Deposition of WALTER BIGG.

Walter Bigg deposed, That Amptil was a page to sir H. Smith, and had no more means when he came to my lord Audley, but the mare he rode on. He entertained him as his page 8 years, and afterwards let him keep horses in my lord's grounds, by which I think he enriched himself 2,000*l.* but he never sat at table with my lord till he had married his daughter, and then he gave him to the value of 7,000*l.*—That Skipwith was sent from Ireland to be my lady's page; and that his father and mother were very poor folks there. He spent of my lord's purse per annum 500*l.* and he gave him at one time 1,000*l.* and hath made divers deeds of land unto him.—My lord was first a Protestant; but after, by buying of Founthill, he turned his religion.

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Lord AUDLEY's Examination.

That Henry Skipwith had no means when he came to him, and that he had given him 1,000*l.* and that Skipwith lay with him when he was straitened in rooms; and that he gave a farm of 700*l.* per annum to Amptil that married his daughter, and at other times to the value of 7,000*l.* and that there was one Blandina in his house 14 days, and bestowed an ill disease there, and therefore he sent her away.

The lord Audley's Examination taken before the Lord-Keeper, Lord-Treasurer, Lord-Marshal, and others; which being shewed to him, subscribed with his own hand, he would not acknowledge, but excused it, saying his eyes were bad; but being perfectly read, he acknowledged it.

My Lord-Steward's Advice to my lord Audley.

My lord; I would advise you not to deny the things which are clearly proved; for then the lords will give less credit to the rest you say.

The Countess of CASTLEHAVEN's Examination.

That shortly after the earl married her, viz. the first or second night, Amptil came to the bed's side, while she and her husband were in bed, and the lord Audley spake lasciviously to her, and told her, 'That now her body was 'his; and that if she loved him she must love 'Amptil; and that if she lay with any other 'man with his consent, it was not her fault but 'his; and that if it was his will to have it so, 'she must obey, and do it.'—That he attempted to draw her to lie with his servant Skipwith; and that Skipwith made him believe he did it, but did it not.—That he would make Skipwith come naked into his chamber, and delighted in calling up his servants to shew their privities; and would make her look on, and commended those that had the largest.—That one night, being a-bed with her at Founthill, he called for his man Brodway, and commanded him to lie at his bed's feet; and about midnight (she being asleep) called him to light a pipe of tobacco. Brodway rose in his shirt, and my lord pulled him into bed to him and her, and made him lie next to her; and Brodway lay with her, and knew her carnally, whilst she made resistance, and the lord held both her hands and one of her legs the while: and that as soon as she was free, she would have killed herself with a knife, but that Brodway forcibly took the knife from her and broke it; and before that act of Brodway, she had never done it.—That he delighted to see the act done; and made Amptil to come into bed with them, and lie with her whilst he might see it: and she cried out to have saved herself.

Then Lawrence Fitz-Patrick was produced: but before his Examination was read, the earl desired that neither he, nor any other, might be allowed Witnesses against him, until he had taken the oath of allegiance. This was referred to the lords the Judges.

The Judges resolve against him, that they might be Witnesses, unless they were convicted recusants.

The Examination of FITZ-PATRICK was then read, the truth of which he then again confirmed upon Oath.

That the earl had committed Sodomy twice upon his person; that Henry Skipwith was the special favourite of my lord Audley, and that he usually lay with him: and that Skipwith said, that the lord Audley made him lie with his own lady; and that he saw Skipwith in his sight do it, my lord being present: and that he lay with Blandina in his sight, and four more of the servants, and afterwards the earl himself lay with her in their sights.

Then SKIPWITH was produced and sworn, and his Examination read, which he again confirmed upon oath, and deposeth, viz.

That the earl often solicited him to lie with the young lady, and persuaded her to love him; and to draw her thereunto, he urged that his son loved her not; and that in the end he usually lay with the young lady, and that there was love between them both before and after; and that my lord said, he would rather have a boy of his begetting than any other; and that she was but twelve years of age when he first lay with her, and that he could not enter her body without art; and that the lord Audley fetched oil to open her body, but she cried out, and he could not enter; and then the earl appointed oil the second time; and then Skipwith entered her body, and he knew her carnally; and that my lord made him lie with his own lady, but he knew her not, but told his lord he did.—That he spent 500*l.* per ann. of the lord's purse, and, for the most part, he lay with the said earl. That the earl gave him his house at Salisbury, and a manor of 600*l.*—That Blandina lay in the earl's house half a year, and was a common whore.

FITZ-PATRICK's second Examination.

That the lord Audley made him lie with him at Founthill and at Salisbury, and once in the bed, and emitted between his thighs, but did not penetrate his body; and that he heard he did so with others.—That Skipwith lay with the young lady often, and ordinarily; and that the earl knew it, and encouraged him in it, and wished to have a boy by him and the young lady.—That Blandina lived half a year in my lord's house, and was a common whore.

EDMUND SCOT's Examination.

He deposeth, That Skipwith frequently knew the young lady, and that the earl knew it, and encouraged him therein.

FRY's Examination.

That Henry Skipwith and the young lady lay often together, and the earl in company; and that then the earl protested, that he would fain have a boy of his begetting.

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Then was read the young lady AUDLEY's Examination.

That she was married to her husband by a Romish priest in the morning, and at night by a prebend at Kilkenny; that she was first tempted to lie with Skipwith by the earl's allurements; and that she had no means but what she had from Skipwith; but she would not lie with Pawlet; he solicited her also to lie with one Green.—That the Earl himself saw her and Skipwith lie together divers times; and nine servants of the house had also seen it.

When the Earl solicited her first, he said, that upon his knowledge her husband loved her not; and threatened, that he would turn her out of doors, if she did not lie with Skipwith; and that if she did not, he would tell her husband she did.—That she being very young, he used oil to enter her body first: and afterwards he usually lay with her, and it was with the earl's privity and consent.

BRODWAY's Examination, who confesseth,

That he lay at the Earl's bed's feet, and one night the earl called to him for tobacco; and as he brought it in his shirt, he caught hold of him, and bid him come to bed, which he refused; but to satisfy my lord, at last he consented, and came into the bed on my lord's side: then my lord turned him upon his wife, and bid him lie with her, which he did; and the earl held one of her legs and both her hands, and at the last (notwithstanding her resistance) lay with her.—Then the earl used his body as the body of a woman, but never pierced it, only emitted between his thighs.—He hath seen Skipwith lie with the young lady in bed together; and when he had got upon her, the earl stood by and encouraged him to get her with child: and that he hath made him the said Brodway kiss his own lady, and often solicited him to live with her, telling him, that he himself should not live long, and that it might be his making; and that he hath said the like to Skipwith.

The EARL's second Examination.

The Earl desired to be pardoned of those things whereof he must accuse himself, and said, 'That condemnation should not come out 'of his own mouth.'

These Testimonies being read, Mr. Attorney pressed things very earnestly, and in excellent method against the Earl, and said,

My lords; you have seen the clearness of the Proofs, and I know your wisdoms to be such, as you well know in so dark a business clearer proofs cannot possibly be had; for let a man be never so wicked, or never so impudent, he will not call Witnesses to see his wickedness: yet you see here this point fully proved.

Then he shewed how both the laws of God and man were against Sodomy, and cited Levit. 18, towards the end, 'That by these Abomi-'nations the land is defiled; and therefore the 'Lord doth visit this land for the iniquity 'thereof.' And then concludes; That God may remove and take away from us his plagues, let this wicked man (saith he) be taken away from amongst us.

Then the Earl (after the Lord Steward had told him he should be heard in his own Defence, with as much patience as was admitted in his Charge) entered into his own Defence. But the Lord Steward advised him to speak pertinently; whereupon he alledged, that he was a weak man, and of ill memory, and therefore desired that he might not be interrupted.

1. Then he began his defence with exceptions against his wife, urging, that she was naught and dishonest with Brodway, by her own confession.

Whereupon my Lord Steward answered, That this made against his lordship; therefore he ought not to alledge for his Defence that fact, as an imputation to his wife, which he forced her unto by compulsion and violence.

2. Then he objected against the Incompetency of the Witnesses, as the one his wife, the other his servants; and they drawn to this by his son's practice, who sought his life: and desired to know, if there were not a statute against the Incompetency of Witnesses?

The Judges resolved him, that there was none touching Witnesses; but in cases of High-Treason, there was a statute concerning Accusers.

3. Then he desired to be resolved, whether, because Brodway doth not depose any Penetration, but only that he emitted upon her belly while the earl held her, that should be judged Felony as for a Rape?

The Judges resolved it to be a Rape, and so consequently to be Felony.

4. Then he desired to be resolved, whether his wife is to be allowed a competent Witness against him, or not?

The Judges resolve, That in civil cases the Wife may not; but in a criminal cause of this nature, where the wife is the party grieved, and on whom the crime is committed, she is to be admitted a witness against her husband.

Then the Lord High-Steward desired the lords the Judges to resolve the questions which Mr. Attorney in his Charge submitted and referred to their judgments.

1. Whether it were to be accounted Buggery within the statute, without penetration? The Judges resolve, that it was; and that the use of the body, so far as to emit thereupon, makes it so.

2. Whether, it being proved that the party ravished were of evil fame, and of an unchaste life, it will amount to a Rape? The Judges resolve it to be a Rape, though committed on the body of a common strumpet; for it is the enforcing against the will which makes the Rape; and a common whore may be ravished against her will, and it is Felony to do it.

3. Whether it is adjudged a Rape, when the woman complaineth not presently? And, whether there be a necessity of accusation within a

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convenient time, as within 24 hours? The Judges resolve, That inasmuch as she was forced against her will, and then shewed her dislike, she was not limited to any time for her complaint; and that in an Indictment, there is no limitation of time, but in an Appeal there is.

4. Whether men of no worth shall be allowed sufficient Proofs against a baron, or not? The Judges resolve, that any man is a sufficient witness in case of Felony.

Then the Lord Steward spake, and said; My lord, you have been graciously dealt with in this proceeding, for it is not an usual thing in so capital and heinous causes as this, to bring the party and witnesses face to face before trial: but, my lord, you have long before this time heard their Examinations, and questioned and opposed them face to face; and are thereby the better enabled to make your Defence; and his majesty is still graciously pleased to continue his goodness towards you, and hath commanded that you should be heard at full: if therefore you have any thing else to say for yourself, speak it.

Whereupon the Earl answered, (having first made a solemn Protestation of his Innocency, but nevertheless implored the mercy of God and the king) That he had nothing more to say, but left himself to God and his peers, and presented to their consideration three Woes:

1. Woe to that man, whose Wife should be a Witness against him!

2. Woe to that man, whose Son should persecute him, and conspire his death!

3. Woe to that man, whose Servants should be allowed Witnesses to take away his life!

And he willed the lords to take this into their consideration; for it might be some of their cases, or the case of any gentleman of worth, that keeps a footman or other, whose wife is weary of her husband, or his son arrived to full age, that would draw his servants to conspire his father's death.

He said further, his wife had been naught in his absence, and had had a child, which he concealed to save her honour.

That his son was now become 21 years old, and he himself old and decayed; and the one would have his lands, and the other a young husband: and therefore, by the testimony of them and their servants added to their own, they had plotted and conspired his destruction and death.

And then (being thereunto required by the Lord Steward) he withdrew himself from the bar.

Then the Lord Steward (after solemn proclamation of silence) addressed himself to the lords, and said: My lords the peers, your lordships have heard the Proofs, the Prisoner's Defence, all his Doubts and Questions resolved by the lords the Judges; and therefore your lordships, if you please, may withdraw yourselves, if you are satisfied; because the Prisoner is not to be called to the bar again, until your lordships are agreed upon the Verdict.

Then the peers withdrew themselves; and after two hours debate, and several advices and conferences with the Lord Chief Justice, whom they sent for, and consulted with four several times; having in that time also sent the earl of Warwick, and viscount of Dorchester, together with the Lord Chief Justice, to consult with the Lord Steward, at the last they returned to their places: and then the Lord Steward asked them one by one, beginning at the lowest, and so ascending;

1. Whether the said earl of Castlehaven was Guilty of the Rape whereof he stood indicted, or not? And they all gave him Guilty.

2. Whether the said earl of Castlehaven was Guilty of the Sodomy with which he was charged, or not? And fifteen of the lords condemned him, and the other twelve freed him.

THE SENTENCE.

When the Verdict was thus given, the lieutenant of the Tower was again commanded to bring the prisoner to the bar, to hear his Sentence; and after he was brought in, the Lord Steward said unto him:

Forasmuch as thou Mervin lord Audley, earl of Castlehaven, hast been indicted for divers Felonies, by three several Indictments; one for a Rape, the other two for Sodomy; and hast pleaded Not Guilty to them all, and for thy Trial thou hast put thyself upon God and thy peers; which trial thou hast had, and they found thee Guilty of them all: What canst thou say for thyself, why the Sentence of Death should not be pronounced against thee?

Whereupon he answered, He could say no more, but referred himself to God and the king's mercy.

Then the Lord Steward said, My heart grieveth for that which my tongue must utter; but justice is the way to cut off wickedness, and therefore hear thy Sentence.

Thou must go from hence to the prison from whence thou camest, and from thence to the place of execution, there to be hanged by the neck till thou be dead, and the Lord have mercy on thy soul.

The Lord STEWARD's Exhortation.

Oh think upon your offences! which are so heinous and so horrible, that a Christian man ought scarce to name them, and such as the depraved nature of man (which of itself carries a man to all sin) abhorreth! And you have not only offended against nature, but the rage of a man's jealousy! And, although you die not for that, that you have abused your own daughter! And having both honour and fortune to leave behind you, you would have had the impious and spurious offspring of a harlot to inherit! Both those are horrid crimes. But my lord, it grieves me to see you stand out against the truth so apparent; and therefore I will conclude with this admonition, That God might have taken you away when you were blinded

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in your sins, and therefore hope he hath reserved you as a subject of his mercy: and as he sends you to see this day of shame, that you may return unto him, so thereby in a manner he lovingly draws you to him: therefore spend the remainder of your time in tears and repentance; and this day's work, I hope, will be a correction from many crimes and corruptions.

Whereupon, at last, the Earl descended to a low Petition to the lords, and very humbly besought them to intercede with his majesty, that he might not suddenly cut him off, but give him time of repentance. And then he desired their lordships pardons, in that he had been so great a stain to honour and nobility.

Then a Proclamation being made by a serjeant, declaring, That the lord High-Steward's pleasure was, that all such as had attended this day's service might depart; the lieutenant of the Tower carried the earl away, and the court broke up.

THE EXECUTION.

In pursuance of the Sentence, a warrant was issued for his Execution upon Saturday the 14th of May following; notice whereof was given him, and his coffin carried into the Tower about a week before, that he might the better prepare himself for death: The dean of Paul's, doctor Winerfe, failed not daily to visit him, and to see how he stood, and to settle him in his religion.

Being brought to the scaffold, attended by the dean of Paul's and Dr. Wickham, together with his servants, he saluted the noble personages, and whole assembly, shewing to them all a very noble, manly and chearful countenance, such as seemed no ways daunted with the fear of death. After a short while shewing himself to the people, he addressed himself to prayer, the deans accompanying him in that exercise, but somewhat apart; which being not long, he stood upon his legs, and leaned upon the two deans, conferring with them. Then he turned to the Lords, and spake to this effect:

"I acknowledge with thankfulness the great goodness of Almighty God, that it hath pleased his divine majesty to bestow on me many endowments, as honour, riches, and the like, which I have mis-spent; having been a vicious liver, and justly deserved death, for as much, and in that the least sin at God's hands justly deserveth death, and no less; but for the two heinous crimes with which I am branded, condemned, and here to suffer for, I do here deny them upon my death, freely forgiving those that have accused me, and have been the occasion of my death, even as freely as I myself do desire forgiveness at God's hands, which I hope to obtain through his infinite goodness and mercy; and somewhat the rather, by your Christian prayers, which I expect, and humbly beg of your lordships and this whole assembly. Now for as much as there hath been speech and rumour of my unsettledness in my Religion, I have, for explanation thereof, not only made Confession of my Faith to these two worthy doctors, but for better satisfaction to the world in that point, express the same in writing under my hand signed; which as it is here set down, I desire may be publicly read."

The Confession of his Faith then was read by a young gentleman, with a loud voice, wherein he professes he dies in the faith of the church of England.

After which he proceeded: "I acknowledge the great justice and mercy of the king's majesty; his justice in bringing me to the bar; and his mercy in affording me such a noble and gracious Trial there: and I give his majesty humble and hearty thanks for assigning my death to be in this manner, contrary to the Sentence pronounced against me at my arraignment. But there is a greater favour than this, for which I am to render thanks unto his sacred majesty, and that is, the long time I have had to repent in; whereof (praised be Almighty God) I can speak with comfort, I have made good use, and am now fully prepared for death, and much the better, by the good help and instruction of these two worthy men, to whom I acknowledge myself bounden, and do here, before you all, give them hearty thanks for their great pains taken in coming to me, praying for me, and preaching and reading to me.—And I desire your lordships to present my humble acknowledgment to his majesty, for his goodness in sending them to me, and my thanks for the same.—I do also from my heart desire and beseech Almighty God to bless the king's majesty, the queen, and the young prince, together with all such other issue as he shall hereafter in mercy bestow on them, and the whole state; and my trust and desire is, there may be ever one of their line to sway the scepter of these kingdoms to the world's end.—And I beseech, and do heartily pray for the welfare and happy prosperity of the king and queen of Bohemia, with all their princely issue. I do again desire your lordships to make tender of my humble acknowledgement of his mercy and goodness.—And now lastly, That you will not bend your eyes so much upon me, as your hands and hearts to heaven in prayers for me; and so I take my last farewell of your lordships and the world."

Then he went again to his private prayers; which being done, he prepared himself for death, striving to shew the like courage and magnanimity which he had formerly done, unto the last: but sight of the headsman (whom yet he freely forgave, and took him by the hand, bidding him do his office manfully) together with the apprehension of his near approaching end, made him somewhat to change colour, and shew some signs of trembling passion; for his hands shook a little in undoing his band-strings; which his man perceiving, stept to him and helpt him, as also off with his doublet. Then taking leave again of the lords, the doctors, and his man, saying a very short prayer by himself, he pulled down his handkerchief over his face, and laid his head upon the block; which was taken off at one blow.

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138. The Trial of Lawrence Fitz-Patrick and Giles Broadway, two Servants of the before-mentioned Lord Audley, Earl of Castlehaven, at the King's-Bench, for a Rape and Sodomy: 7 Charles I. A. D. 1631. [2 Rushw. Coll. 102.]

On Monday the 27th of June 1631, the marshal of the King's-Bench brought Fitz-Patrick and Brodway to the bar, where was a jury of sufficient and able Wiltshire men, impannelled to go upon and try them.

The countess of Castlehaven herself was in court, to give Evidence against Brodway; and she came in upon the instant, when the Lord Chief Justice (sir Nicholas Hyde) demanded of her, Whether the Evidence she had formerly given at her lord's Arraignment was true, and the full matter of Charge she had then to deliver against the Prisoner? Whereupon she answered, It was.—My lord said: Madam, you have sworn that Brodway, prisoner at the bar, hath lain with you by force, which may be, and yet no act committed: Did he enter your body? She said, That in her former oath taken, when she testified he lay with her by force, her meaning was, that he had known her carnally, and that he did enter her body*.

Then was she wished to look on the Prisoner: unto which motion and commandment she made a short reply: That although she could not look on him, but with a kind of indignation, and with shame, in regard of that which had been offered unto her, and she suffered by him, yet she had so much charity in her, and such respect to God and his truth, that she had delivered nothing for malice: and therefore hoped that her oath and evidence thereupon should be credited: and so desired to be believed and dismissed. Which being granted, she departed with as much privacy as might be into her coach.

Fitz-Patrick being asked concerning his guiltiness or innocency, demanded, who were his accusers? The Lord Chief Justice answered, You have accused yourself sufficiently. Fitz-Patrick replied, That he thought neither the laws of the kingdom required, nor was he bound to be the destruction of himself: what Evidence he had formerly given, was for the king against the earl, and no further.

The Lord Chief Justice replied, It was true, the law did not oblige any man to be his own accuser; yet where his testimony served to take away any one's life, and made himself guilty of the same crime, therein it should serve to cut him off also.

Then the Jury demanded of the Court satisfaction concerning the words of the Statute, which run, 'To charge him alone to be, and accounted a felon in law, that committed a Buggery with man or beast.' (Of which fact the late earl was found guilty, and had suffered.)

The Lord Chief Justice replied, That forasmuch as every accessary to a felon is a felon in law; so he being a voluntary prostitute, when he was not only of understanding and years to know the heinousness of the sin, but also of strength to have withstood his lord, he therefore was so far forth guilty.

Whereupon the Jury found the bill, and the Sentence of Death was passed on them both; and they were delivered and committed to the sheriff of Middlesex, who, after he had suffered them to have some repast at Mr. Hill's in the Palace Yard, and conference with their friends, carried them to Newgate, where they behaved themselves civilly and religiously.

As soon as they were found guilty, the Judges of the Court wrote this Letter to the Lord Keeper to prepare him for the king.

"Right Honourable; May it please your lordship to be informed, That this day Giles Brodway and Lawrence Fitz-Patrick were tried before us in the King's-Bench, for the several offences of Rape and Buggery, of which they were indicted, and they have received Judgment of Death: but we forbear awarding Execution, upon a message sent from your lordship by sir Thomas Fenshaw, of his majesty's pleasure for the stay of Execution, until further direction from his majesty: but conceiving there is great cause to put the malefactors to execution, we thought it our duty to acquaint your lordship with the passages of the Trial; that his majesty by your lordship's means being made acquainted therewith, may signify his further pleasure.—Brodway, who was arraigned for the Rape, very imprudently denied his own Confession, taken before the lords the peers in the Trial of my lord Audley: he pretended he was amazed, and knew not what he subscribed; and professed himself guiltless, with great execrations. He would not be satisfied, unless the

* Emission is necessary to constitute a rape. So ruled by eight judges, though indeed it does not seem perfectly clear what was lord Mansfield's opinion, cont. lord Loughborough C. J. of C. B. Buller J. of B. R. and Heath J. of C. B. (Perryn B. absent) in the case of Hill tried at Lincoln assizes in 1781. See East's Crown Law tit. Rape, where an account is given of previous opinions on this point. In practice, direct proof of emission is not required. It may be inferred from circumstances. Note, It seems that Mr. East was not aware that the earl of Castlehaven and lord Audley was the same person. The earldom of Castlehaven was an Irish peerage, which in 1777 became extinct on the death of the last Earl, for want of male descendants, claiming through males only from the first earl. The English honour of Audley, being a barony in fee, is inheritable by females, and still subsists.

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lady was produced face to face, which she was; who by her oath, *viva voce*, satisfied the auditors, both concerning the truth of the fact and his own impudence.—Fitz-Patrick, who was arraigned for the Buggery, confessed his Examination to be true; but like one very ignorant, or rather senseless, would have them true against the lord Audley, and not against himself, which was impossible: he pretended he was promised security from danger, if he would testify against the lord Audley; and so sought to raise a suspicion, as if he had been wrought upon, to be a witness to bring the lord Audley to his end. They were both found guilty, to the full satisfaction of all that were present; and we for our parts thought it to stand with the honour of common justice, that seeing their testimony had been taken to bring a peer of the realm to his death, for an offence as much theirs as his, that they should as well suffer for it as he did, lest any jealousy should arise about the truth of the fact, and the justness of the proceedings. But upon receipt of your lordship's Message, we have stopped the Execution till his majesty's further pleasure be known; to which we shall humbly submit ourselves, and rest at your lordship's command, N. Hyde, W. Jones, J. Whitlock, G. Croke."

The king by this means being truly informed how things stood, signified his pleasure, that they should be executed, but to have a week's time for repentance.

On Wednesday, the 6th of July 1631, they were brought to Tyburn; where, when the executioner had tied the halter about Fitz-Patrick's neck, he said:

"Forasmuch as I am here, and, as it were, upon the instant to suffer death, I desire all loving subjects and members of the church of Rome to pray for me." Then he proceeded to pray to our Saviour, his Mother, and the Saints; in which he was interrupted by some gentlemen, who told him, that the beginning of his prayer was good, for that he offered it to Christ Jesus, in whom only salvation is to be found; as for the Virgin Mary, and the Saints, they could do him no good. But notwithstanding he persisted, saying, "O yes, the blessed Virgin never forsook or failed any that trusted in, or called upon her; and therefore he would depend upon her and the rest of the Saints; and so proceeded to an exhortation to Mr. Brodway, to cleave to the same opinion, and die in the Romish faith; for which to have him do, he said, if he had it, he would give the whole world." Unto which motion Brodway gave no answer, or seemed not to regard it. "Then he proceeded to shew how he had been examined by my Lord Chief Justice touching the corruptness of my lord of Castlehaven's life, wherein he said he confessed nothing to prejudice the said earl.

"That being within three days after sent for before the lords of the council, my lord Dorset had entrapped and ensnared him to his destruction; for saying upon his honour, and speaking it in the plural number (as the mouth of the whole board) that whatsoever he delivered should no ways prejudice himself, he thereby got him to declare the earl guilty of the sin of Buggery; wherein himself being a party, was the only cause he came now to suffer death: for which his lordship's skill and policy in sifting him, together with a dispensation of his promise and oath, he freely forgave him; saying farther, the said lord had done him no wrong, because he therein was but an instrument to send him out of this world into a better. Then he demanded of the company, if the earl denied the sin at his death; and wished my lord had not (if he did) for it was too true; his lordship had both buggered him, and he his lordship. That it was true (for some private discontentment) he bore a little malice to the earl and Skipwith, for which he asked God forgiveness. That for Brodway, if he had done any thing to the countess, he did it not out of his own ill corrupt nature, but was provoked and persuaded to it by the earl:

"He cleared the young lord, as never being any occasion or means of his father's death, in hiring, or persuading him to give evidence, as he had done. He confessed he had lived an ill life, in that he had delighted in drinking, whoring, and all manner of uncleanness; but now, as he was heartily sorry, so he doubted not of mercy of Almighty God, to pardon and forgive him all his sins, through and for the merits and mediation-sake of Christ Jesus, the blessed Virgin, and the Saints in Heaven.

"That he had fallen or run into these sins, (and especially that which he came to die for) by reason he had neglected, and not so duly, as he should have done, repaired to his ghostly father, to make confession, and take instructions from him. That after he did make confession and his sins known to the priest, he was not only sorry for them, but also resolved never to come into my lord's house again; but it was through frailty, and because he was not furnished of another place."

So turning again to Brodway, and persuading him to embrace the Romish faith, wherein, as he perceived, his labour was in vain, so the sheriff and other persons of quality willed him to forbear, and shut up his discourse, unless he had any thing more to say to the purpose. Whereupon praying for the king, queen and state, he betook himself to private prayer, and therein for the most part continued to his death.

Brodway came, (and as it was thought by the company, a true penitent) and after fetching a deep sigh at the sight of the tree, he lifted up his eyes and hands towards Heaven, making and saying to himself two short prayers; so attending Fitz-Patrick's discourse, he sat in private meditation, often making it manifest he was in prayer most of the time, and also rejoicing at the assembly's well wishing of him, for which he returned smiles and thanks. His time being come to stand up and have the halter put about his neck, and so declare himself, he willingly suffered the one, and proceeded to the other. First asking Fitz-Patrick if he had

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done, he pulled a sheet of paper out of his pocket; which being writ broadways, he could not spread it to read, therefore desired to have his hands untied; which was done, and he read it distinctly, to the assembly; the effect whereof was, to declare himself guilty, in the sight of Almighty God, of death and damnation; for that he had broke all the commandments, in thought, word, and deed, and sinned in pride of life, lust of the eye, conceit of his own beauty, matchless strength, and other natural gifts, in desire of revenge, not pitying the poor, unlawful riches, not repairing to sermons, not observing the Sabbath, &c. For all which, and other his sins whatsoever, he both desired of, and trusted in God for pardon, and that through and for the only merits of our Saviour Christ Jesus, his bitter death and passion. He expressed a strong assurance, which his very soul had, of forgiveness, in that, through the assistance of the Holy Ghost, he had laid such hold on Christ as he had done. This paper-writing contained the confession and prayer; also (as I remember) something of his slender guiltiness and desert of death, but not so much. Then delivering his to the sheriff, he opened a little book, intitled, 'Learn to die,' and desired the company to join with him; so reading over three short prayers, the last whereof was composed only of confession, and for pardon, which prayer he pronounced with great comfort, at every Amen clapping himself on the breast; he closed it up, and gave it to his ghostly father, a minister and kinsman of his, who came along with him on horseback close by the cart. Then he pulled out a little paper, which contained a prayer of his own making; and when he had read it, and every one joined with him in the Amen, he commended it also to the sheriff; and then throwing away his posy of flowers, he roused himself and said to this effect:

"Gentlemen, though true it is, what I formerly have delivered touching my guiltiness and desert of death, my meaning was, and is, only in respect of my sins towards God, and no further for breach of the laws of the kingdom, than only lying once with the lady Castlehaven, through persuasion of the earl, who was then in bed with her: and using some small force for the purpose, I did emit, but not penetrate her body. I came not to my lord with a desire or intent any ways to serve him, but was rather inclined for the sea: only Mr. Skipwith had drawn me thither for society-sake: and not hearing from my friends concerning my intended voyage, and being more kindly respected by the earl than I looked for, I staid from week to week, and from month to month, contrary to my intention. Then my lord, making me his bed-fellow, did one day, when Skipwith was with him in the garden, (but walking somewhat apart) break out in speeches to me to this purpose: Brodway, thou art young, lusty, and well favoured, and therefore canst not but prevail with any woman thou attemptest: wherefore for that I am old, and cannot live long, my wife wholly delighting in lust, which I am neither able nor willing to satisfy, thou mayest do well to lie with her: and so pleasing her, after my death marry her, and thereby raise thy fortune. Fitz-Patrick knows my lord had solicited me again and again, hearing him use this language when we have been in bed together, and he lying at the bed's feet." Which to clear, he charged Fitz-Patrick to speak his knowledge; who replied, "'Twas true." Then he was asked by one of the lords, "Whether when my lord solicited him, my lady desired to have him know her carnally?" To whom he said, "No, he would not wrong her, though she hated him infinitely: But," said he, "I know well, if I were minded, and able to proffer, she would not say nay: for Mr. Skipwith and Amptil lay with her commonly."

He added, "That Skipwith confessed to him he had often known her, and gotten a child upon her, which she, like a wicked woman, had made away: which was the only and sole occasion he the said Skipwith now hated her, and therefore had turned to the young lady Audley; all which he presumed Skipwith would confess upon his oath. That the countess was the wickedest woman in the world, and had more to answer for than any woman that lived, as he thought." 'At which words, that Lord which asked him the former question, said, Grow not into a passion, Mr. Brodway, and speak nothing for malice. He answered, "God forbid I should, I am in charity with all living people, and do as freely forgive my lady Castlehaven, as I do desire God to forgive me: but what I speak, is true, as I shall presently answer before him that redeemed me, and the Holy Ghost who sanctified me: To whom be all honour and glory, now and for evermore. Amen."

Then he proceeded farther, and said, "That my lord would have had him done it long before: for one night coming to him to his bedside, he caught him, and bid him come to bed to him and his wife: that thereupon he made to him as if he would; but being got from him, departed the chamber, never intending to do so foul a deed; and that for the reasons aforesaid he hated her of all women living: Howbeit, that one time, satisfying my lord's desire, he came to bed to them, where (being gratified) nature provoked him to a kind of desire, and he emitted, but did not enter her body, as he hoped for salvation; that he never knew any woman carnally whilst he lived in my lord's house.

"That it was not his intentions to bring to light either my lord's or my lady's shame; but that when he was upon his oath he could not but speak the truth, his nature being never prone to lying; or if it were in his youth, the good correction of his parents had weaned him from it, saying, that his mother had often told him the old Proverb, 'A lyar is worse than a thief;' and he thought he had more stripes for that than all faults else whatsoever: that he had, as he hoped, spoke nothing of moment

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against my lord at his arraignment; he could not now remember every thing; if he had, he desired pardon." And so concluding his Speech, prepared himself for death; pulling out a laced handkerchief, he desired the executioner to tie it about his head. Then pulling off his garters, and unbuttoning his doublet, Mr. Goodcoale, the minister, asked him, if he would not have a Psalm. He said, Yes, with all my heart. Then he read the 143rd psalm; which Mr. Broadway, pulling up the handkerchief, sung very chearfully, never changing colour at all. The minister desired him to make confession of his faith; so he pronounced aloud the belief.

Mr. Goodcoale said, These are the Articles of the Christian Faith according to the Church of England, into which faith you was baptized; pray signify whether in that faith you intend to die? He said, Yes; for there is no other faith, (as I suppose) in and by which a man can be saved. Then he made request to the sheriffs and those of his kindred there, that he might be buried in his own country. It was then told him, that it was granted, and order taken to have it so, wherefore he should now mind his prayer. When his kinsman asked him, if he had never another prayer in his pocket? he said, No. Then asked Mr. Goodcoale, if he would say after him? And he said, Yes, with all my heart; but first he desired the executioner to tie his hands again. Which being done, Mr. Goodcoale said a short prayer to recommend his soul and body to Almighty God, in and for the merits of Christ's death and passion: to which Brodway and the people said Amen. Then lifting up his hands to Heaven, he said, 'Lord Jesus receive my spirit, and the cart was drawn away.'

Fitz-Patrick lifting up his hands, and commending himself to God, was executed in like manner.

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139. The Trial of JAMES Lord UCHILTRIE, for Calumnies and slanderous Speeches against James Marquis of Hamilton; and the Earls of Haddington, Roxburgh, and Buccleugh, tending to the sowing of Sedition betwixt his Majesty and the said Noblemen, at Edinburgh: 7 CHARLES I. A. D. 1631. [From an authentic MS.]

Curia Justiciariæ S. D. N. Regis tenta in pretorio burgi de Edinburgh, ultimo die mensis Novembris, A. D. millesimo, sexcentesimo, trigesimo primo, per honorabiles et discretos viros, Magistros Alexandrum Colville de Blair, et Jacobum Robertoun Advocatum, Justiciarios deputatos nobilis et potentis domini Willielmi comitis de Stratherne et Monteith, dom. Grahame, Kilbryde, et Kynpont, præsidis secreti Concilii et Justiciarii generalis Dom. S. D. N. Regis totius regni sui Scotiæ, ubilibet constitut. sectis vocatis et curia legitime affirmata.

Intran'

JAMES Lord Uchiltrie delaitit of the making of Leasings, Calumnies and slanderous Speeches against James marquis of Hamilton; the earls of Haddington, Roxburgh, and Buccleugh; tending to the sowing of Sedition betwixt his majesty and the said noblemen, his majesty's loyal subjects; in form and manner specifyed and set down in his Dittay.

Pursuer, sir Thomas Hope of Craighall, knight and baronet, Advocate to our sovereign lord for his highness's entries.

My Lord Advocate produced an Act of secret council, commanding him to pursue James lord Uchiltrie, now entered upon pannel for the crimes contained in his Dittay, of the which Act of Council the tenor follows:

'Apud Hallyrudhouse vicesimo 2do die 'mensis Novembris A. D. millesimo, sexcentesimo, trigesimo primo.' 'Forasmekill as the 'king's majesty, by his letter directed to the 'lords of his privy-council, having signified his 'royal pleasure and direction, that James lord 'Uchiltrie, whom his majesty has sent home 'to be kept in close ward, shall be tryed and 'censured according to the laws of this king-'dom, for some Informations given by him, re-'flecting upon some noblemen and counsellors 'of the same, before what judicatory and judges 'the said lords should think fit and competent 'for that purpose: and his majesty having, to 'that end, sent down to the said lords some 'Depositions under the lord Uchiltrie's own 'hand; and the authentic copies of others, 'whereof the principals are retained by his ma-'jesty, because they likewise concern other 'persons. And the said lords having read and 'considered the same Depositions, and having 'taken into their consideration, which is the 'most proper Judgment for trying and censur-'ing of matters of this kind; they have all 'with one voice found, and by the tenor of 'this act, finds and declares, That the Trial 'and Censuring of the said lord upon the 'particular aforesaid, is most proper and com-'petent to be followed out before his majesty's 'justice: and therefore ordains sir Thomas 'Hope of Craighall, knt. his majesty's Advo-'cate, to form and draw up the said lord Uchil-'trie's Dittay; and to pursue him criminally 'thereupon, before his majesty's justice, upon 'the last day of November instant; and or-'dains his majesty's said Advocate to give a

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'just copy of the Dittay to the said lord 'Uchiltrie, betwixt and the 24th of November 'at night; to the intent he may have time to 'be advised therewith, and to consult his Advo-'cates, anent his lawful defences competent to 'him against the same. Anent the doing 'whereof, the extract of this Act, shall be unto 'his majesty's said advocate a warrant, 'Ex-"tractum de libris actorum secreti concilii "S. D. N. Regis, per me Jacobum Prymrois "Clericum ejusdem sub meis signo et subscrip-"tione manualibus, sic subscribitur James "Prymrois.'"

After production and reading of the which Act of Council, my Lord Advocate also produced his majesty's Letter, directed to the lords of his majesty's privy-council of this kingdom, dated the 24th of Sept. 1631, together with two Depositions of the lord Uchiltrie's, the one dated the 20th of June 1631, the other upon the 24th of June 1631. Then three several Depositions made by Donald lord Rea, whereof two thereof dated upon the 21st of June 1631, and the third upon the 24th of June 1631, all true copies thereof under the hands and subscription of the Committee of the Council of England. Of the which Depositions and Letter above-written, directed by his majesty to the council; the tenor follows. In the first, the deposition made by James lord Uchiltrie upon the 20th of June 1631.

Copia vera. The Examination of James lord Uchiltrie, taken the 20th of June 1631.

The said Examinant saith, That on or about the 6th or 7th of May last, at the sign of the Bear near the Bridge-foot, the lord Rea told this examinant, that soldiers and travellers did often hear those things, whereof those that staid at home had no notice; and said, he did believe there was a plot against this land. This Examinant wished him, if he had any good grounds so to think, that he should not fail to discover it. The lord Rea said, he had no certain ground, but if he had stayed but five weeks longer in the Low Countries, he would have known the certainty; and that he would have hazarded his life but he would have had the certainty. The 13th of May the lord Rea came to this Examinant's chamber, and there putting this examinant in mind of the former speech between them, he told this examinant, that he had learned more certainty then ever he had before since the time of their last speech; whereupon divers passages were between his lordship and this examinant, about the discovery of it, and the manner. In the end his lordship told this examinant, that the purpose of the marquis of Hamilton's Levies (as divers of his commanders and followers had informed him the said lord Rea) was, that either they should not go out of England and Scotland, or if they did, they should return to England or Scotland, and surprize the king's houses in Scotland, viz. the castles of Edinburgh, Striveling, and Dunbarton; and fortify themselves in Leith, under pretence of training; and should take Berwick, and so march forward into England. And this Examinant asking what could be their intention so to do; the lord Rea said, that he was informed they meaned to take the king's person, and to immurate him, to send the queen into a cloister, and to captivate the young prince with his father, and to strike off the heads of all the principal men about the king, both English and Scots: and in particular the Lord-Treasurer of England, the earl of Monteith, sir William Alexander, and sir Thomas Hope. And this examinant saith, That before the lord Rea discovered the particularities aforesaid to this examinant, this examinant using persuasions to him to reveal it, asked the lord Rea what it might be, saying, it was either a French or a Spanish faction. To which the lord Rea said, It was neither; but told this examinant what it was, and so revealed the particulars abovementioned. Whereupon the lord Rea being fully resolved to proceed to a further discovery, and thinking it fitter to be done by this examinant than by himself, lest those whom it concerned might sooner suspect it, desired this examinant to acquaint his majesty or the Lord-Treasurer therewith.

On the morrow, being Saturday the 14th of May at night, this Examinant came to have spoken with the Lord-Treasurer; but his lordship being gone to bed, by his appointment, this examinant came the next morning, and told him, he had somewhat to reveal that concerned his majesty, and all his kingdoms and posterity. The Lord-Treasurer thereupon went instantly up to the king, and after, the same day, told this examinant, that his majesty had given him commission to hear this examinant's relation. This examinant further saith, That the lord Rea told this examinant, that he had much of this beyond sea from Robert Meldrum and David Ramsay. But since his coming into England (as he said) he had spoken with sir James Ramsay, sir James Hamilton, col. Alex. Hamilton and captain Douglas, and had gotten somewhat out of every one of them: he also said, he had spoken with the lord Seaforth, and understood somewhat from him.

On Monday the 16th of May, this Examinant attended the Lord-Treasurer at Whitehall; and entering into a relation, in the very beginning discovered, that the matter which he was to relate concerned the lord marquis of Hamilton and his actions; which so soon as he had named, the Lord-Treasurer commanded him to say no more, until he had acquainted the king again; but wished this examinant that he and the lord Rea should go presently to Greenwich, where the Lord-Treasurer would meet them. But the king being come towards Whitehall, this examinant and the lord Rea came back again, and were then appointed by the Lord-Treasurer to attend his majesty on Thursday at ten o'clock, which they did. The examinant further saith, That on Monday the 16th of May, this examinant delivered to the Lord-Treasurer a List of Names, to represent

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to his majesty the strength of the lord Hamilton's party and adherents in Scotland. At this examinant's coming to his majesty, this examinant told the king, that the business was a Treason intended against his majesty, and the party was the marquis of Hamilton, as this examinant was informed; and that it was the filthiest treason that ever was intended, and was sorry that any Scottish man should have a hand in it, for it was a shame to the whole nation. And then the lord Rea himself coming in, made relation to his majesty, who remitted him to the Lord-Treasurer; whereupon this examinant coming to the Lord-Treasurer, and telling him the king had remitted the lord Rea unto him; the Lord-Treasurer wished, that the lord Rea would put his relation in writing. Whereupon the lord Rea and this examinant went together, and sat up all night; and the lord Rea first putting it into writing, this examinant wrote it out of the lord Rea's papers, who on the morrow brought the same to the Lord-Treasurer: but this examinant was not then present; but the next time that he came to the Lord-Treasurer's, being asked by him whose the hand-writing was, this examinant said, it was his own hand; and the Lord-Treasurer telling him that the lord Rea had not subscribed it, this examinant said, he would without doubt subscribe it. And about two days after he brought the lord Rea to the Lord-Treasurer, who read over the whole writing, and subscribed his name to it, saying, he would seal it with his blood.

This Examinant further confesseth, That he told the Lord-Treasurer, that the lord Rea told him he had yet more, and would say so much, that the marquis should not have the face to deny it: which the lord Rea then present affirmed; insomuch as the Lord-Treasurer said, Then is the business at an end, there needs no writing.

This Examinant further saith, That on the Sunday morning, when the marquis of Hamilton came out of Scotland, the lord Rea told this examinant, that he had spoken with the lord Seaforth, who assured him their purpose was to take the king, the queen, and the prince; and this examinant asking how they should effect it, the lord Rea replied, The lord Seaforth had told him, they were great with the earl of Dorset, who had the custody of the prince. And this examinant further saith, That the lord Rea told him, that he was assured by my lord of Roxburgh, that the marquis and his company would hasten their purpose; and the lord Rea said, that surely the Hamiltons had taken some vent of the business, and that sir James Ramsay had told him, he had 1500 men in readiness upon an hour's warning, but they should not come about London till their business was ready withal; which this examinant the same morning acquainted the Lord-Treasurer, to the intent that his majesty might know thereof.

And further saith, That shortly after the lord Rea told him he had spoken with the lord Seaforth, who told him, that the matter which he had formerly told him concerning the earl of Dorset, was but a disguised thing.

This Examinant further saith, That on that Sunday morning he wished the Lord-Treasurer to advise the king, that he should go to London for more safety; and understanding the king had sent for the lord Rea, this examinant wished the lord Rea were not sent for, because the lord Rea was gone to the lord Seaforth's to learn more: And further saith, That the same time being in the end of the king's dinner, this examinant told the king in these words: 'Sir, 'now we know the business, but know not the 'time; and therefore, sir, either do or die.' -

Copia Vera. My Lord Rea's first Examination, 21st of June, 1631 *.

In the Examination of Donald lord Rea, taken the 21st of June, 1631, the said examinant saith, That having heard in Sweden from David Ramsay, such things as are contained in the written Relation which hath been delivered to his majesty; and before having heard in Pomerland those passages from Robert Meldrum which are in the same relation, this examinant having a resolution to come for England about December last, was stayed in Denmark by reason of the ice, so as he came not to Holland till about March last, where he had conference with David Ramsay, and heard from him such other passages as are contained in the same relation. And after coming into England, because David Ramsay had told this examinant, that he would write to the marquis of Hamilton, how far forth the said David Ramsay had treated with this examinant, this examinant expected that the marquis would have spoken thereof unto him; he did therefore forbear to say any thing thereof; yet about two or three days before the lord marquis went into Scotland, this examinant did speak to the lord Uchiltrie to this purpose: That his lordship was better acquainted than this examinant with the fashions and laws of this land; and desired to know what danger it was, if any man hearing beyond sea of things that might be dangerous to the king or state, should not speak of it. To which the lord Uchiltrie answered, No less than your head and estate. And this was all that passed between them at that time, being the first time they spake thereof; and the place was, as he thinketh, at the lord Uchiltrie's own lodgings.

He further saith, That about eight or ten days after, this examinant coming to the lord Uchiltrie's lodgings to talk of some other business, after speech thereof, spake to this effect: My lord, you remember I asked you a question awhile since, what the danger might be, not to speak of matters dangerous to the king or state, which he had heard beyond the seas, and I would now again have your advice therein: And the lord Uchiltrie promising his readiness

* See the Trial of Rea and Ramsay by Combat, No. 140.

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to advise him, so as he might be acquainted with the particular, this examinant told him, he would acquaint him with the particular, if he would swear not to discover it but as he should direct; adding, That if he did otherwise, this examinant would pay him. The lord Uchiltrie then said, and protested, That he would not discover any thing but as this examinant should appoint; whereupon this examinant declared the particular to him, who hearing it, told this examinant it was necessary to be revealed, and doubted lest this examinant had kept it too long already: But then this examinant said, Considering it concerned one so near the king as the marquis of Hamilton, he thought it not fit that this examinant should himself break it to the king, lest the king should at first reject it; but it would be fitter for some other to do it, and therefore desired his opinion how to discover it. The lord Uchiltrie, advising awhile, said, He thought it best it were discovered to some of the Privy-Council; whereupon this examinant said, That he would not discover it to any Scotsman, but thought it best to reveal it to the Lord-Treasurer, because he thought the Lord-Treasurer was no way in the Plot.

According to which resolution the lord Uchiltrie, as he after told this examinant, did, according as was agreed between him and this examinant, repair to the Lord-Treasurer the same night; but failing then to speak with him, he went the next morning, before this examinant saw him, and returning, told this examinant he had been with the Lord-Treasurer, and in general imparted to him, that he had a matter to discover which nearly concerned his majesty: And said further, it was no English business, but it was, to his own shame, he spake it, a Scottish business, neither was it any Popish Plot: And the Lord-Treasurer then refused to hear it, till he had warrant from the king.

After the lord Uchiltrie and this Examinant were appointed to wait on the king at Greenwich, whither this Examinant coming, found the lord Uchiltrie within with his majesty; and then this examinant coming in, made a full relation to his majesty; who asking this Examinant wherefore he had not himself told his majesty sooner of it, this examinant answered, That considering the nearness of the marquis of Hamilton to his majesty, this examinant was afraid lest his majesty would have been impatient towards this examinant; and besought his majesty to forgive this examinant, if he had thought he had done amiss therein. His majesty thereupon referred this examinant to the Lord-Treasurer, and bid this examinant put the Relation in writing. Whereupon that night this examinant and the lord U. sat up all night, and this examinant writing it first down, the lord U. wrote it sheet after sheet, out of this examinant's paper. And this examinant brought the same written relation to the Lord-Treasurer, and read it unto him, and left it with him. And a day or two after, this examinant and the lord U. came again together to the Lord-Treasurer; the lord U. having told him, that this examinant had forgotten to sign it; and then this examinant signed it, saying, he would make it good with his blood.

At which time this Examinant remembers the lord U. told the Lord-Treasurer, that this examinant had more to say yet, which this examinant did then also affirm; and the cause wherefore he did affirm it, was, because this examinant had spoken with the lord Seaforth, and had some particulars from him, which he did not particularly tell to the lord U. but affirmed to him in the general, that he could say no more; but a day or two after, this examinant went again to the lord Seaforth, and spake with him, and then he told the same, first to the lord U.

He further saith, That the lord Uchiltrie, on Sunday morning, told this Examinant, that he had been with the Lord-Treasurer, and had told him of the passages with the lord Seaforth, and of the marquis's return, and that he conceived it might be dangerous at that time for his majesty. But this examinant told him, he had done evil therein, for there was no such suddenness to be feared: and on the same Sunday in the afternoon, this examinant coming to his majesty, and hearing from him, that he had been advertised of somewhat importing matter of present danger; this examinant said, he had been with the lord Seaforth, but had not the certainty of things, but prayed his majesty to give him leave to go again to the lord Seaforth's, and then he would learn all. And at the same time his majesty telling what danger had been suggested to him, now upon the marquis's return: this examinant protested he knew nothing against the person of the marquis; but that he was, for aught this examinant knew, as good a subject as any the king had.

Copia Vera. My Lord Rea's second Examination the 21st of June 1631.

The said lord Rea, having deliberately heard read the Examination of James lord Uchiltrie, taken the 20th of this instant, doth acknowledge the same to be true in all points, so far as the same concerneth the knowledge, words or acts of this examinant, saving the explanations hereafter following: He saith, that as touching the conference between the lord U. and this examinant the 13th of May last, where it is therein mentioned that this examinant told him, that since the time of their last speech, he had learned more certainty than ever he had before; this examinant did not say, that he had learned more certainty since their last speech, for in truth he had not learned any thing within that time. But thinks he might say, that he had learned more certainty since he came to England than he had before; and therefore takes it, that the lord U. did mistake in that point.

And whereas in the same conference it is set down, that this Examinant should say that he was informed, that they meant to strike off the

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heads of all the principal men about the king, this examinant said, that he was informed they would strike off the heads of the Spanish faction; and that he named the Lord-Treasurer, the two bishops, the earl-marshal, the earl of Carlisle, sir Francis Cottington, the lord Monteith, sir Wm. Alexander, and sir Thomas Hope, and likewise sir Kenelm Digby, and spake of none other, neither in general nor particular; and saith, that he was so informed touching the Spanish faction by Mr. Meldrum, and David Ramsay; and touching the Scots by the earl of Seaforth. And saith, that Meldrum and David Ramsay did name the aforesaid Englishmen to be of the Spanish faction. And whereas it is said, that this examinant desired the lord Uchiltrie to acquaint his majesty or the Lord-Treasurer with the matter; this examinant did desire him to acquaint the Lord-Treasurer, but did not mention his majesty, but that it should come by the Lord-Treasurer to his majesty.

He confessed, he said, that since his coming into England, he had spoken with sir James Ramsay, sir James Hamilton, and capt. Douglas, and gotten somewhat out of every one of them; but did not say he had spoken with Alex. Hamilton, or gotten any thing out of him since this examinant's coming into England.

This Examinant denieth, that he either said himself, or affirmed its being said by the lord U. that he could say so much as the marquis should not have the face to deny it; but said he could bring as honest a man as this examinant, that would tell to the marquis's face more than this examinant would do: and thus he meant by the lord Seaforth.—He confessed that he said, sir James Ramsay told him he had 1,500 men in readiness, but would not bring them together, till the parties in Scotland were first ready; and saith, sir James told him as much, and that there were good officers, and the earl of Essex, and the abp. of Canterbury were sureties for some of them; and other than this, he spake not touching the 1,500 men.—He saith, he was not acquainted with the list of the names delivered by the lord U. to the Lord-Treasurer, nor had any thing to do therein.

(Copia vera.) The second Examination of James Lord Uchiltrie, taken the 24th of June 1631.

The said Examinant confesseth, that the understanding which he had of the business, concerning the marquis of Hamilton, whereof he hath been so often examined, came to him from the lord Rea. He confesseth further, that the paper of Names which he did deliver to the Lord-Treasurer, was made by this examinant himself, and the lord Rea was not privy to the making of it, or to the delivery thereof to the Lord-Treasurer, till after it was done.—He saith that the cause wherefore he did in that paper mention the lord marquis to be prime agent, was, for that the lord Rea had told him, the lord marquis's followers had said, the intent of the marquis's levies was to invade Scotland. Being told, that the lord Rea hath been so far from charging the marquis, that he hath affirmed before his majesty, that for aught he knows, the marquis is as good a subject as any the king hath; he answereth, if in tenderness and care of the king's safety, and upon ground of the lord Rea's relation, for the lord marquis's followers, he have gone any thing too far, he trusteth his majesty will impute it to his duty.

Being asked, why, in the aforesaid Paper, he makes the earl of Melros, the earl of Roxburgh, and the earl of Buccleugh to be plotters, saith, that the lord Rea told him, the lord Seaforth had affirmed it to him, that the earls of Melros and Roxburgh were acquainted with the particulars and secrets of the business. And further saith, the lord Rea had told him, he could not guess who else should be in the plot, unless it were the lord Buccleugh; of whom the lord Rea said, he heard him speak terrible and presumptuous words against the king, at his own table in Holland.

He said, the lord Rea did affirm to this Examinant, that he had the aforesaid report of the earls of Melros and Roxburgh from the lord Seaforth, before he, this examinant, made or delivered the said Paper to the Lord-Treasurer: The said examinant doth avow, that on the 13th of May, the lord Rea had affirmed to him, that since their former speech, (which was the 6th or 7th of May) he had learned more certainty than ever he had before.—He confesseth, that whereas in his former Examination, he said, the lord Rea told him, he was informed that they meant to strike off the heads of all the principal men about the king; he was mistaken in mentioning all, and did not well mark himself when he so expressed it; his purpose being to have said, they would strike off the heads of many; for so, he takes it, was the scope of the lord Rea's speech.

Being told that the lord Rea denieth, that he spake with col. Alexander Hamilton since his coming into England, he saith, it is possible that this examinant might mistake in adding that name to the rest, and therefore will not contest about that. He doth avow, that in the presence of the lord Rea, before the Lord-Treasurer, this examinant said, the lord Rea could say so much as the marquis should not have the face to deny it; and what this examinant said, the lord Rea being then present, and hearing it, did not gainsay.—He saith, the lord Rea told him, sir James Ramsay said to him, that he had 1,500 men in readiness, and the first time said, upon an hour's warning. But at a second time, the lord Rea spoke of eight days warning; and further, that he would not bring them to London, till their business was ready.—Being acquainted with what John Macky, son to the lord Rea, had confessed to have been told him by this examinant, he doth acknowledge it, and that he said it to John Macky, after the lord Rea and this examinant had attended his majesty about the same business,

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but did not think his speech thereof to John Macky should have done any hurt to the business.

(Copia vera.) The third Examination of Donald Lord Rea, taken the 24th of June 1631.

He saith, that the first time that the lord Seaforth had any speech with this Examinant, touching the earls of Melros and Roxburgh, being privy to the particulars and secrets of the lord Hamilton's business, was on Monday after the marquis's coming out of Scotland, and not before.—He further saith, that the lord Uchiltrie having some speech with this examinant, who might be like in Scotland to take arms, if the marquis of Hamilton should take up arms; the said lord U. and not this examinant, named the lord Buccleugh: whereupon this examinant told him, that at the siege of the Busse, this examinant heard the lord Buccleugh use some words, whereby this examinant took him to come male-content out of England.

The Tenor of his Majesty's Letter directed to the Lords of his Majesty's Council of Scotland.

'C. R. Right trusty, &c. The lord Uchiltrie 'having been examined before our council here, 'touching some Informations given by him, re-'flecting upon some of the nobility of that our 'kingdom; we have been pleased to remit him 'thither, to be tryed according to the laws 'thereof; having to that purpose sent you 'herewith inclosed some Depositions under his 'own hand, and the authentic copies of others, 'whereof the principals we cause to be reserved 'here, because they likewise concern other 'persons. Our pleasure is, that having given 'order for receiving and committing him to safe 'custody, you cause try and censure him ac-'cording to our said laws, before what judica-'ture and judges you shall think fit and com-'petent for that purpose; and for your so doing 'these shall be sufficient warrant. Given at 'our honour of Hampton-Court, the 24th of 'September, 1631.'

After this, my Lord Advocate produced the List of Names, or Representation written and given in by him to the Lord-Treasurer of England, upon the 16th of May 1631, together with the lord Uchiltrie's Dittay, of the which List or Representation and Dittay aforesaid, the tenor followeth:

The tenor of the List.

Representation for my Lord-Treasurer.

The marquis of Hamilton is prime agent.

Plotters.

The earl of Melros.
The earl of Roxburgh.
The earl of Buccleugh.

Adherents to Hamilton, by new blood and affinity, and dependance.

The earl of Kinghorne.
The earl of Abercorne.
The earl of Glencairne.
The viscount Lauderdale.
The marquis of Huntley.
The earl of Wigton.

By near Alliance by his two Sisters.

The earl of Eglington.
The viscount Drumlangrig.
The earl of Melros hath alliance and affinity.
The earl of Cassils his son-in-law.
The lord Carnegie his son-in-law.

The lord Lyndesay his grandchild by his daughter.
The lord Boyd his grandchild by his daughter.
The lord Ogilvie his son-in-law.

His eldest son married to the earl of Marr's daughter; And so brother-in-law to the lord Erskyne, now Keeper of his majesty's two principal Castles of Striveling and Edinburgh; and so commander of all almost of his majesty's Ordnance in Scotland.

The earl of Melros's son; likewise brother-in-law to the earl-marshal, and to the earls of Rothes and Kinghorne.

The earl of Melros's second son, married to the lord Wauchton's daughter.

The earl of Melros himself brother-in-law to the earl of Somerset, and to the lord Balmerinoch.

The earl of Roxburgh.

Brother-in-law to the earl of Perth.
Father-in-law to the constable of Dundee.
Father-in-law to the lord Pitcairn.

And the said lord Roxburgh able to raise of his own friends and followers above 1,000 gentlemen in two days.

The earl of Buccleugh.

The earl of Buccleugh, nephew to Roxburgh.
The earl of Buccleugh, brother-in-law to the lord Erskyne.
The lord Hayes.
The earl of Winton.
The lord Sempill.
The lord Ross.

Apud Edinburgh vigesimo nono Novembris 1631. In presence of the bishop of Dunblane, my lord of Carnegie, my lord Justice Clerk, and Justice Depute. The whilk day James lord Uchiltrie being present before the lords examinators above-named; and the list of Names before mentioned being shewed unto him, and he required to declare if he would recognize and acknowledge the same to be his own hand-writing; the said lord Uchiltrie, after inspection and consideration thereof, declared that List of Names was written with his own hand, and delivered by him to the Lord-Treasurer of England; *sic subscribitur* J. Uchiltrie, ad B. of Dunblane, Carnegie, Geo. Elphinston, A. Colville.

The Tenor of the lord Uchiltrie's Dittay or Indictment.

James lord Uchiltrie; Ye are indicted and accused forasmekill as by divers acts, statutes and constitutions of parliament, made and published in the days of our sovereign lord's most royal progenitors, specially by the 43d act of the 2nd parliament of James 1, of worthy memory it is enacted, statute and ordained, That all leasing-makers and tellers of them, whilk

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may engender discord betwixt the king and his people, wherever they may be gotten, shall be challenged by them that power has, and tyne life and goods to the king. And likewise by the 83d act of the sixth parliament of king James 1, of eternal memory, bearing touching the article of Leasing-makers to the king's grace, of his barons, great men and lieges, and for punishment to be put to them; therefore it is thereby declared, that the king's grace, with advice of his three estates, ratifies and approves the acts and statutes made thereupon of before, and ordains the same to be put to due execution in all points; whilks acts of parliament, in the 205th act of the 14th parliament of our sovereign lord's dearest father king James the 6, of happy and never-dying memory, and with advice of his highness's estates in that parliament ratified, approven, and confirmed, and ordained to be put in execution in all time thereafter following, as in the said laws and acts of parliament, at length is contained. Notwithstanding whereof, it is of verity, that he the said James lord Uchiltrie, having in the month of May, the year of God 1631, last past, heard by relation of Donald lord Rea, that certain speeches, surmises and informations were made to him by David Ramsay, with the head of Mr. Robert Meldrum, and certain other persons beyond sea, in Sweden, Pomerland and Holland respectively; and by the said David Ramsay and certain other persons within the kingdom of England, anent some plot and dangerous purpose intended against the sacred person of our gracious lord and sovereign, the king's most excellent majesty, his gracious queen, and their dearest son the prince, and against the land by surprizing the king's majesty's houses and castles of Edinburgh, Striveling, and Dunbarton, and for seizing of the town of Leith. Ye not being content to retain yourself within the bounds of a faithful subject, by revealing of that, whereof ye had received information from the said lord Rea, out of a malicious policy and design, tending to the sowing of discord and sedition betwixt his majesty and his most loyal subjects, the lord marquis of Hamilton, the earl of Haddington, the earl of Roxburgh, and the earl of Buccleugh; did at your first meeting with his majesty, which was upon the 17th of May last past, signify to his highness that the business was a Treason intended against his majesty: and that the party was the marquis of Hamilton, as ye was informed. And to the effect his majesty might be put in better assurance of the truth of your said speeches, ye upon the 16th of May preceding, delivered, to the lord-treasurer of England, a List of Names, to represent to his majesty, the strength of the said marquis of Hamilton's party and adherents in Scotland. Whilk is all written with your own hand, and intitled, "Representation for my Lord-Treasurer." Wherein ye name the marquis of Hamilton to be the prime agent, and names the earl of Melros, now earl of Haddington, the earl of Roxburgh, and the earl of Buccleugh, to be plotters. Likewise upon Sunday, being the 22d of May last past, at which day the marquis of Hamilton (having come post from Scotland in three days) was to present himself to his majesty. And ye thinking that ye had possessed his majesty sufficiently with your malicious Leasings and Calumnies against the said lord marquis; and that his majesty being so instigate and irritate against him, would follow your cruel and malicious counsel; ye came to his majesty about the end of his dinner, and most boldly and male-pertly spake to his majesty these words, 'Sir, now ye know the business, 'but knows not the time, and therefore, Sir, 'either do or die.' By the whilk malicious counsel (if God by his grace had not ruled and directed the heart of our gracious sovereign to proceed in the business with greater wisdom, calmness and moderation,) ye by your former wicked counsel intended ye thereby did what in you lay, to move and cause his majesty, to put in practice some sudden and violent course, for subversion of the life and honour of the said lord marquis, his majesty's most loyal subject. Like as all the present articles and passages in your proceedings, in the premises, were maliciously forged, invented and practised by yourself; without any warrant arising to you from the Relation of the said lord Rea's; whilk is manifest by your own Deposition, made in the presence of a number of the council of England, deputed by his majesty for your examination, upon the 20th and 24th of June last past. By the which ye have granted and confessed the premises laid to your charge to be of verity; and also does grant that the paper of Names which ye did deliver to my Lord-Treasurer, as said is, was made by yourself. And that the lord Rea was not privy to the making thereof, nor to the delivery of the same, to the said Lord-Treasurer. And sic-like in your examination, ye being inquired for what cause, ye did name the said lord marquis to be prime agent, ye could assign no true reason, nor cause, by any warrant of the lord Rea against the marquis. But by the contrary the said lord Rea being examined upon the 21st of June, in presence of his majesty's council, declared that he knew nothing against the person of the lord marquis; but that the said lord marquis was as good a subject as any the king's majesty had. And likewise ye being asked by what warrant ye did call the earls of Melros, Roxburgh, and Buccleugh to be Plotters; ye answered thereto, that the lord Rea had told you, that the lord Seaforth had affirmed to him, that the earls of Melros and Roxburgh were acquainted with the particulars and secrets of that business, declaring thereby that the lord Rea had affirmed that to you, before you gave in, and delivered your paper of representation to the lord treasurer. And further, ye declared, that the lord Rea had told you, that he could not guess who else should have been upon the plot, unless it were the lord Buccleugh. Albeit the lord Rea being examined in presence of his majesty's council upon the 24th of June last

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past, declared, that the first time the lord Seaforth had any speech with him, anent the earls of Melros and Roxburgh, and their being privy to the marquis of Hamilton's business, was upon the Monday after the marquis of Hamilton's coming out of Scotland, and not before: and the marquis having come to court from Scotland upon Saturday the 21st of May, and the representation given by you to the Lord Treasurer, containing the list of the Plotters and Actors, being given in by you to the said Lord Treasurer, upon the 16th of May before; ye could never truly affirm, that ye had named the said earls to be plotters, upon pretence of any information received from my lord Rea, who did not speak to you anent them, at the time of the giving of the said Representation; but eight days thereafter, and such like. The said lord Rea deponed upon the said 24th of June, that ye, and not he, did name the earl of Buccleugh, as one who would take arms in Scotland to assist the marquis; by the whilk Leasings, Calumnies, and slanderous Speeches, untruly alotted, devised and vented by you, against the said marquis of Hamilton, the earls of Haddington, Roxburgh, and Buccleugh, in manner foresaid; all of them being his majesty's faithful councillors and loyal subjects; ye have manifestly controverted the tenor of the said laws, and acts of parliament, and incurred the pains and punishment mentioned therein, viz. the deserved punishment of death, which ought and should be execute upon you with all rigour, to the terror and example of others.

The Justice at command of a warrant and direction of the lords of the secret council, whereof the tenor follows: 'Apud Halyrud-'house, vicesimo quinto die mensis Nov. 1631. 'The Lords of the secret council, for some spe-'cial cause, and considerations moving them, 'ordains and commands his majesty's justice, 'justice-clerk and their deputes, to proroget 'and continue the Dyet appointed for the Trial 'of James lord Uchiltrie, until Thursday next, 'the 1st of Dec. next to come: whereanent 'this extract of the act shall be unto the said 'justice, justice-clerk and their deputes, 'a War-''rant extractum de libris actorum secreti con-''cilii S. D. N. regis, per me Jacobum Prym-''rose, clericum ejusdem, sub meis signo et ''subscriptione manualibus, sic subscribitur ''Jacobus Prymrose;'' Prorogates and continues the Trial of James lord Uchiltrie, now impannelled, to the morn the 1st of December next to come, and ordained him to be returned back to ward, to be kept in sure firmance, in the mean time: the jury or persons of assize summoned to this day, are warned, *apud acta* to compear the said 1st day of December next to come: ilk person under the pain of six marks.—Whereupon the Advocate asked Instruments.

Curia Justiciaria S. D. N. Regis tent' in pretorio burgi de Edinburgh, primo die mensis Decembris, anno Dom. millesimo, sexcentesimo, tricesimo primo, per honorabiles et discretos viros, magistros, Alexander Colville de Blair, et Jacobum Robertoun, advocatum, justiciarios deputatos nobilis et potentis comitis Willielmi comitis de Strathern et Monteith, dom. Grahame, Killbryde, et Kynpont, præsidis secreti concilii et Justiciarii generalis dict. S. D. N. Regis, totius sui regni Scotiæ, ubilibet constitut. sectis vocatis et curia legitime affirmata.

Intran'

James lord Uchiltrie, delated of the crimes foresaids, contained in his Indictment preceding.

Pursuer.—Sir Thomas Hope of Craighall, knight and baronet; his majesty's advocate for his highness's entries.

Prolocutors in defence.—Mr. Robert Nairne, Mr. Alexander Pierson, Gilbert Neilson, Advocates.

The Prolocutors for the impannelled, produced an Act of the Lords of secret council; ordaining and commanding them to compear and assist him, by proponing of all lawful defence, competent to him on his Trial, and desired the same might be insert and remain on process, whereof the tenor follows: 'Apud Ha-'lyrudhouse vigesimo quinto die mensis Novem-'bris, 1631. Whereas James lord Uchiltrie 'has made choice of Mr. Robert Nairne, Mr. 'Alexander Pierson, and Gilbert Neilson, ad-'vocates, to concur and join with him, for pro-'poning of his lawful defences, competent to 'him against the Dittay, whereupon he is to be 'accused before his majesty's justice, upon the '1st of December next: therefore the Lords of 'secret council ordains and commands the said 'three advocates to confer and meet with the 'said lord Uchiltrie, to receive his informations; 'to accompany and assist him at the bar; and 'to do their duty and office in all and every 'thing lying to their charge, concerning the 'proponing of all lawful defences, competent to 'the said lord in his trial. Whereanent the 'extract of this act shall be to them a warrant ''extractum de libris actorum secreti concilii ''S. D. N. regis per me, magistrum Gilbertum ''Prymrose, clericum ejusdem, sub meis signo ''et subscriptione manualibus, sic subscribitur ''M. Prymrose.'' After reading of the whilk Act of Council, the said Prolocutors protested, because the present matter of disputation *est res ardua,* anent Treason and Relations thereof, from party to party; that whatever the exigence of the cause requires from them, as proofs to speak herein, for clearing of the nobleman impannelled, his innocence, and of the warrants of his information; that it is not with any thought of wronging, or tasking of any parties, noblemen or others; but to do that whilk their duty as Prolocutors craves of them to be done, being commanded hereto by the Lords of his majesty's secret Council: and that the purpose and speeches that shall by God's assistance be uttered and delivered by them in this matter, may be so accepted of my Lord Justice.

Thereafter the Indictment of the lord Uchiltrie, being read judicially, and he accused of the

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crimes therein contained; my Lord Advocate asked Instruments of the reading thereof, and of the acts of parliament set down in the proposition of the said Indictment. And because the subsumption of the said Indictment is founded upon certain Depositions made in England, in presence of five of his majesty's councillors, deputed by his majesty to that effect: he therefore repeats the Examinations of the lord Uchiltrie produced yesterday in process, dated the 20th and 24th of June last; with the three Examinations of my lord Rea's, whereof two are dated the 21st of June, and the third upon the 24th of June: and declared, that he used these Depositions under the hands and subscriptions of the five councillors of England, as authentic copies, whilk should make as good faith, as if the principal were produced.

It is alleged by Mr. *Alexander Pierson*, as Prolocutor for the pannel, that it cannot, nor should not be proceeded against the impannelled here in Scotland, but conform to the laws and statutes of England; the place of the pannel his offence, (if any be) and not conform to the municipal laws of Scotland. 'Quia de jure 'judex originis vel domicilii non potest punire 'subditum delinquentem extra territorium, nisi 'secundum pœnam impositam a jure communi, 'vel secundum statuta loci in quo deliquit non; 'autem secundum statuta ipsius loci originis, 'vel domicilii.' Julius Clarus, quest. 85, numb. quarto.

It is answered by my *Lord Advocate*, that the alledgeate is no ways relevant, except the pannel will condescend to the relevance of the Dittay; and of his own consent be content, that the same pass to the knowledge of an assize. Next, it is answered by his majesty's advocates that he oppones his majesty's Letter direct to the council, bearing, that the impannelled shall be tried according to the laws of this kingdom. And in the one place it shall be justified, that his majesty's letter shall be grounded upon the civil and common law.

It is answered thereto by the lord *Uchiltrie* and his Prolocutors; that the king's majesty's Letter is, and must be understood, without prejudice, of the pannel's lawful defences.

Item, That the alledged crimes contained in the Dittay are, or perchance may be, lawful in England, and yet criminal in Scotland; and it carries no reason that the pannel should be punished here in Scotland, for any fact committed in England, not punishable by the laws of England, where the pannel is *tutus ratione loci*.

Secundo, It is alledged by the Pannel, that the subsumption of the indictment has no dependance upon the proposition thereof; because the particulars contained in the subsumption are no ways the leasings mentioned in the said acts of parliament, whereupon the proposition is founded, especially seeing the leasings mentioned in the said acts, are leasings tending to discord betwixt the king and his people: and the telling whereof is unlawful and prohibit. But the particulars of the Dittay or Indictment are no ways such. But by the contrary, the matter thereof being an heinous treason against the king's majesty and estate; in favour of both, 'propter publicam utilitatem,' it is incumbent to every subject that shall hear speeches of such matter, though the matter itself be a lie and untruth, whilk is alike to the hearer, neither does it belong to him, to judge or discern therein; it is incumbent, I say, to every subject incontinently to tell the same; the telling whereof tends not to discord between the king and his people; but to suppress and prevent the same, and the chief cause thereof, which is Treason; and the not telling and revealing whereof is punishable by the law of all nations, by our municipal laws and acts of parliament; yea, by the same acts, whereupon the Dittay is founded, viz. James 6, parliament 14, cap. 205. And therefore the telling thereof is no ways prohibited and punishable by the said acts, neither are these particulars in the Indictment the leasings mentioned in the said acts, whilk is *medium concludendi* in the Dittay. And whilk last act being the last in time, as it ratifies, so it explains the true sense of the former.

And further, it is alledged by *Gilbert Neilson*, prolocutor for the Pannel, that not only by the foresaid act, of the 14th parliament of king James 6, whereupon the Dittay is founded, is there a necessity laid upon the impannelled, and all his majesty's lieges, to reveal what they hear, concerning his majesty's prejudice; but likewise by the 134th act of James 6's 8th parliament, it is specially statute, That whosoever hears any speeches to the harm or prejudice of the king's majesty's estate, shall with all diligence reveal the same to his majesty, or to some other, the king's majesty's officers, that may make the same manifest to his majesty, with this special addition, that in case the same be not done, the person concealer, and not teller or revealer, shall incur the like punishment, contained in the said acts, set down against the principal leasing-makers. And so the impannelled was necessitate, upon no less pain than his life and estate, to reveal the same.

It is answered by his majesty's Advocate, That this preceding defence can elude no part of the Dittay; because the first part thereof anent the lawfulness or necessity of revealing of treason is granted in the Dittay or Indictment. And if the pannel had contained himself within the duty of revealing, albeit the Plot and Treason revealed had been false, yet he would have deserved commendation and reward from his master. But the Indictment is founded upon three particulars, to the whilk no answer is made; and whilks three particulars agrees and quadrates with the natural quality of the leasings, contained in the act of parliament, whereupon the Dittay is founded. Because they are such, as might have engendered discord betwixt his majesty and his loyal subjects; in so far as it is qualified in the Dittay, that the impannelled having only had his relations from the lord Rea, and whilk relations had no warrant

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against the marquis of Hamilton's person, as author or actor of the Treason, nor against the three noblemen as Plotters, but depended 'ex 'auditus, vel relatione relati ab altero;' that is, from David Ramsay, and Mr. Robert Meldrum, of whom neither of them did relate any thing that could prove against the marquis; but simply upon the speeches and report of some, whom they call his followers, or upon their imagination, or possibly foolish and perverse wishes, that the nobleman who was imployed for the levying of an army for aiding the king of Sweden, should employ his forces to the destruction of the king, his queen, the prince their dearest son, and kingdom. Yet the impannelled, when as he might have sufficiently exprest his loyal duty to his master, by bringing the lord Rea to his majesty, to make his own relation, did at the first appearance before his majesty turn the uncertain report and relation to a positive speech: shewing that the business was a treason; and the party the marquis of Hamilton. Next, the Pannel, by his Representation all written with his own hand, and delivered to my Lord-Treasurer of England, to be shewn to his majesty, he has expressed the lord marquis to be prime agent; and the earls of Haddington, Roxburgh, and Buccleugh to be plotters; and hath added to the number of 20 or 30 noblemen, as adherents to them. And last, when his majesty had received this positive information, and was possessed with appearance of the truth thereof; to add a spark to the fuel, the Motto was given, 'Sir, 'now either do or die;' whilk words could not contain any other intention or event (if his majesty had not been graciously and wisely disposed), but either to have used some violent course against the marquis's person and life, or to commit him to prison, and to cause him to make answer as to Treason, *ex vinculis:* whilk is the condition of traytors, both by the common law and by the act of parliament, made by king James 2, parliament 12, cap. 49, whereby it is ordained, That persons slandered of Treason, shall be taken and remain in firmance, while they thole an assize. And all their proceedings are directly contrary to the act of parliament, whereupon the Dittay is founded, especially seeing the Pannel, by his Deposition made the 20th of June, Articulo primo, in relating the lord Rea's first speeches declared that the lord Rea granted that he had no certain ground for the Treason alledged by him; and it is an heinous and odious fact, punishable by all laws, to turn relation into delation, and to be an author or adviser to a sovereign prince, to begin at execution before trial. And all the particular points of the Dittay are clear, and evident by the Deposition of the impannelled, made upon the 20th and 24th days of June; whilk are the true copies of the original and authentic Depositions, made in the presence of five of his majesty's council in England; like as the copies produced and read in the presence of the Pannel, and his prolocutors, are subscribed by the said five councillors; and also are declared by his majesty's letter, directed to his council the 24th of September, to be true copies of the said Depositions: whereof the principals are retained by his majesty, for the causes mentioned in the said Letter. And therefore ought to have full faith, as if the principals were produced; like as the Pannel by his acts *de calumnia* will not refuse, but that the Representation containing the list of the names was given in by him, without the privity of the lord Rea, and also that he spake these words to his majesty upon the Sunday after dinner, being the 22d of May; which was the self same day that the marquis came from Scotland to England, and was to present himself to his majesty, viz. 'The purpose 'is known, the time not known; Sir, either 'do or die;' in respect whereof the alledgeute ought to be repelled.

It is duplyed for the Pannel by his Prolocutors, as to the particulars contained in my Lord Advocate's Answer, they cease to answer him now in the general, seeing they are upon the relevancy of the Dittay and Indictment, and shall answer every one, *singulatim* as they lie in the Indictment, *suo loco.*

Tertio, It is alledged for the Pannel, that the particulars contained in the Indictment are not Leasings, 'quoad referentem neque id genus 'referens mentitur, quoniam quantum in ipso 'est non fallit, sed fallitur, et quicquid falsitatis 'vel mendacii in relatis inest, id ad suos au- 'thores referendum, cap. Is autem 22 quest. '2. et cap. 55. Beatus Paulus ibidem, ubi di- 'citur, non mentiri eum qui animum fallendi 'non habet quod est essentiale et formale men- 'dacii, impostura scilicet et intentio fallendi.' And the telling and revealing of the whilks matters aforesaid, 'nullum habet in se delic- 'tum, sed est de natura boni;' being commanded, and therefore in the hearer and relater, 'presumitur omnis dolus abesse, quia parere 'necesse habet.' And specially in such a business as this, whilk so highly concerns the king's majesty and estate. Whereof there was so great appearance, by the relation made by the lord Rea, whilk the pannel craves may be read to the judge.

It is answered by my *Lord Advocate,* that if the defence means of the Treason related by the lord Rea, the pannel cannot be quarrelled for it, nor for telling thereof, albeit it were a lye. But the Leasings and Calumnies assumed upon in the Dittay, arises upon the contradiction, betwixt that which was related by the lord Rea, and that whilk was spoken and affirmed positive to his majesty. And where it is alledged, that 'mendacium est semper cum 'animo fallendi,' that is, 'in discrepantia inter 'intellectum et vocem ejusdem personæ;' where he thinks one thing, and speaks another, whilk is not our case. But 'mendacium vel 'falsitas,' whereupon we dispute, is the discrepance and the contrariety betwixt the relation made by the lord Rea, and that which is related by the pannel: wherein the pannel was obliged, as a faithful subject, to make a

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simple or true relation, 'sine paraphrasi, vel 'periphrasi, sine interpretatione, vel circumlo-'cutione, et ut in Apographa vel exemplari 'committitur falsitas, si transcriptio differt ab 'exemplari, ita committitur falsitas ubi relatio 'positive refertur;' whilk is the leasings, whereupon the Dittay subsumes. And where it is desired that the lord Rea's relation may be produced and read to the Judge, if it be meant of that relation whilk is subscribed by the five councillors of England; and if the pannel will acknowledge it, to make faith as the principal, together with the remanent depositions of the pannel, and the lord Rea, whilk are all subscribed by the said five councillors, and already produced and read to the judge; the pannel shall receive satisfaction of his desires, otherways not.

It is duplyed for the Pannel, that the foresaid alledgeance is to answer that part of the Dittay, bearing the heads thereof to be forged and vented by the pannel.

Quarto, it is alledged by the Pannel, that as to the subsumption of the Dittay, bearing, that all the articles and passages of proceeding therein mentioned, were maliciously invented and practised by the pannel, whilk is qualifyed by the Pannel's own Deposition and alledged Confession against himself, and by the Pannel's Deposition freeing the Lord Rea, and the lord Rea's Deposition freeing himself thereof; the qualification inforces not the pannel in the particulars to be a leasing-maker, and to have forged lyes.—First, For the Pannel's own Deposition, it inforces the just contrary, to wit, that the lord Rea was the Pannel's informer in all. As for the lord Rea's Deposition against the pannel, proported in the Dittay; that inforces not forging of lyes against the pannel, neither can the lord Rea's deposition have any force against him; first, because the lord Rea is party, and the pannel is a witness against him for the king, and whose deposition cannot be respected against the testimony, made against himself, for the king's majesty: and in effect is but a denial, whilk can neither liberate himself, nor weaken the pannel's deposition. 'Et omnibus in re propria dicendi testimonii 'facultatem jura submoverunt, lege 10. Cod. 'de testibus.' *Item*, The lord Rea's deposition made by him, not being sworn, and so is null of the law; 'Quia testis injuratus examinatus 'non probat nec fidem faciat, lege juris-ju-'randi;' nona Cod. de testibus et lege testium xviii. Cod. eodem.

Item, The lord Rea's Deposition not made in the presence of the pannel, and so 'non 'valeat authentica, sed etsi,' Cod. de testibus. *Item*, Although the lord Rea were not party, he is but 'testis singularis et nihil probat.' *Item*, The lord Rea's Depositions produced cannot be respected, because they are not the principal subscribed by my lord Rea, but relations, and doubtless from the council. 'Et in criminali-'bus aliorum judicum relationibus credere non 'oportet,' Lege singul. xiv. Cod. de accusationibus et inscriptionibus.

It is declared by the lord Uchiltrie himself, now upon Pannel, that the Depositions whilk he made in England, and subscribed with his hand, are true in themselves, as he there deponed, according to the relations and grounds of Information, which he received from the lord Rea. The reconciliations which are ingrossed in the several Depositions, being allowed and admitted for reconciling of any apparent contrariety, without prejudice of what explanation of the same depositions he may justly make further; he declares, that the alledged copies of the Pannel's own depositions, under the hand of the five councillors, so far as his memory can serve him, are not different in the substance of them, from the original. But that there is no more in his depositions, nor that whilk the subscribed copies contain, that he cannot say. And this his lordship does according to his memory, and in reverence of his majesty's letter, and noblemen's hands thereat.

My Lord Advocate takes instruments of the impannelled's declaration in that part, whereby he grants that the copies of his depositions made by him, under the hand of the five councillors, is not different in substance, according to the Pannel's memory.

Thereafter, my lord Uchiltrie and his Prolocutors craved that the lord Rea's Relation made upon the 18th of May, whilk under the hand of the five councillors, might be read to him, because he minds to found exceptions thereupon.—To the whilk, it is answered by his majesty's Advocate, that he cannot be compelled to produce the said Relation, in respect no part of the qualification of the Dittay is founded thereupon. And yet according to his former answer, says, if the Pannel will acknowledge the same, as it is under the hands of the five councillors, to make as great faith as the principal, he is content, that the said Relation be read; of the whilk Relation the tenor follows.

> The true Relation of such passages, as I DONALD Lord REA have heard or learned, which may concern my most dread sovereign, or his estate, beyond seas and elsewhere, as I will be ready to take my oath upon, and seal with my blood against all opponents. Written this 18th of May, 1631.

In the month of April, 1630, or thereby, at my coming from Stockholm, I found col. Alex. Hamilton, brother to the earl of Haddington, sir James Hamilton, son to the said earl, sir James Hamilton of Reidhall, nephew to the said earl, and one Hamilton the lord of ——; who were all officers under the king of Sweden then. But before my coming there, they had all cashiered themselves, not having served one year.

At this time the laird of Bensho, Lyndesay, my lieut. colonel, being bed-fellow and comrade to sir James Hamilton son to the earl of Haddington, keeping a chamber in James Mackleane's a Scotsman's house in Stockholm,

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Lyndesay did inform me, that the reason why the Hamiltons had cashiered themselves, was because their chief, the marquis of Hamilton, was to be a soldier, and they would follow his fortunes. I asked Lyndesay who had told him so much; he told me sir James Hamilton of Priestfield, Haddington's son: and Lyndesay told me withal, that all these Hamiltons, and sir John Hamilton, another son of Haddington's, had denuded themselves of their fortunes and estates, some of them to their friends, but the earl of Haddington's children to their father.

Moreover, Lyndesay told me, that sir James Hamilton, Haddington's second son, had told him that sir James Spence, now lord Spence, had directed Mr. Robert Meldrum with letters into England; and that thereafter they did expect David Ramsay with the head cousin to the lord Spence, as ambassador from the marquis of Hamilton: and all the Hamiltons did expect David Ramsay's coming.—Also Lyndesay did inform me, that sir James Hamilton did desire him to join with them, and that they would give him a regiment; which he did accept, and did desire my consent, which I did yield unto.

Also ten or twelve days after we did hear from Denmark, that there was an ambassador coming from England, who proves to be David Ramsay; who did give himself out, all the way as he came, to be an ambassador: which to prove, he did stand in competition with his majesty, our dread sovereign's extraordinary ambassador sir Thomas Roe; both the said sir Thomas and David Ramsay encountering in the town of - - - - - in Denmark: yet David Ramsay would never do so much as visit the other ambassador. Upon which oversight I did question David Ramsay, whose answer was, he did not desire to be seen of any man that would discover him; affirming to his cousin sir Robert Anstruther (as David Ramsay told me) that no honest man could live at home. David Ramsay, col. Alex. Hamilton, and sir James Hamilton, attending their dispatch from the king of Sweden at Elsmeby, were forced to reside with me in my ship, for at this time we were all on ship-board.

And one night drinking some healths, amongst the rest, the marquis's health coming by course, I asked col. Alex. Hamilton, the marquis's christian name; he answered me, 'James, by 'the grace of God;' sir James added, 'King of 'Scotland:' therefore his health passed under that name, till I did take exceptions, and did desire them to alter their title; sir James Hamilton answered *nolens, volens,* it should be so, and did laugh. I did desire them to drink it more covertly, thus, 'To the happy event of 'all Good Intentions;' so David Ramsay said it should be so.

That night, after the two colonels Hamiltons went to bed, David Ramsay and I being alone on the hatches above, David Ramsay and I drinking and smoaking a pipe of tobacco, told me many abuses in the court of England; laying the whole blame upon the Lord-Treasurer. He told me, that the marquis had sent him with a challenge to the Treasurer, and that Popery and Arminianism had ever come the most part from the Bishops; and that there was nothing looked for but desolation and change of religion, and that the poor soul the king was blinded to his ruin; and that he had been plain with the king, till he did give him no ear; therefore he said, he had retired himself from thence, since no honest man could live there, and with many such discourses he laboured to possess me. My answer was, The Lord amend those evils, and no remedy but patience. By God, Donald, (said he) I will use your own phrase, we must help God to amend it. He told me, he had brought as much gold with him, as would maintain him at the rate of six pound a-day for three years, and did assure me that before that time would expire, that God would raise up some men to defend his Church, and liberate honest men from slavery. Withal he told me, that his majesty at his parting with him, told him, that he would do with him as king Henry 4. said to Colvil, I will think on thee in absence as present.

Thereafter I did desire one favour of him, that he would tell me if the marquis of Hamilton would come over; he said, he would tell me to-morrow. The next night after, I did renew my former question of the marquis's coming over, and he said he would. I asked him what content my lord marquis had at home? He said none; for the king had forced him to marry a wife, and to acknowledge her, who he said was a very beast. I asked him of what religion my lord marquis was? He said, a good protestant, and before it were long, he would let the world see his aim was the defence of his religion. I told him, it did avail us little to make the Gospel a fair passage in Germany, if we lost it at home. He said, there were many honest men in our land, and that the marquis would use his army to protect them, which was his only aim. I desired him to go no further on with me; for I would not desire more trust of it, but that I would spend my blood in my lord marquis's quarrel. Well, my lord, I will go no further, for my master's secret no man shall get.

The third night, on land in an isle, he told me, that Alex. Hamilton and sir James were to go for England, and he to Holland; yet if I had any thing to do in England, that he would be willing to do me service. I told him I had a mind to seek the reversion of Orkney from the king my master, if the marquis would mediate with my master; for it were good for my lord to have a friend in that place for his ends. He said, By God it was to be thought upon; and he did desire me to give him leave to think upon it that night. On the morrow, he and Alexander Hamilton did desire me to write a general letter to the marquis, with the two colonel Hamiltons, with great assurances of true friendship from their master, if I would continue constant in resolution; I did give them my letter, and so we parted.

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In the month of July, a day or two after the taking of Stetin, I did encounter Mr. Meldrum who came from England: after salutations, I did ask him what news? He answered me, matters are worse and worse; the king giveth greater way to Papists and Arminians than before; that Cottingham was gone to beg peace with Spain; that Pembroke was dead; that the marquis governed all, and was made Keeper of Windsor, and was made knight of the garter, and was to be Admiral of England. He did ask me where his cousin David Ramsay was: I told him he was gone for Holland; he did ask me, what he had done: I did answer, that all was ended to his mind, and that Alex. Hamilton was to get powder, arms, and munition with him from Sweden, to the marquis. At these news, he did throw his cap to the ground, and cut a caper, calling aloud, Good news! good news! I am a happy man! I am happy and made for ever! I thank God my five years pains is not for nothing; good my lord Rea, is this true? Yes, said I, for I have one double of the contract, I am engaged in the business to David Ramsay, and Alex. Hamilton and sir James Hamilton, and by writ to my lord Hamilton. O my lord, (saith he) that was the work of God and not man, to inspire your lordship to go with us?

At that time I cast Lyndesay loose, to find more of Meldrum; who told Lyndesay that 6,000 trained soldiers would do the turn with their own faction in the country.

The next day at col. Leslie's tent, I encountered Meldrum, whom I did call out, and he told me that king Charles was good and created for nothing, but for desolations and undoing of kingdoms, religion, and people. There was no way but to immurate him within a wall or dungeon for ever. I asked what way we might do that? He said the way was easy: first, after the men were listed in Scotland, that they might take one month's time to learn to handle their arms at Leith, without any suspicion: then they might seize on the castles of Edinburgh, Sterling, and Dumbarton in one night, and upon Berwick; and having the castle of Edinburgh, the town durst not stir; then to fortify Leith: thereafter into England per force. I answered, the plot was good if it held.

He told me further, that he was writing a Declaration of the justness of the marquis's quarrel, with the tyrannical using and suffering of the Church under king James in his last days, and now worse groaning under his son; with the Hamiltons clear title to the crown. I allowed of all. But I did demand who I thought would take our parts; he said, he did know nine of the best earls in Scotland that would live and die with us. As also that the body of England was with us, and some of the nobility for evil will of the Treasurer. The next day there came news of the birth of the prince; I did ask Meldrum if that would cool the marquis's intentions: he sighed and said, not if the king and queen of Bohemia will give their daughter to the marquis, as they had promised. Is that true, said I? He answered, I should see ere it were long. That night I did desire Lyndesay to drink with Meldrum, which he did, and Harry Muschampe an English gentleman was with them. Lyndesay told me on the morrow, he did think Meldrum to be the worst secretary in the world, for he did reveal this last night all he did think. I do not remember the night's discourse; but do remit to Muschamp's relation.

A week after, I did speak with Meldrum again in Leslie's tent; so he did desire me to walk forth, and told me he had been with secretary Sadeler, to whom Meldrum did deliver a private packet of letters, and did require answer. But the Secretary told him, that the king of Sweden would write none, till he heard from the marquis of his last letters, sent with David Ramsay. Meldrum went further with the Secretary of Sweden, telling him, that it was greatly for the advantage of the king of Sweden, whose ambition was without limits, that the marquis did raise war in Britain; for if the king of Sweden had a mind to take Denmark, the king of Britain should not be able to help his uncle. The secretary of Sweden did answer, that we care not for, neither do we fear your king: for he that would not help his own sister, will never help his uncle.—I did ask Meldrum what they did intend to do with the prince and queen of Britain? He answered, the child should be cast in with his father, and the queen sent home to her mother to be put in a monastery. I did ask him, what charge he would have in those employments? He said, he should be Secretary of State, and have a horse-troop.—Meldrum did shew me also, that all who would not take our part, of Scotsmen in Scotland should be put in the Bass, or some other prison, till all were ours; and that the marquis would take pledges of all who in Scotland did lie by as neutrals at the first.

At my coming to Holland in March last, David Ramsay did leave word at Amsterdam, when I did come, to send him word; which I did: he came from the Hague to Amsterdam, and stayed with me eight days, where he did deliver me a letter from the marquis only of compliment and thanks. He told me all went right with the marquis; that he had gotten from his majesty 10,000*l.* in England, and the Wine-Customs of Scotland for 16 years; which the marquis would sell, and that all things went on without any obstacle; and that the only stay was for want of arms and munition, and especially powder; and desired me to put on hard for this, with the Swedish ambassador, which I did. Thereafter he told me, he had evil news to tell me, that the marquis's wife was brought to bed of a child.

I did ask him, where our forces should meet; he said upon the sea, and thereafter land in Scotland or England, he would tell me no more: but that for my business of Orkney, I might have it better cheap than to pay the duties of it; and he told me, that when I should meet with the marquis, he would infuse in me

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that which he durst not; since he would have the marquis to take the thanks to himself. And withal he did desire me, that I should not tell the marquis what had past between him and me.

I did ask him, what part of England we should best land at? He said at Yarmouth or Harwich, or thereby. He told me that England had made a peace with Spain very prejudicial to Holland; and that the treasurer, and such of the Spanish faction, as Carlisle, and Cottington, and Kenelm Digby, had muffled the king to bar the Hollander from the fishing; which he said might fall out happily for them, and he did desire me to assist them at the prince of Orange's hand, as a special service to the marquis, to make the States contribute with the marquis: and I did speak to the prince of Orange, and his excellency told me, that he would do his best therein.

He told me, that Spain and France were striving who should first drink up England in their ambition; but he hoped the marquis should prevent them both. He did ask my advice, whether it were best to cross the seas once, or to go on bravely? I answered, delays were not good, which he did subscribe to; and so we concluded, and I came for England.

At my coming to England, my lord Hamilton did give me many thanks, assuring me, that he would not want me; and that I should have what conditions I would desire, for he said, that should not separate us. I did desire his lordship to go on with me regliy, if he meant to have my service, he should have it without conditions; he did answer, My lord, I will not want you, for I have written to the king of Sweden, with Elphingston and Meldrum, that I will detain you with me, and assure your lordship, that he that will hazard with me now in this business, it shall be a tie to me and my posterity, to hazard my fortune and estate with him and his. The same word the next day he sent to me, with sir James Hamilton, the earl of Haddington's son.

The said sir James Hamilton and I being together, I did much commend a suit of apparel which sir James had; his answer was, I have them on, pay them who will, I have taken them up, it may be a merchant of London will pay for them, ere it be long; my lord, take one also on luck's head.

The first day, my lord marquis went down to Greenwich in a barge, accompanied with sir James Ramsay, sir James Hamilton, sir Robert Ballenden, Capt. Douglas, and, I do think, Ludowick Leslie, the king our master having gone before; the discourse was moved, if they were to make an insurrection, where would they begin? The marquis answered, he would march to London directly; and one of them, I think Capt. Douglas, said, that he knew a house in London should make them up for ever.

That day my lord marquis told me, he would sell the Wine-Customs, for he expected no more from England. Capt. Douglas told me, that they would have from the king 100 barrels of powder, and that they would make shift for arms. Sir James Ramsay told me, on Sunday last at Greenwich, that he had 1,500 men in readiness on a week or less advertisement; and that his stay only was here, till he heard the men in Scotland were ready, and that his rendezvous would be at Norwich, and meet the rest. Sir James Hamilton told me, that the English rendezvous should ship at Harwich, for he said, the devil have his part of the river of Thames, he did not like it.

The earl of Roxburgh told me, that he and others the marquis's friends, were at first against the marquis's courses; but now since they saw his lordship so far engaged, and that he only aimed at the glory of God, that he and all others his friends would put to their helping hand.

On Thursday last, the earl of Roxburgh told me, that the marquis would hasten his resolution, and said, that he would assure me, my lord marquis thinks himself for ever bound to me, and so do all his friends, for his lordship's cause; and I will assure your lordship he trusts you, and that you never took a more fast and real friend by the hand.

My lord Roxburgh, sir James Ramsay, and captain Douglas questioned me, what was the reason, that I had taken on sir Pierce Crosby, since the marquis had cast him off? This day severally, I told them, I was forced, in honour and conscience, to keep my promise to the king of Sweden; so that I did take on sir Pierce Crosby, to send him thither with Irish and English, and that myself was minded with all the Scots that I could get, to follow the marquis's fortunes; the which answer severally given, gave them all content.

In witness of the truth of these, I have signed it with my hand, day and year aforesaid.

Sic subscribitur, D. REA.

After reading of the whilk relation judicially, the said lord Uchiltrie declared, that so far as his memory serves him, there is no difference betwixt the foresaid copy of relation, subscribed by the five counsellors, and the principal, or original, set down and subscribed by the said Donald lord REA: upon the making of the whilk declaration, his majesty's Advocate asked Instruments.

Thereafter his majesty's Advocate answering to the former alledgeances proponed by the pannel, and to the first part thereof, he opponed the pannel's own Depositions, made upon the 20th and 24th of June, subscribed by the five councillors; and whilk are granted by the pannel to be true copies, together with the representation subscribed and written with the pannel's own hand, whilk verifies the first and last points of the particulars concerning the pannel's positive affirmation of the treason. And that the marquis was prime agent thereof, together with the speeches spoken to his majesty, upon the Sunday after dinner; and as to the third particular point of the Diitay, anent

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the earls of Haddington, Roxburgh, and Buccleugh, who are called Plotters; that is verified by the relations made by the lord Rea the 18th of May, acknowledged also by the pannel, and by the lord Rea's Depositions, whilks are used conjunctly, for verifying the second particular point of the Judgment, anent the three noblemen who are called Plotters, the one thereof, viz. the relation to prove the negative part of the Dittay, and that the pannel had no warrant from the lord Rea: and for verifying the affirmative, that the lord Rea disclaimed the same uses, the said lord Rea's Depositions. And where it is alledged, that the Dittay, so far as it is founded upon the lord Rea's Deposition, is not relevant against the pannel, because he is the pannel's party, and because he was not sworn, and not in presence of parties, 'quod est testis singularis,' and not subscribed by him; it is answered, first, That the negative point *per se* is sufficient to infer the relevancy of the Dittay in this point; that he gave them up as Plotters, without any warrant of the relation from the lord Rea, whilk is clear, by conferring the List of Representation, given in by the pannel (wherein they are called Plotters), with the said lord Rea's relation. Whereby it is evident that the Representation, given in upon the 16th of May, could have no warrant of the relation, whilk in the pannel's Depositions is affirmed to have begun upon the 13th of May, and closed the 18th of May, and delivered to the Lord-Treasurer to be given in to his majesty. Within the whilk relation there is not a word of the said three earls; neither can the pannel pretend ignorance hereof, in respect he in his own Deposition grants and confesseth, that the Lord-Treasurer, to whom they were remitted by his majesty, desired to give in the relation in writing, conform to the whilk the pannel and the lord Rea went together and consumed the whole night in drawing the said relation; whilk night was the night or evening of the said 17th of May, whereupon first they appeared before his majesty. And the pannel having given in the representation of the prime agent and the plotters upon the 16th day preceding, he could not have omitted such a substantial point of the relation, which so nearly touched the marquis and the three noblemen aforesaid, and the pannel's own exoneration. Like as the pannel himself with his own hand wrote up and drew off the said lord Rea's Papers the said relation of the 18th of May: so that the pannel can never affirm, that he had any warrant from the said relation for branding the marquis as prime agent, and the said three noblemen as plotters.

And as to the Arguments made against the lord Rea's Deposition; First, the same is not used *per se*, but jointly with the other, 'Et 'juncta plena faciunt fidem.' Next the lord Rea is not the pannel his party, 'sed est author 'et mandator quem tenebatur edere,' otherways he would have been himself culpable of treason, or, a delator of treason against the said noblemen, 'poena talionis vel tautopatheias' by act of parliament, made by king James 6, par. 11, cap. 42. Next, 'Nulla necessitas jurisjurandi 'quia non testis sed author a reo nuncupatus.' And the singularity cannot be objected, because he used him 'tanquam singularem et solum,' to warrant his declaration; and for present he could not be, if the lord Rea had been examined 'tanquam testis,' as the pannel alledges; and as to the authentickness of the copy of the relation, it is approven by the pannel, and he cannot be heard to object against the authentickness thereof, nor of the other copies; because they are subscribed by the said five counsellors, and have the warrant of his majesty's missive letter directed to the council: which the pannel for reverence of his majesty's letter, and of the counsellors subscribers of the said copies, has acknowledged as true. And therefore cannot be heard to object against the remanent, whilk has the like solemnity of his majesty's letter, and consequently the fourth alledgeance ought to be repelled.

Quinto, It is alledged for the pannel by his prolocutors, That as to the particulars of his Dittay, the pannel purges every one of them in manner following; viz. The first particular point is not relevant, because that the pannel at his first meeting with his majesty upon the 17th of May did signify to his majesty, that the business was a Treason against his majesty, and that the party was the marquis of Hamilton, as he was informed. This Article enforces not against the pannel, that he is a leasing maker and forger, but clearly frees him thereof, bearing 'as he was informed.' Whilk Article being the sum and substance of the whole Dittay having the aforesaid clausule (as he was informed) annexed thereto, inforces of necessity the same clausule to all the particulars of the Dittay comprehended under the said general, 'quia 'semper specialia generalibus insunt.' And that the pannel spake it by information, it is clear by the pannel's Depositions upon the 20th and 24th days of June, and by the lord Rea's Deposition the 21st of June, acknowledging the pannel's Examination to be true in all points, in so far as the same concerns the knowledge, words and acts of the lord Rea, and by the relations made by the lord Rea and subscribed by him, and other relations made by the said lord Rea to the pannel by word, as the pannel's own deposition bears. Neither was it ever heard or practised, that any subject being necessitated by the law to reveal what may concern the king's majesty or the state, and revealing the same with his informer therein, and constantly abiding thereat, and willing to maintain the same upon any torture or trial whatsoever; that the revealer, upon the party's denial, should be called in question of his life, as the deviser and forger, or the same to work any ways against the revealer; and which if it should now take place, and begin to be a preparative against the pannel; it were to give way and occasion to all treasonable exploits, and that securely, because none would or durst reveal the same.

Next, as for the List of Names of the princi-

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pal agent and plotters represented to the Lord Treasurer the 16th of May, affirmed to be forged and invented by the pannel himself without any warrant from my lord Rea, conform to the pannel's deposition upon the 20th and 24th days of June last, none of the pannel's depositions foresaid, to the whilk the Dittay remits, bear any such confession or forging by the pannel; but bears expressly the lord Rea's relation to him in both the pannel's depositions, which is sufficient for an informer.

It is asked by the pannel, That whereas it is alledged by my Lord Advocate, that the pannel could never ascribe any true cause or knowledge in the List or Representation where the lord marquis is named prime agent, and the said earls of Haddington, Roxburgh, and Buccleugh, plotters; because the Lord Advocate affirms, that the relation was given in upon the 18th day, and the List presented to the Treasurer the 16th day; and so the pannel could have no just reason why these contained in the List, were not contained in the Relation, which was posterior. The pannel affirms, that howsoever the List was given in before, the reason thereof is thus: The Lord Advocate making mention of his relation, distinguishes not betwixt a relation by word, and another by writ; but so it is, that my lord Rea made relation to the pannel upon the 13th of May of the whole things contained in the Relation upon the 18th of May, as appears evidently by the pannel's 1st and 2nd depositions, and upon the 14th and 15th days my lord Rea renewed the discourse concerning my lord Seaforth, and explains himself in these particulars concerning the earls of Haddington and Roxburgh, anent their being upon the secret and counsel of the marquis's courses; That it was represented upon the 14th and 15th days, the lord Rea and the pannel being both at Greenwich, returned upon Monday morning, being the 16th day, to London; at which time the pannel went unto the Lord Treasurer, and there fell in discourse with the Treasurer on the business concerning the marquis's power in Scotland, and friendship with the pannel, and to shew his lordship he would let him know was very great; and so came forward to the pannel's own house, and wrote the Representation, and delivered the same to the Lord Treasurer, which was done upon the 16th day, being Monday. And where my Lord Advocate alledges, that there could be no ground for this representation before the giving in thereof from my lord Rea's written relation, because the representation preceded it in time, and the Plotters were not named in the relation, whilk therefore followed upon the 18th of May, answers the verbal relations concerning the Plotters made by the lord Rea to the pannel preceded the scriptural relations given in to the Treasurer; yea and the representation both, because done upon the 14th and 15th days of May, the representation being upon the 16th, and the written relation upon the 18th. Neither was it needful to the lord Rea to make that relation in this paper, which he had made to the pannel before by word, like as there are sundry other things in the pannel's depositions, whilk are not set down in that written relation. First, because in all the written relation, no mention is made of my lord Seaforth, or any thing proceeding from him; if of nothing from him, why then of the grounds of the pannel's representation, whilk was had from my lord of Seaforth?

The Justice continues all farther disputation and reasoning in this matter (by reason of the lateness of the night) to the morn the 2d of this month of December, and ordains the Pannel to be returned to Ward, to remain therein in the mean time; the persons also warned *apud acta* to the morn, all persons under the pain of a thousand marks.

Curia Justiciaria S. D. N. Regis tent' in prætorio burgi de Edinburgh, secundo die mensis Decembris, anno Dom. millesimo, sexcentesimo, tricesimo primo, per honorabiles et discretos viros, magistros, Alexandrum Colville de Blair, et Jacobum Robertoun, Advocatum, Justiciarios deputatos nobilis et potentis comitis Willielmi comitis de Stratherne, et Monteith, dom. Grahame, Kilbryde, et Kynpont, præsidis secreti concilii et justiciarii generalis dict. S. D. N. Regis, totius sui regni Scotiæ, ubilibet constitut. sectis vocatis et curia legitime affirmata.

Intran'

James Lord Uchiltrie, delated of the crimes foresaids, contained in his Dittay.

Pursuer.—Sir Thomas Hope of Craighall, knight and baronet; his majesty's Advocate for his highness's entries.

Prolocutors in Defence.—Mr. Robert Nairne, Mr. Alexander Pierson, Gilbert Neilson, Advocates.

The said James lord Uchiltrie by himself repeats the former first Alledgeance, word by word, as it stands, and eikis thereto, that he can no ways be in *mala fide*: That the grounds of his Representation preceded not his written representation *hoc argumento*, as it is alledged, because the lord Rea had omitted in his relation to make mention thereof; whereas my lord Rea's facts cannot make the pannel guilty simply; neither can his omissions take away the strength of the pannel's arguments of his innocency: For it was the pannel's part to follow him, and not to lead him; to reveal assertions, and not to indite assertions to him. Neither was the Pannel under any just cause of fear that his omission could endanger him in the point; because he was conscious to himself, that my lord Rea had told him the grounds of his Representation of before, viz. upon the 14th and 15th days of May, by verbal relations thereof upon the said days. The pannel likewise knew that there was a second relation wrote of sundry other particulars to be made by my lord Rea subsequent; among the whilk he knew the grounds of his preceding verbal relations of his representation was to be justified and cleared. So by these reasons the lord Rea's omission of the grounds of the pannel's

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Representation out of his scriptural relation, *eo tempore*, can give no just ground to invalid or infringe the truth of the pannel's assertion. That my lord Rea by verbal relation preceding both the representation and that written relation, had told him that the earls of Haddington and Roxburgh were upon the council and secret of the business informed against the lord marquis. The same last argument holds good likewise for my lord Buccleugh; and as to the representation in general, the pannel declares, That it was written and given in upon a discourse of my lord treasurer's inquiry for the friendship of the marquis in Scotland by blood or interest; whereby conjecture might be made of his power suppositive, if his friends had joined to him. And this is clear by the very writ itself, in naming it a representation, and not an information, accusation, nor relation. The general strain of the writ likewise evidences, that there was no intent by that writ to reflect in any thing concerning the lord marquis or those three noblemen. Because the representation containing one side and a half of paper, that whilk concerns these noblemen originally will scarce take up two long lines. Whereby it is manifest, that the intent of the pannel was more to illustrate other things, viz. The alliance and interest in blood of the noblemen to these first four, than any intent of either delating or inserting any crime or fact against these first four; but to distinguish by way of narration betwixt the one and the other. And although this be said, the pannel attests, that the mentioning of these noblemen succeeding the first four, be taken in no evil part, for he attests no meaning to that effect, whilk the pannel thinks Christian charity will not presume; his wife's son, his children's brother, the prop of his providence under God, and of his wife and children, the earl of Cassils being one; and the marquis of Huntley his chief by his mother, his good dame, brother's son, who saved the pannel's life, and for whom the pannel has ventured his life, or any of his; can it be presumed that the impannelled would have intended malice to that mass, wherein these two helped to make up the construction? Neither doth it appear by any intent, that any thing was meant by the representation, but an explanation of noblemen's power in Scotland. Neither let this be thought any new invention, or new explanation; because it is mentioned before that alledged by my Lord Advocate in the Dittay, and acknowledged thereby; neither can it be presumed, that these words, prime Agent and Plotters, can import an information of any thing, because all direct affirmations must be enunciation, and must have *suum vinculum* to join the subject and the attribute together. Which *vinculum* and connection of it want no enunciation; if no enunciation, no affirmation, nor lye. But so it is, the words (prime agent) have no *vinculum*, nor the word 'plotters' simply has no *vinculum* betwixt them as attributes, and the persons named as the subject, and therefore no enunciation, nor affirmation, nor lye. And where my Lord Advocate in his Dittay affirms, that it is manifest by the pannel's own deposition, the truth of the Dittay; and in the dispute yesterday, produces a particular, that the pannel should have deponed, that the lord Rea said, that he had no certainty of the business; this can no ways fortify the assumption of the Dittay. Because the pannel's deposition says not that the lord Rea had certainty, but whether he had certainty or no, the words whilk the pannel alledges was told to him by the lord Rea; for the pannel's deposition depends not upon a *scientia certa*, but *relatio certa*, that he spake it to the pannel as he has deponed. As to the third Article of the Dittay, anent the pannel's proceeding and speeches to his majesty the 23d of May, to-wit, 'Sir, ye know the busi-'ness, but know not the time; sir, either do, 'or die;' this Article enforces not upon the pannel lying to his majesty. For the lord Rea, and the pannel upon his information, both had acquainted his majesty with the business, so that the pannel might truly say, 'Sir, ye know the business;' and it is as true, that the pannel knew not the time. As to the words 'do or die,' that is a usual phrase of speech, and imports, 'Sir, see 'to your safety,' till these informations had been cleared, and is of itself a faithful advice to his majesty, and not a malicious counsel; and advice for to prevent the king's majesty his harm, and not to draw harm upon any other: like as the words themselves inforces not against the pannel, as the Dittay bears; but does very well admit a harmless sense, and should be interpret to the best meaning the words may admit. 'Quia de jure etiam in dubiis et obscuri 'quod minimum et benignius sequimur. Lege 'nona et 56 de regulis juris; et in ambiguis 'orationibus maxima sententia spectanda est 'ejus qui eas protulet. Lege 96. ibidem: et 'quoties idem sermo duas sententius exprimit, 'ea potissimum accipienda est, qua rei gerendæ 'aptior est, dabit autem operam exprimi reus 'dicta verba at cui licito;' to-wit, the revealing of purposes he heard against the king and state. 'Denique in pœnalibus causis semper benignius 'interpretandum est.' And therefore the pannel's speaking and insisting with the king's majesty to see to his own safety, should be referred to its own cause; to-wit, the pannel's most bounden duty and tender love to the king's majesty, his welfare, and to the state of the kingdom, fearing their faith, upon that relation that had been made to him. And also fearing his own faith, if that he should have been found any ways remiss or slack in not insisting with his majesty to prevent those evils and treasonable plots, so often related and repeated to him; and whilk the pannel then feared to have been treason, and to have come beyond sea. And should not be attributed, as the Dittay bears, to any malicious counsel, or purpose of the pannel, for instigating, or stirring up of his majesty, to any sudden and violent course against the marquis's life and honour; as the pannel attested before God, to have been his true meaning. Like as he in his Examination

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in the 21st thereof, depones, that upon Sunday morning whilk was that day he and several the king's majesty with these former speeches, was, that he should go to London for his safety, and that the pannel had no other end of speaking of the words foresaid.

Item, The words 'do or die,' can be no Leasing, because they are not words of affirmation, but of counsel or advice.

As to the Paper of Names, whilk the Dittay affirms; the pannel has confessed to be made by himself, and that the lord Rea was not privy to the making thereof nor delivery of the same to the Lord-Treasurer; it is answered, these words made by yourself, is written with your own hand, so purported to be by the Dittay itself, in that article anent the list of names delivered to the treasurer. To the writing of the whilk paper with pen and ink, and to the instant delivery thereof, by the pannel to the said Lord-Treasurer, the lord Rea was not privy, he not being present with the pannel at that time; but does no ways enforce, that the names and matter of that written paper was forged and devised by the pannel. But by the contrary, the pannel by his deposition, made the 20th of June, whilk bears, that after the lord Rea had revealed to him the particulars, he desired the pannel to acquaint his majesty; or the Lord-Treasurer, therewith; leaving to the pannel his own free-will, whether he should acquaint him therewith by word or writ. 'Et 'hic maxime spectanda est sententia proferen-'tis,' who is no ways contrary to himself in his depositions; but whilks both subsists in their own true sense.

As to the Article bearing the pannel in his Examination, being inquired for what cause he did name the lord marquis to be prime Agent; and that the pannel affirmed, that he could assign no true reason nor warrant from the lord Rea: it is answered, that the pannel is not obliged to give any true cause. But that the lord Rea's relation to him *qualis qualis* is a sufficient warrant.

Secundo, The Pannel's deposition upon the 24th of June bears the contrary of the said Article, and assigns the cause to be, that the lord Rea had told him, that the lord marquis's followers had said, the intent of the marquis's levies was to invade Scotland or England. As also the Pannel's Examination upon the 20th of June purports, that upon the 13th of May, the lord Rea came to the Pannel's chamber, and there putting the Pannel in mind of their former speeches, told the Pannel that the purpose of the marquis of Hamilton's levies, as divers of his commanders and followers had informed him, was, that either they should not go out of England or Scotland, or if they did, they should return to England or Scotland, and surprize the king's houses in Scotland, viz. the castles of Edinburgh, Striveling and Dumbarton, and fortify themselves in Leith, under the pretence of training, and should take Berwick, and so march forward into England: and that the intention so to do, was, as the lord Rea said, that he was so informed, and as the deposition in itself bears.

Tertio, The lord Rea's written relations of divers persons discourses to the same purpose, of the whilk he was informed by themselves; whilks written relations, although they be written on the 18th of May last, yet are of matters and purposes that passed long before, and related of before to the pannel by word, by the said lord Rea.

Quarto, The lord Rea at his first coming to his majesty in this business, in the pannel's hearing, being asked of the king's majesty, why he had not told his majesty sooner of it; the said lord Rea answered, because it concerned so near the marquis of Hamilton, who was so near to his majesty; he was afraid to communicate the same to his majesty immediately, as the said lord Rea's deposition taken upon the 21st of June purports.

Item, The lord Rea's deposition made upon the 21st of June, wherein he depones, that he said he should bring as honest a man as himself, that would tell to the lord marquis's face more nor the lord Rea would do; so all that the pannel spake herein, was by information, and so therein is no forger, nor maker of Leasings.

Item, The pannel's deposition, taken upon the 20th of June, bearing that the pannel told the Lord-Treasurer, That the lord Rea told him, he had yet more, and would say so much, as the lord marquis would not have a face to deny it; whilk the lord Rea then present affirmed, in so much as the Lord Treasurer said, then is the business at an end, there needs no more writing. And this Article before repented, the pannel affirms, that the Lord-Treasurer of England heard these words, and did affirm the same before the king's majesty and council of England, upon the peril of the pannel's head.

Item, As to the Article bearing the lord Rea's Declaration upon the 21st of June, that he knows nothing against the person of the lord marquis, but that the marquis was as good a subject as any the king had: it is answered thereto by the pannel, that his deposition and representation depends not upon the lord Rea's knowledge, but upon his relation made to the pannel. And that Declaration of the lord Rea's takes not away the relation made by him to the pannel, and doth not infer making and forging of Leasings in the pannel without warrant from him; this specially being considered, for weakening and infringing of the lord Rea's oppositions to the pannel's depositions, that my lord Rea having said these words in presence of the Treasurer of England, and justified by the Lord-Treasurer of England, in presence of his majesty and council of England, that the lord Rea would say so much, as the marquis should not have the face to deny it; and now he says that he knows nothing anent the marquis's person: whilk are contradictory to himself, and renders himself not sufficient to improve the pannel's depositions.

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Item, Here the pannel, in this place, repeats the objections of the nullities, made against the lord Rea's Depositions, so far as the same may be prejudicial to the pannel.

Item, As to the Article, bearing that the pannel being asked, by what warrant, he called the three earls Plotters; and that he answered that the lord Rea had told him, that the lord Seaforth had affirmed to him, that the earls of Melros and Roxburgh were acquainted with the particulars and secrets of that business; declaring therewith, that the lord Rea had affirmed the same to him, before he gave in the paper of representation to my Lord-Treasurer. Albeit the lord Rea, by his deposition the 24th of June, declared, that the first time the lord Seaforth had speech with him, anent the said two earls, and their being privy to the marquis's business, was upon the Monday after the marquis's coming out of Scotland, and not before; and so after the representation given in to the Treasurer upon the 16th of May, containing the names of the Plotters and Actors; at whilk time the pannel could not truly affirm any information from my lord Rea: to the whilk it is answered by the pannel, that he, by his deposition made the 24th of June, has declared, that all the understanding the pannel had in the business, came to him from the lord Rea, also by his deposition the 20th of June.

Item, The lord Rea's granting of the speech himself, anent the two earls, makes presumption against the said lord Rea, likewise for the time, 'Quia dicta facta presupponunt et tra-'hunt se cum suis circumstantiis:' neither is it probable nor ordinary, that there should be that sagacity of spirit in the pannel, as to press what the lord Rea should make to him so long before, 'Quod non præsumitur, sed præsump-'tio, pro eo est, quod maxime est, secundum 'naturam toto; titulo de presumptionibus.' And so this Article enforces not against the pannel, that he is maker and forger, because the lord Rea denies not simply, but the time of the pannel's deposition thereanent, whilk is no leasing.

Item, The pannel in his Examination upon the 20th of June, in the course and order of the depositions thereof, whilk is the order of time, before the article anent the representation of the list of names to the Lord-Treasurer; he depones, that the lord Rea had told him, that he had spoken with the lord Seaforth, and had understood that from him; whilk general has no other meaning but that whilk is particularized, by the said lord Rea's Examination upon the 24th of June; in that article thereof, bearing that the lord Rea did affirm to the pannel, that he heard the aforesaid report of the two earls, before the pannel made or delivered the paper of representation.

Item, The lord Rea's deposition upon the 24th of June, bears not the lord Rea to deny, that he did affirm to the pannel, that he heard the report of the said two earls from the lord Seaforth, before the pannel made or delivered the paper of representation to the Treasurer. But purports, that the first time that the lord Seaforth had any speech with the lord Rea, touching the two earls, their being privy to the particulars and secrets of the lord Hamilton's business, was upon Monday after the marquis's coming from Scotland. And so that the lord Seaforth had not spoken with the lord Rea thereanent at that time; whilk is nothing to the pannel, whether the lord Seaforth had spoken with the lord Rea or not. But denies not the foresaid report of the two earls made by the lord Rea to the pannel, whilk the lord Rea did then affirm, that he had the same by information of the lord Seaforth; neither is the pannel obliged to make good the lord Rea's warrant herein, that the lord Rea had the same by information of the lord Seaforth; but the question is, if the pannel heard the same from the lord Rea, before the giving in of the representation to the Treasurer. Whilk the pannel affirms and abides at, conform to his depositions, made upon the 20th and 24th of June, as said is.

Item, The pannel here also repeats all the objections against the lord Rea's Depositions, *ut supra*.

Item, Anent the Article, bearing, the lord Rea to have told the pannel, that he could not guess who else should have been in the plot, unless it were the lord Buccleugh; and that the lord Rea, who by his deposition upon the 24th of June depones, that the pannel, and not he, did name the earl of Buccleugh, as one would take arms in Scotland to assist the marquis: It is answered thereto, *ut supra*, that the pannel by his deposition has declared, that all the understanding he had in the business, came to him from the lord Rea; as the pannel's examination bears, and whilk he abides at as most true.

Item, The pannel's deposition upon the 24th of June, bearing the lord Rea told him, anent the earl of Buccleugh, is not simply, but *cum causa*, bearing the lord Rea's reason, wherefore he named him: and whilk reason in substance is granted by the lord Rea, although with some diversity of words, at the least not denied in his Examination upon the 24th of June. And therefore, the said lord Rea's deposition affirming the reason, but denying the naming the said lord Buccleugh, ought not to be credited in his denial; but the lord Rea's affirming of the reason, inforces upon him the naming of the said earl. 'Quia ratio confessa dicti præ-'ponderat et præsumit contra proferentem.'

Item, The lord Rea's speeches to the pannel anent the lord Buccleugh, though conjectural, necessitate the pannel to the representation, and revealing of the same to his majesty; especially seeing the lord Rea strengtheneth the same with reason wherefore he so spake, to wit, that he heard the lord Buccleugh speak terrible and presumptuous words against the king's majesty, at his own table in Holland; as the pannel's deposition upon the 24th of June purports, and whilk is granted by the lord Rea himself in substance, at the least not denied.

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Item, The pannel repeats here again all his objections against the lord Rea's depositions; and alledges that it was never heard nor practised, that a subject being necessitate by the law, to reveal what may concern the king or state, and revealing the same with his informer therein, and constantly abiding thereat, and willing to maintain the same by any trial or torture, that the revealer, upon the party's denial, should be called in question of his life, or the same any ways work against the revealer. And whilk if it should now take place, and begin a preparative against the pannel, the same were to give way and occasion to all treasonable exploits; and that securely, because none would or durst reveal the same.

And further, where it is affirmed by the dittay, that in the list presented by the pannel to the Lord-Treasurer, there is designed the earls of Haddington, Roxburgh and Buccleugh to be Plotters; the pannel had ground to make the relation, no ways affirming any thing positive; because in the pannel's deposition made the 24th of June, being examined and asked why in the aforesaid paper, he makes the said earls plotters;

It is answered in the Deposition, that the lord Rea had told the pannel, he could not guess who else should be in the plot, unless it were the earl of Buccleugh; whilk word Plot, having had relation to the earl's business, must also have relation to the other two earls, seeing they were spoken of all at one time.

It is answered by his majesty's Advocate, first to the first article of the fifth exception, anent the purging of the Pannel's speech to his majesty, upon the 17th of May: By this word that is subjoined, as the Pannel is informed, whilk the proponer for the Pannel will have to be repeated in all the subsequent passages concerning the business; first, that this word, 'as he 'is informed,' cannot purge him, because he received no positive information from the lord Rea against the marquis, nor no warrant to call him party, prime agent, and to affirm to his majesty the business was known; to whilk last he subjoins his counsel, very dangerous for the life and estate of the marquis; whilks three are conjoined to infer against the pannel, an exceeding of the relation made to him by the lord Rea, and the exceeding of it, with the peril of the nobleman, his life and estate; there being neither word nor passage in the lord Rea's written relation, whilk may either warrant their speeches, or infer them by consequence. And in matters of this high strain, as of treason, no illation by consequence is permissable, but upon the peril of him that infers. For in all the written relation there is not a direct word spoken against the marquis, neither by David Ramsay, nor by Mr. Robert Meldrum; but allanerly some mad and frantick speeches uttered by Meldrum upon his own imagination, or wish to have it so, for disturbance of the estate, by expressing the manner how such an enterprize, according to his foolish opinion, might be performed; but not one word or syllable, that Meldrum heard it from the lord marquis, or from any who declared they heard the marquis speak it. And as to David Ramsay, the worst word that is in his relation, is anent the marquis's miscontentment, and all the marquis's aim was to use his levy for the protection of religion; whilk aim and intention the lord Rea, after his coming to England, clearly understood by the lord marquis himself; who employed him to be a colonel in his company, and gave him this assurance, that he that would hazard with him in that glorious business for assistance of the king of Sweden, should make use of him, with the hazard of his fortune and estate: and none of these passages will quadrate with those speeches spoken by the Pannel to his majesty; That it was a treason, an odious treason, and the lord marquis party, as the Pannel was informed; and that it was the filthiest treason that ever was intended, and that the Pannel was sorry that any Scotsman should have fallen into it, it being a shame to the whole nation: whilk is a positive affirmation, not as the Pannel was informed, but as he himself did infer, upon the relation made to him by my lord Rea, who would give the Pannel no assurance he had any certain ground, whilk is manifest by the Pannel's deposition upon the 20th of June last. And as to the relation albeit it avowed with these words, as he is informed, could give the Pannel no warrant to express these positive speeches to his majesty, upon the 17th of May; so far less to the other of prime agent, and known business, with the subsequent counsel. First, Because they are positively spoken without adjection, (as he is informed), and where the proponer for the Pannel urges that these words 'as he is informed,' must be repeated in all subsequent passages; that has some probability, 'in unico continuo actu, vel unica scriptura.' But here the acts are diverse, the days diverse, the expression of writing diverse, the list being upon the 16th of May; the speech with the king, as he is informed, upon the 17th of May; and the speech of the known business with the council being upon the 22d of May: and these three taken *conjunctim* evidently charges the Pannel with the excess of his duty. For he did all his duty that was required of him, as a faithful subject, when upon the 15th of May, whilk preceded all the expressions, he came to the Lord-Treasurer and told him, that he had a business to reveal concerning his majesty, and whilk, as he said, concerned the marquis of Hamilton's actions, and that he had the same of the lord Rea: after the whilk, he had no necessity as a loyal subject, to go further. And yet he goes on to the expression of all these speeches, and adds thereto his dangerous counsel to his majesty; whilk can have no respect to the lord Rea's relation, nor to the Pannel's duty in revealing of it. And where the Pannel would purge his giving in of the lists first, because it is not an enunciative speech, 'quia caret vinculo:' this is contrary to the representation, bearing the *vinculum* is the marquis of Hamilton as prime agent: and

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this word *is* must be repeated in the subsequent word Plotters; the sentence being, the earls of Melros, Roxburgh, and Buccleugh plotters. Whilk is a sentence that has a clear signification, affirming the attribute plotters upon them three, in as evident and clear signification, as the clause subsequent, whilk names the whole noblemen adherent by blood.

And where it is alledged, that albeit the pannel named the lord marquis prime agent, he did allanerly upon intention to distinguish the marquis, and the other three earls from these of their adherents in blood; and urges that this intention should be charitably expounded:

It is answered, that 'crimen vel delictum 'non potest purgari bona intentione.' And if the points contained in the Dittay, whereupon the pannel is accused, be in their own nature criminal, they cannot be purged by a good intention, nor yet by a protestation adjected, the time of the doing it. But the intention, with the fact and deed, are both alike judged odious, and punishable. 'Et nunquam præsumitur 'bona intentio nisi probetur, ad eluendum cri-'men;' as it is instanced, by Jul. Clarus de injuriis, 'tu mentiris salva reverentia.' This instance being adduced, whilk by the opinions of all the doctors cannot excuse the committers of the injury, and much less in this Dittay; whilk contains 'injuriam capitalem,' striking upon the life and fame of the noblemen. 'Nam qui defamat, jugulat plusquam maledic-'to quam in manu injuria est qui sic incidiatur, 'ut nota et iamad posteros transeat, quod est 'sæpe eundem occidere:' and charity can have no place here, without the offence of justice, whilk craves the due punishment from the offender. And where it is alledged, that the pannel had no warrant, both to name the marquis prime agent, and the earls plotters, by a verbal relation from the lord Rea, there can be no respect had to a verbal relation, except it were proven to the judge, especially in a matter 'tantæ atrocitatis.' Neither can the pannel alledge to a verbal relation, to colour his behaviour therewith; because the pannel affirms, that their verbal relations were made upon the 14th and 15th of May; whilk precedes the relation exhibited in writ, upon the 18th of May. In the whilk relation there is not a syllable of the three earls as plotters; albeit in the relation there is mention made of the speeches spoken by the earl of Roxburgh to the lord Rea. And the pannel having given in his list upon the 16th of May, and knowing the peril of adding or paring to that, whilk was related to him in a matter of this importance; whilk should have been as tenderly handled, as the life, honour and safety of our gracious sovereign upon the one side; and the care to eschew the branding of noblemen with the odious aspersion of his treason, did require of him, on the other part: And cannot pretend a colour of excuse by the omission of the names of the said three earls in the relation given in upon the 18th of May thereafter; specially seeing the relation in effect was his own deed; because he brought the lord Rea to his majesty, to make the relation. And the lord Rea, in his relation to his majesty, spake never a word of the three earls; nor yet the pannel in his relation to the king's majesty, and the Lord-Treasurer, spake not a syllable thereof: whilk is clear by the pannel's depositions upon the 20th of June, which bears his relation, made in presence of the councillors his examinators; wherein is no word of the three earls. And likewise by the Examination of the lord Rea upon the 21st of June, which is such like; and when his majesty had remitted the pannel and the lord Rea to the Treasurer, who directed them to draw up the lord Rea's relation in writ; the pannel confesseth, that he and the lord Rea went home, and sat up all night; and that the pannel, after the lord Rea had put the relation in writ, did write the same over with his own hand, out of the lord Rea's Papers. And yet not a word of the relation of the three earls; which would not have been omitted, if it had been truly done. And where the pannel pretends, that the omission thereof was in respect that the relation contains allanerly that which was related by the lord Rea upon the 13th of May; but not that which was upon 14th and 15th of May; which was learned of the lord Seaforth; that alledgeance hath no warrant of the relation, nor yet any appearance at all; because in the pannel's examination upon the 20th of June, the pannel doth condescend of that which was done upon the 14th and 15th of May; but not one word of the earls, albeit in that same examination he makes mention, that the lord Rea had spoken with the lord Seaforth. And sic-like, in the examination of Donald lord Rea, upon the 21st of June, 1631, and also the pannel's own deposition foresaid; that the pannel two days after the relation, which behoved to be upon the 20th of May (relation being upon the 18th), the pannel brought the lord Rea to the Treasurer, and caused him to subscribe his relation; at which time the pannel told the Lord-Treasurer, that the lord Rea had more to say: whereupon the lord Rea being asked what it was, and wherefore detained, the lord Rea answered, that he had spoken with the lord Seaforth, and had sundry particulars from him, which he did not tell to the lord Uchiltrie in particular, but generally. affirmed to him he would say more. But one or two days after, the lord Rea went to the earl of Seaforth, and then told the same, first to the pannel. And that the pannel, upon the Sunday of the morning (which was the day of the marquis's returning from Scotland) he had told the Lord-Treasurer these particulars, spoken by the lord Seaforth, and therewith also of the marquis's return: whereby it is clear, that as nothing is contained in the relation touching the three earls, neither in the verbal relation to his majesty and Lord-Treasurer, nor in the subscribed relation; so the speeches thereanent spoken by the lord Rea to the pannel, was not till eight days after giving in of the list.

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And where it is alledged by the pannel, that as the lord Rea's fact cannot burden him, far less his omission; it is answered, first, it must bind him, because he has named him to be his author: and wherein he is not his author, the pannel himself must needs be the forger. And next, because the relation in effect is the pannel's own deed, as said is; and as to the purgation of the speeches, that the business is known, 'Sir, either do or die;' that the same must be interpret 'secundum communem usum 'loquendi;' and to mean as mickel as, see to your own safety: it is answered, that they must be taken properly, and not improperly, and must be ruled by the preceding speeches of the party and prime agent; as if the pannel had said to any person, this man slew your father, 'do or die.' In the which case, the words would not be exponed safety, but revenge: and where it is alledged 'quod in du-'biis benignior fieri debet interpretatio;' this rule of law has only place 'in contradictibus, 'sed non in crimininbus, præcipue atrocioribus,' as this is. But it is urged, 'hic sumus in fac-'to licito;' but it is answered, 'hic in maxime 'illicito.' Because there was nothing required of the pannel, but to reveal, whilk was done of before; and whatever was done after the revealing, that might tend to the hurt of the reputation of the noblemen, or touch them in their life and estate, was altogether unlawful and capital; and the unlawfulness is manifest, by the subjoining of that pernicious counsel, 'to do or die:' whilk is not of the nature of a relation, but of the nature of the instigation, of a sovereign prince to a dangerous act, tending to the destruction of the life and honour of them, against whom the counsel is given; and by their answers, the whole objections made against the particulars of the libel are solved. To the which is added, the lord Rea's declaration by oath, freeing the marquis, his majesty's letter of the 29th of June, sent down to the council, declaring the lord marquis, and the said three earls of Haddington, Roxburgh and Buccleugh (to be as his majesty knows them to be) as good and faithful subjects as any within his majesty's kingdoms; and declaring his majesty's resolution, to have those who have given false information against them, to be punished. After the which, did follow his majesty's letter of the date of the 24th of September, for trying and censuring the pannel, upon the particulars given forth by him against the noblemen: wherein the pannel, notwithstanding of all his purgations, can have no just warrant against the marquis, specially in the two last points of prime agent, and known business; nor pretext against the earls of Haddington and Roxburgh; but, by the pannel's confession, least of all against the earl of Buccleugh, against whom he had nothing but a guess by his own confession, and yet he makes him plotter.

It is duplyed by Mr. *Robert Nairne* for the pannel, that this Dittay consists upon three deeds done and committed, by the pannel, together with his intention in the doing of them. As to the pannel's intention, that it was not of purpose of making any leasing, against the act of parliament, but to the revealing of an alledged treason against his majesty; the revealing whereof was necessitate by that addition adjoint to the last act of parliament libelled: for obedience of the whilk act, the pannel did whatever was done in this business by him, and that the first part of the dittay is not relevant against the pannel to infer the punishment libelled against him, is clear, by retorting of the argument after this manner: A deed commanded by the act of parliament, cannot infer a punishment by the same act of parliament; true it is, that the first deed contained in the assumption of this dittay was commanded by the act of parliament, imponing a necessity to all hearers of treasonable speeches against the king or state to reveal the same: *Ergo*, he did the same lawfully. Whereas it is alledged in the dittay, that by and after the information which the pannel had by relation, he has exceeded in the particulars expressed in the dittay. And first, in the first particular, at the doing and speaking whereof by and after the anterior information, which the pannel had received, the lord Rea his author was present: who being inquired or by his majesty, why he was so long in revealing of the alledged treasons; he answered, That he was afraid to do the same, in respect of the nearness betwixt his majesty and the marquis. So that that which the pannel did for obedience to the law, and his author being present beside him, is no ways relevant to infer the punishment of Leasing-makers against him contained in the act of parliament. Like as also the said lord Rea, after the said relation to his majesty being remitted to the lord-treasurer, declared that the marquis was party; and further said, That he would cause as honest men as the lord Rea himself to affirm the same.

Whereas my Lord Advocate, in his reply, quarrels the former words positively set down, and not by relation; it is duplyed, That the form of the speech is not in question here, but the matter; for albeit, that the pannel had reported in other words, or by a description, or paraphrase, that which my lord Rea related unto him, without changing or altering of the substance, commits no fault, nor cannot be accounted therefore a leasing-maker. And here the proponer repeats the words contained in the relation and depositions, which he remits to the Judges consideration. And to the second part of the subsumption, anent the delivery of the List of Names to the treasurer, it is answered, That that part of the Dittay is most irrelevant, and cannot be subsumed upon the proposition of the indictment; for to reason thus, all leasing makers should be punished. True it is, that the pannel has written, and delivered a list of names to the treasurer: *Ergo*, he ought to be punished, is an evil argument, which is remitted to the judge, except it had libelled, that the said list contained leasings, which is not libelled. And albeit it had been libelled, it is alledged, that the said list of

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names as it is set down, contains no purpose, for it is not written therein, prime agent and plotters in such a treason; not only indefinite prime agent and plotters. And if the pursuer will force these words, to this alledged treason contained in the relation, the pannel then will repeat the word used of before (as he is informed). And here alledges, that it is as lesome, or rather more lesome to the pannel, to erk true words for the pannel's good, nor to the pursuer of the Dittay, to erk others for his accusation. And albeit the said words had been adjected, whereby the sentence might have been filled against the pannel; yet he closes himself with the relation made by the said lord Rea verbally, before making of the written relation. And where it is disputed, that there cannot be a verbal relation here respected; it is answered for the pannel, that it is clear, the written relation we learned of the marquis's servants and followers *tantum*.

And further alledges, That the disputation of the time of the giving in of the List upon the 16th day, and the time of the speaking of the lord Rea with the lord Seaforth, upon the 21st day, is no ways relevant nor material; it being confessed, at the least not denied by my lord Rea, that he had related of the three earls to the pannel: For the deed being constant, the circumstance of time is not so material, and cannot be presumed that the pannel should have any knowledge thereof; who had of before been very long absent, and no ways interested in their advice, and altogether ignorant of them; could of himself without any information, named the same persons whom the revealer was to name, and none other.

It is answered by his majesty's Advocate, That he oppones the Dittay, with the reply made to the former defences.

Lastly, It is alledged for the pannel, That as it cannot be proceeded against the pannel here in Scotland, but conform to the laws and statutes of England, the place of the pannel's alledged offence, and according as the fact is punishable, or not punishable, and more and less punishable in the kingdom of England; so there can be no legal accusation institute or laid against the pannel here in Scotland for the said facts and deed, but upon the laws of England, or at least upon the common law. And true it is, that the Dittay is not founded upon the laws of England, nor yet upon the common law; but upon the municipal laws of Scotland, and acts of parliament thereof: And therefore the Dittay is no ways relevant, subsuming and concluding upon the acts of parliament, mentioned in the proposition of the Dittay.

Item, If the relevancy of the Dittay all be sustained, it is alledged, that there can be no pain inflicted, but that whereby the said facts and deeds are punishable by the laws and statutes of England, or by the common law, and no ways by the pains mentioned in the said acts of parliament. 'Quia judex originis vel 'domicilii non potest punire subditum delin-'quentem extra territorium, nisi secundum 'pœnam impositam a jure communi vel statutis 'loci in quo deliquit, non autem secundum 'statuta ipsius loci originis vel domicilii.' Jul. Clarus, Quæstio 85.

To the whilk it is answered by his majesty's Advocate, That the first part of the alledgeance is altogether unreasonable and absurd; and as to the second part of the alledgeance, it is answered, That the pannel, being a Scotsman by birth, and also *quoad domicilium* being resident, by his lady and children in Scotland; and having committed the crime libelled against four noblemen in Scotland; he must be subject not only to the laws of the kingdom, but to the pain and punishment contained in the laws: like as his majesty by his missive letter has ordained him to be tried and censured by the laws of the kingdom. And where it is alledged, that he is only punishable by the pain inflicted in England, where the crime is committed; and for this alledges Jul. Cl. in his 85th question; first Julius Clarus in that place calls the matter disputable, 'et egere decisione Cæsarea.' Next, he adduces the number of doctors, conflicting in divers opinions *pro et contra*. And in the end he seems himself to incline to the punishment *loci delicti*. And after it, cites Marianus in cap. 'Postulasti extra de foro competenti: 'qui dicit generaliter esse communem conclu-'sionem, quod delinquens debeat punire pœna 'imposita a statutis loci in quo delinquens 'punitur.' And this last speech after his own carries *communem opinionem*, for his own is only given, *ad cautionem*, to free the judges from inquisition of law. From whilk the Justice-General is well warranted, by his majesty's letter commanding the pannel to be judged, conform to the laws of the kingdom.

And further, it is granted by Jul. Clar. to the which the proponer assents in his acceptation, 'quod posset delinquens punire pœna juris com-'munis vel pœna loci ubi delinquitur.' But so it is, that by the common law, 'Calumniatores 'puniuntur pœna talionis, lege quisvis Cod. de 'Calumniatoribus, novella Leonis 77. Lege 'finali Cod. de accusationibus Leg. 38. digest. 'de pœnis.' And Cicero in his fragments cites the Law in his Twelve Tables, in these words: 'Nostræ inquit, duodecim tabulæ cum per pau-'cas res capite sanxissent in his hanc sanxien-'dam putaverint; si quis actitavisset quod in-'famiam fateret flagitiumve alteri, et præterea 'atrox injuria, de jure communi punibilis est 'pœna mortis.' Jul. Clar. Questione 83 numero 9.

The Justice continues this Diet with all further disputation and reasoning in this matter, to the morn the third day of December instant; and ordains the pannel to be returned back to his ward, therein to remain in the mean time. The persons of assise warned thereto, *apud acta*, as of before, ilk person under the pain of 1,000 marks.

Curia Justiciaria S. D. N. Regis tent' in prætorio burgi de Edinburgh, tertio die mensis Decembris, anno Dom. millesimo, sexcen-

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tesimo, trigesimo primo, per honorabiles et discretos viros, magistros Alexandrum Colville de Blair, et Jacobum Robertoun, Advocatum, Justiciarios deputatos nobilis et potentis comitis Willielmi comitis de Stratherne et Monteith, dom. Grahame, Kilbryde, et Kynpont, præsidis secreti concilii ac justiciarii generalis dict. S. D. N. Regis, totius sui regni Scotiæ, ubilibet constitut. sectis vocatis et curia legitime affirmata.

Intran'

James lord Uchiltrie, delated in the crimes foresaid, specified in his Dittay.

Pursuer.—Sir Thomas Hope of Craighall, knight and baronet; Advocate to our sovereign lord for his highness's entries.

Prolocutors in defence.—Mr. Robert Nairne, Mr. Alexander Pierson, Gilbert Neilson, Advocates.

It is duplyed by the said James lord Uchiltrie himself, being entered upon pannel anent the first part of my Lord Advocate's reply, bearing, that the Clausule, as he was informed, can no ways be repeated in the particulars. And although the pannel so said, yet he has no positive information from the lord Rea; it is answered, the same ought to be repelled, because of the clause 'as the pannel was informed' purported in the Dittay itself: For the pannel in that whilk is the same, and strength of the whole Dittay, is necessarily understood, and should be repeated in all the subsequent passages of the Dittay; because it is *unicus actus continuatus.* And whilks whole three parts of the subsumption, as they are used conjunctly by my Lord Advocate against the pannel; so the pannel alledges that these words, as he is informed, contained in the general, must be understood and repeated in all the three several parts of the subsumption; as being the sum of all, whilk is after alledged, or was after imparted by the pannel, and ought so to be understood. And where it is alledged, that where the pannel, although he said, 'as he was informed,' yet it is no positive information from my lord Rea, to ground a positive assertion of the whole, contained in the Dittay.

It is answered thereto, He had positive assertions and information *quoad relationem; sed quoad veritatem* he was not bound to have it; sic-like many parts of his affirmations would be best cleared by the confronting of the pannel and his informer, whilk was never yet done. Neither are the chief of the pannel's affirmations, alledged by my Lord Advocate, simply taken, positive affirmations, but with interpretations, constructions and glosses, dipping *in mentem* of the pannel: To which God is his only judge, and it is an hard matter by presumed constructions, to draw the pannel to the question of his life; 'Nam non presumuntur delicta, 'sed probantur.' The pannel refers himself to his deposition, *in substantialibus,* undenied by the lord Rea, as is clear by the pannel's former exceptions. Whereas my Lord Advocate mentions the madness and foolish imagination of Meldrum, as the lord Rea's author of the speeches; first, the pannel protests, he urges nothing against those noblemen from himself, *ab origine.* But he adheres to the Relations of the lord Rea, verbal and by writ; neither disputes he against Meldrum's sufficiency, or for it; but that Meldrum's words, related to him by the lord Rea, gave him just ground of revealing. And as to the words alledged, related by the pannel to the king, anent the odiousness of the matter, and the lord marquis as party; this can no ways be laid to the pannel's charge as a fault, much less as a crime capital, because the informer, viz. the lord Rea, was present at the discourse; and related himself to the king, *eodem tempore,* the particulars of what the pannel had spoken; neither did he at that time oppose him, or contradict him in one circumstance, whereby the pannel was *bona fide* exonered, and therefore ought not now to be laid to his charge. And further, in the time of the pannel's relating his own words, the pannel affirms, that he did it with tears coming over his cheeks, no sign of malice, or sowing sedition, in expressing these words to the king, like as his majesty bare record thereof, before the council of England, the impannelled being present.

And to that part of my Lord Advocate's Reply, anent the lord marquis to be prime agent; the pannel repeats the first member of his duply, together with the impannelled's former exceptions thereanent.

And where my Lord Advocate affirms, that the pannel did his duty sufficiently in the first discourse, and might have acquiesced there with duty; the pannel affirms, that he could not, because all the time, from the 13th of May to the 20th, it was *actus continuatus,* by constant information running from the informer to the pannel; and so required a constant duty, whilk he durst not omit, neither with safety nor duty. And this is clearly by my lord Rea's own Deposition; who affirms the relating of several things, in several days and times, and is manifestly proven by the pannel's own depositions.

And where my Lord Advocate refuses to the pannel the exception of charity, answering, That 'crimen non potest purgari bona intentione, transeat,' where there is 'crimen simplex.' But where there is 'tantum crimen,' by constructions, periphrases, and glosses, *supra mentem,* yea, *contra mentem* of the pannel; there charity justly may be admitted: For a good intention, as it will not purge a manifest crime, neither should the wresting of the pannel's intention inforce a crime, and so not debar charity.

And where my Lord Advocate doth urge against the pannel's defaming of the noblemen, it is answered by the pannel, that the first author must be the defamer, and not the reveuler; the whole matter of the pretended defamation, being original acts of the lord Rea's *quod defensorum,* upon pannel, and not acts of the pannel; as it is evident, by the pannel's two depositions, the lord Rea's first deposition the

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21st of May, where the said lord Rea doth acknowledge the examination of the pannel, taken the 20th of June, to be true in all points, so far as the same concerns the knowledge, words and acts of the said lord Rea; upon the explanations then following. By which explanations, and notwithstanding thereof, there is substance enough in the pannel's deposition, to prove that the lord Rea, and not the pannel, was author to the whole matter of the pretended defamation. And whereas my Lord Advocate would in his reply seem to question the verbal relations, flowing from the lord Rea to the pannel; to this the pannel opposes his own deposition, and the first article of my lord Rea's examination formerly cited, wherein the lord Rea ratifies the pannel's verbal assertions: if he ratifies them, they must be in *rerum natura*; if they be, my Lord Advocate's assertion is not relevant. And where my Lord Advocate alleges the leaving forth of the lord Rea's verbal relation, out of his representation in writ, given in to the Lord Treasurer; the pannel repeats his exception made thereanent as before. And to all my Lord Advocate's discourse to that effect, containing one side of paper, the pannel oppones his first answer, and his depositions, and the lord Rea's relations, and his examinations agreeing thereto. And whereas my Lord Advocate would bind the pannel to answer for the lord Rea's omissions, because the lord Rea is his author; the pannel being sitting behind at the time of the expression, can hardly find means to be persuaded that it came from his majesty's advocate; and oppones and repeats the pannel's exception herein. And where my Lord Advocate, upon these words, ye know the business, and not the time (do or die), says, that these words should have a proper interpretation; which is, says he, to be a counsel given by the pannel, for subversion of the marquis's honour and estate: the pannel answers thereto, that he adheres to his exception already already alleged; and further adds, that the lord Rea said to the pannel that Sunday morning, that the lord Seaforth had said to the lord Rea, their purpose was to take the king, the queen, and the prince: and so the information being given to the pannel, furnished to the pannel great cause of fear, and his fear the reason of the expression of these words, of advising the king to prevent his danger; as the pannel had formerly advised my Lord Treasurer of England, to advise his majesty to retire to Whitehall from Greenwich, as to a place of more safety. And this is clear, by the pannel's deposition the 20th of June, ratified by the lord Rea in the first article of his examination the 21st of June.

And where my Lord Advocate alleges, that the lord Rea and his majesty's letter frees the marquis of Hamilton, and the other noblemen, by the lord Rea's oath: It is answered thereto by the pannel, that the pannel doth not charge them; he only charges the lord Rea as his informer and author, humbly attesting, that in what essential points the lord Rea is contrary to the pannel, he does the pannel wrong: and therefore the pannel declares, that whensoever it shall please his majesty to permit the pannel and the lord Rea to be confronted, or if then upon difference, the matter be not cleared of the pannel's innocency; the pannel is ready to hazard his life in a duel, to the glory of God, and to the clearing of the truth of this business, his majesty commanding the same, with a protestation, that he carries no malice to the said lord Rea. If the business be not decided by this, or that if his majesty is pleased to admit torture before a duel-trial, the pannel is ready with him to bear out the torture, and to be tried thereby, with the said lord Rea, and let the truth then appear: which if it be not then, whenever it shall please God to call the pannel to bear testimony thereof with his blood, if God be not graciously pleased to bear him up in it, let men so conceive: and if God bear him out in it, then will he be found meet after his death, to have been an honest man, and his blood shall be required of the takers thereof.

My Lord Advocate, before any answer to be made by him to the pannel's former duply, produced his majesty's Letter sent down to the lords of his majesty's privy-council, of the date of the 29th of June, 1631, and desired the same to be judicially read, of the whilk the tenor follows:

"To our right trusty, &c. the viscount of 'Duplin, our Chancellor; the earl of Menteith, 'President of our privy-council; and to the 'remanent earls, lords, and other of our privy-'council, of our kingdom of Scotland."—*Sic superscribitur*,

"C. R. Right trusty, &c. we greet you well. 'Whereas we are informed of a practice in appearance so pernicious, and nearly concerning 'us, as we would not but take some trial thereof, both by ourself, and some of our council, 'appointed by us for that purpose. But in the 'mean time, because of some sinistrous rumours maliciously dispersed thereupon, to the 'prejudice of our right trusty and right well-beloved cousins and counsellors, the marquis 'of Hamilton, and the earls of Haddington, 'Roxburgh, and Buccleugh, and some others; 'lest the like reports be brought unto your 'ears, we have thought good hereby to declare, 'that not only we have found by the trial we 'ourselves have taken, that they are altogether 'innocent and clear thereof; but likewise that 'the prime informer thereof hath now cleared 'them upon oath, testifying them, as we know 'them to be, as good and faithful subjects, as 'we have in any of our kingdoms. And for 'the business itself, whensoever it shall be fully 'tried, we will thereafter express our further 'pleasure concerning others interested therein, 'according as we shall find just cause, either 'in punishing any person that shall be found 'guilty, or in punishing any person that 'shall be found to have given false information. And whereas we have formerly by 'our letters recommended unto you, our right 'trusty and right well-beloved cousin the mar

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'quis of Hamilton, for furthering the speedy levy 'and transportation of his men with all possi- 'ble diligence; these are again to require you 'to contribute the best help that your autho- 'rity or endeavours can afford for that effect. 'Whereof, both out of the regard we have to 'him, and to that employment, being very con- 'fident of your best care; we bid you farewell. 'From our Court, at Greenwich,' the 29th of 'June, 1631.'

After reading of the which Letter of his majesty, it is answered by my Lord Advocate, that the urging of the pannel to have the words 'as 'he is informed,' to be repeated in all the rest of the Dittay, wants all reason; the points of the Dittay bearing relation of several deeds done in several times. And where it is alleged by the pannel, that these words, 'as he was 'informed,' were true, 'quoad relationem et 'quoad veritatem,' there was no necessity: If this were true, the Dittay were eluded, for the pannel is not accused of a Leasing in respect of the verity of the matter related, but in respect of his discrepance from his author, and that he affirms more than his author, and with greater certainty than his author: and that, not content with both these two excesses, he follows it out to the very point of execution, which is evident in the point of certainty, by these words spoken to his majesty, 'the busi- 'ness is known,' whilk is more certain by the opposition of the uncertainty of time only, which redoubles the certainty of the business. And in the point of execution, by that pernicious and cruel counsel, 'do or die:' the effect of which pernicious counsel, if God in mercy had not disposed the royal heart of our wise and gracious sovereign, would have produced more lamentable effects, nor could be quenched with the pity of tears shed by the pannel. And the conferring of the lord Rea (whom the pannel calls the prime author) with himself, in the progress of his behaviour, will manifest the pannel's guiltiness of the points of the Dittay, wherein he is accused: for the lord Rea, who behoved to have greater certainty than the pannel, never proceeded to the points of positive party, prime agent, plotters; and to say to the supreme sovereign prince, that the business was known, in all which points the pannel has involved himself; but the lord Rea was content to reveal the reports made to him by David Ramsay, and Mr. Robert Meldrum, to the pannel, without adding or paring. And when the pannel, upon the 22d of May, which was the day of the marquis's returning from Scotland to England, came to the lord Rea, and told him, that he had been with the Lord Treasurer, and acquainted him with the passages, which he had from the lord Seaforth, and of the lord marquis's return, and that he had conceived, that it might be dangerous at that time for his majesty; for the which cause the pannel in his deposition saith, that he did advise the king to remove from Greenwich to Whitehall or London; my lord Rea answered, that the pannel had done evil therein, for there was no such suddenness to be feared: yet notwithstanding hereof, and that his author had reproved his rashness, the pannel went thereafter and attended his majesty at dinner, and at the end of dinner spake these words of the certainty of the plot, uncertainty of the time, and added the counsel. Like as the pannel being asked, hereupon granted that he met with the lord Rea upon that Sunday the marquis came to court, and also that he met with the Lord Treasurer; and counselled his majesty's removing from Greenwich to London. But denies that the lord Rea said, that he thought it was evil done. Notwithstanding hereof, the pannel went thereafter and attended his majesty at dinner, spake the words and gave the counsel; like as his majesty being something wakened by that fearful counsel, sent for the lord Rea, and did acquaint him, that some present danger was suggested to his majesty, upon the marquis's returning. To the which the lord Rea answered by oath, that he knew nothing against the marquis, for any thing he knew, but that he was as good a subject as any his majesty had.

And where the pannel would labour to free himself, by denying the counsel given to him by the lord Rea; it cannot be a warrantable excuse, except he would prove that his author advised him to do it: which is improbable, seeing the lord Rea, his author, neither did it, nor allowed of its being done by the pannel. And where it is alledged by the pannel, that he had sufficient warrant from his informer, he cannot affirm it, as being contrary to the relation made by his author: which is not a syllable of the marquis as prime agent, nor of the three noblemen as Plotters. And whatever the pannel did after the discovery of the business to the Lord-Treasurer, which was upon the 15th of May; it was the pannel's own word, work and deed, as the giving in of the list, expressing the certainty of the plot, and urging the putting in execution. And where the pannel alledges, that all was done upon a good intention, and that God is only judge of the mind; it is true where the mind is not revealed by speech or act punishable of the law: but if either speech or deed be done against the law, the pretext of the mind will never excuse it.

And albeit it be true, as the pannel alledges, 'Quod delicta non præsumuntur sed probantur,' yet it is as true, 'Quod in delictis præsumitur 'dolus nisi probatur contrarium.' And in the case of this Dittay, we have a law prohibiting Leasings and Calumnies under the pain of death; and seeing by the Dittay, there are three particulars libelled, which his majesty in his Letter of the date of the 29th of June, has called false informations, and which directly fall within the compass of the law, as reflecting upon the life, honour and estate of the noblemen; the pannel's excuse by intention is too slender, to free him from the punishment of the law. And where it is alledged by the pannel,

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that he has named his author, and that he was present the time of his relation, and did not contradict him therein, which the pannel alledges for a sufficient ground of his exoneration; the contrary is true: for the lord Rea, in his Examination upon the 21st of June, doth acknowledge the pannel's Examination to be true in all points, saving the explanations thereafter subjoined. But this approbation cannot exceed the subject; and also the subject must be restricted according to the conditions of the explanation; but so it is, that in the pannel's examination, which is approven by the lord Rea; there is not one syllable of the lord marquis as party or prime Agent, or of the three noblemen as Plotters.

And therefore that falls not within the compass of the approbation, and where it may appear that in the pannel's examination upon the 20th of June, it is granted, that on Monday the 16th of May, he delivered to the Lord Treasurer the list of names; that is not a part of the pannel's relation approved by the lord Rea: but it is the pannel's answer to an interrogatory, asked of him by the counsel, which could have no respect to the lord Rea's relation. Like as the pannel being examined thereupon the 24th of June, grants that the list was made by himself: and that the lord Rea was not privy to the making thereof, which is also confessed by the lord Rea himself in his examination the 21st of June, 1631, and last article thereof. Wherein he depones, not only that he was not acquainted with the list of names delivered to the Lord-Treasurer, but that he had nothing to do therein; which both excludes the concourse of the making of the list, and his knowledge of the purpose of it. And where it is alledged by the pannel that after the revealing to the Lord-Treasurer, he could not abstain from the remanent passages of his behaviour, because it was *actus continuatus* by the lord Rea to the pannel, from the 13th of May to the 20th of May; it is answered, that after the first revealing, the pannel had no more to do in the necessity of duty, because his author was revealed: and whatever followed after discovery made by the pannel, would have tied the author and not the pannel; there being no law that might have punished the pannel for shifting his course after the revealing. But there being manifest hazard and danger in law, to follow further after the revealing of the business, which the author thought neither clear nor certain; and the pannel not being conscious upon what mind the lord Rea made his first information to him, which might very readily have been upon malecontentment, grudging and malice, his credulity to him was cruelty against the noblemen. And his going forwards after the revealing, was a manifest engagement of himself, in the malice of the author, and drawing upon himself the opinion of greater.

And where it is alledged by the pannel, that his behaviour cannot be counted in the nature of Leasings, punished by act of parliament, but allanerly by way of illation and sinister construction; the contrary is clear, by the three points of the Dittay. And the pursuer, in his reply, has most justly challenged the pannel as a defamer of noblemen; because their fame, honour and credit was unblameable before it was taxed by the pannel; and the lord marquis brought under danger of the loss of life, honour and estate.

And where it is pretended by the pannel, that the cause of his speaking of these words to his majesty, upon the Sunday of the marquis's coming to court, was because the lord Rea told the pannel that the lord Seaforth had assured him, that the Plot was for taking off the king and the queen; first, that excuse has no warrant from the lord Rea's deposition; next, in that same conference betwixt the pannel and the lord Rea upon the said Sunday, the lord Rea told him it was an idle fear; and thirdly, it cannot be a pretext, because that passage of the taking the king and queen, is contained in the relation made by the lord Rea upon the 18th of May; and so cannot be pretended as a new information lately come to his knowledge, to waken the pannel to such a pernicious counsel. And this shall suffice for answer to the duply, which is closed with that which is contained in the reply; that the pannel had no warrant of his speeches and proceedings positive against the marquis; nor colour of warrant against the three earls, and neither warrant nor colour at all against the earl of Buccleugh, against whom the pannel, by his own confession, had nothing but the guess of the lord Rea; which the lord Rea not the less refuses, and affirms to be the nomination of the pannel. But howsoever it is only a guess, by his own confession, from his author, and yet in his list he makes him a plotter. And albeit the like evidence of the pannel's calumnies against the other two earls being undoubted, as having no warrant at all from the lord Rea's relation, wherein there is no syllable of these noblemen; and that the excuse made by the pannel of a verbal relation by the lord Rea, has no probability, and also is contradicted by the lord Rea, being poised thereupon: yet in these two noblemen the pannel covers himself under the shadow of a verbal relation, against that which himself drew up in writing; but in the lord Buccleugh's he is excluded from all verbal relation, in respect of his own deposition, whereby he is manifestly convinced of incurring the punishment of the acts of parliament whereupon the dittay is formed, as having named him plotter, when by his own deposition he grants it to be a guess of the lord Rea.

It is quadruplyed by the pannel, that for answer to the triply, made by the Lord Advocate his pursuer, he repeats and oppones his defences contained in the former exception and duply. And further the pannel adds, that where it is objected by my lord advocate against the pannel, that he had no ground nor cause from the lord Rea's relation, from the pannel by word, to call the two earls of Haddington and Roxburgh plotters; but by the contrary,

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that the lord Rea refuses and denies the same; again the which objection, the pannel does repeat and adhere to that article of his second deposition, dated the 24th of June in these words following: he saith, the lord Rea did affirm to the examinant, that he had the foresaid report, anent the earls of Melros and Roxburgh, from the lord Seaforth, before the pannel then examined, made or delivered this said paper or list to the treasurer. And in the article preceding, in the same deposition, the pannel affirms the lord Rea told him this; whereby it evidently appears by the two articles joined together, that the pannel had ground for that part of his representation.

And whereas it is affirmed by my Lord Advocate, that the lord Rea denies the same, this comparing of the pannel's assertion, and the words of the lord Rea's denial together, the lord Rea's words will be found to import no direct nor clear denial; the pannel affirms that the lord Rea told him, that the earl of Seaforth told him, that the said two earls were upon the secrets of the business of the marquis; my lord Rea's words in his denial bearing, that the first time the lord Seaforth had any speech with him, touching the said earls of Haddington and Roxburgh, their being privy to the particulars and secrets of the lord Hamilton's business, was on the Monday after the marquis's coming out of Scotland. The pannel affirms, that the lord Rea told him such a thing; the lord Rea says, the lord Seaforth spake not to him any such matter before such a day: how do these two agree or contradict one another? The pannel affirms the lord Rea told him; my lord Rea affirms my lord Seaforth told him not such a thing before such a day: what is that to the pannel, if the lord Seaforth had never told that to the lord Rea, the lord Rea might have told it to the pannel for all that? And where it is alledged for the fortifying of the triply by my lord advocate, that the lord Rea in his deposition, denieth that he was acquainted with the list of names, delivered by the pannel, or had any thing to do therein; the pannel affirms, that this eludes not the particular words concerning the two earls; because of the denial of the general list, wherein they were ingrossed: for the manner of the discovery was left to the pannel, when the direction of the discovery was given him. And so it was not needful that the lord Rea should be acquainted with the papers, with the pen, the ink, the hour and the manner of the writing; because that was left to the pannel. Neither can the general denial of one piece of paper take away the pannel's testimony of the certain, determined, condescended upon by word. And for his word that he had no hand therein, is not meant *de materia*, affirmed by the pannel, reported to him against the said two earls; because he grants the substance in the preceding deposition made by him thereanent. And as to that relation by that list, concerning the earl of Buccleugh as plotter, for defence of the pannel's deposition it is produced in these words, bearing, 'And further saith (to wit the pannel), 'that the lord Rea had told him, he could not 'guess who also should be in the plot unless it 'were the lord Buccleugh; of whom the lord Rea 'said, he heard him speak terrible words against 'the king, at his own table in Holland.' There it is affirmed, that he suspected the lord Buccleugh to be upon the plot: if suspected to be on the plot by the lord Rea, and told by him to the pannel; the pannel was necessitated to reveal the same, yea *in iisdem terminis*, to reveal him to be a plotter; whom he said, he suspected to be upon the plot. To this my lord advocate objected, my lord Rea's denial, which are in these words: That the pannel and lord Rea having some speech together, who might be looked for in Scotland to take arms; the pannel, and not the lord Rea, named the lord Buccleugh. Whereupon the lord Rea told, that at the siege of the Busse, the lord Rea heard the lord Buccleugh use some words, whereby the lord Rea took the lord Buccleugh to have come malecontent out of England. In this presumed denial, there is contained a discourse betwixt the pannel and the lord Rea, as the lord Rea alledges. And in this discourse, that the pannel should have named the lord Buccleugh, and not the lord Rea; this naming, is a naming in the respect of time first or last; for the lord Rea grants that he did name the lord Buccleugh, because of the last words of that clause; so that his denial respects only priority of time, but no ways the pannel's assertion: for not a word of his assertion is denied. But by the contrary, for corroboration of the pannel's just ground, concerning the earl of Buccleugh; the lord Rea makes addition of more nor the pannel had remembrance of; and so fortifies his affirmation, and proves no denial thereof.'

The pannel adds further, for eluding of the mistaking of these his words, 'Sir, we know the 'business, but not the time, therefore do or 'die.' It is affirmed by the lord Rea, that he did hear of his majesty that there was a danger suggested to him; which danger my lord advocate alledges to have come from the pannel's words. If a danger but by the king's self apprehended, then not a persecution, for a danger imports defensive remedies, and not violent and malicious attempts; yea, it imports and implies a preventing, and not a prosecuting. And lastly, it clearly confirms the mentioned intention of the pannel's expressing of those words, which was to prevent his majesty's danger. This the pannel's alledgeance, is cleared in the lord Rea's deposition, made the 21st of June; yea, this is my lord Rea's relation, to whom the pannel never spake, since the pannel and he entered to their trial. As for the words, 'Sir, we know the business infallibly, 'this is no lie;' because the pannel and the lord Rea was at his majesty's ten days before, and affirmed the same; the pannel by relation from the lord Rea, and the lord Rea from others, 'and so that is no lie.' And that the pannel did not know the time, it is alledged in the contrary, *ergo*, not no lie. As for the

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words 'do or die,' by my lord advocate's declaration, it is but 'concilium perniciosum.' And that it is not 'mendacium,' neither can it be made nor interpreted 'mendacium,' by any probability or sense, and no malicious council, as is alledged against the pannel; considering the pannel's declared intent, and the lord Rea's before-mentioned examination, wherein it is called a danger, 'so not a lie,' and therefore not rightly subsumed.

My Lord Advocate repeats his former replies and triples, and desires my Lord Justice to close this process, so that there be no further dispensation or reasoning herein, till anent the relevance or irrelevance of the indictment. The Justice by Interloquitor declares the process to be closed; and continues Interloquitor upon the alledgeances proponed by the pannel against the dittay, and answers made thereto by his majesty's advocate, to Wednesday next, the seventh of December instant; the persons of assize warned *apud acta*, to compear the said day in the hour of cause, ilk person under the pain of 1,000 marks. And ordained the pannel to be returned to ward, therein to remain in the mean time: whereupon my Lord Advocate asked instruments.

Curia Justiciaria S. D. N. Regis tent' in prætorio burgi de Edinburgh, septimo die mensis Decembris, anno Dom. millesimo, sexcentesimo, trigesimo primo, per honorabiles et discretos viros, magistros Alexandrum Colville de Blair, et Jacobum Robertoun Advocatum, Justiciarios deputatos nobilis et potentis comitis Willielmi comitis de Stratherne et Menteith, dom. Graham, Kilbryde, et Kynpont, et Præsidis secreti Concilio et Justiciarii generalis dict. S. D. N. Regis totius regni sui Scotiæ, ubilibet constitut. sectis vocatis et Curia legitime affirmata.

Intran'

James lord Uchiltrie, delated of the crimes foresaid, mentioned in his indictment.

Pursuer.—Sir Thomas Hope of Craighall, knight and baronet; his majesty's advocate for his highness's entries.

Prolocutors in Defence.—Mr. Robert Nairne, Mr. Alexander Pierson, Gilbert Neilson, Advocates.

The lord Uchiltrie being entered upon pannel, produced to my Lord Justice, an Act of the lords of his majesty's secret Council, for continuation of this Diet, and of all further trial or proceeding against him, for the crimes contained in his Dittay, to the first day of February next to come; of the whilk act of council the tenor follows: 'Apud Halyrudhouse sexto 'die mensis Decembris, anno Dom. millesimo, 'sexcentesimo, tricesimo primo. The Lords 'of the secret Council, for some special causes 'and considerations, ordains and commands his 'majesty's justice, justice-clerk and their de'puties, to continue all farther Trial and pro'ceeding against James lord Uchiltrie, upon the 'crimes whereof he has been accused before 'them, till the 1st day of February next. 'Whereanent the extract of this act shall be 'unto them a warrant, extractum de libris ac'torum secreti consilii S. D. N. Regis, per me 'Jacobum Prymrose clericum ejusdem, sub 'meis signo et subscriptione manualibus, sic 'subscribitur Jacobus Prymrose.' According to the which Act of Council, warrant and command aforesaid, therein contained, the Justice continues all further trial and proceeding against the said James lord Uchiltrie, upon the crimes aforesaid, unto the said 1st day of February next to come: and ordained him to be taken back again to his ward, therein to remain in sure firmance, till the said day. The whole persons of assize, called upon by their names, are of new warned, *apud acta*, to compear before his majesty's justice, the said 1st day of February next to come, in the hour of cause; ilk person under the pain of 1,000 marks. Whereupon my Lord Advocate asked instruments.

Extractum de libris actorum adjournalis S. D. N. Regis, per me Johannem Bannatyne, Clericum deputatum honorabilis viri, dom. Georgii Elphingston de Blythiswood, militis, Clerici Justiciarii principalis dicti S. D. N. Regis, et dictorum Curiarum, Testan. his meo signo et subscriptione manualibus. Sic subscribitur, JOHANNIS BANNATYNE Clericus deputatus Clerici Justiciariæ Generalis S. D. N. Regis, Testan. his meis signo et subscriptione.

The lord Uchiltrie, appearing on the said 1st of February, was sentenced to perpetual Imprisonment.*

* "The lord Uchiltrie, a man of a subtil spirit and good parts, had not those endowments of his mind been stained with some ill qualities: his malice against the marquis of Hamilton was hereditary, he being the son of capt. James Stewart, who in king James's minority, when the Hamiltons were groundlessly and in a mock parliament attainted, carried the title of earl of Arran, and possessed their fortunes." Burnet's Memoirs of the dukes of Hamilton, p. 11, and 12. where he relates the whole business; and p. 12, says, "This was a calumny, than which hell could not have forged a fouler, for lord Uchiltrie judged that this would infallibly have produced one of two effects, either raised such a jealousy in the king's thoughts, as to have quite ruined the marquis, since few ministers are proof against such whispers, or at least it would have stopped his voyage for a while, till he was tried, and the smallest delay in that would have scattered his soldiers, (which the king was to send under the marquis's command, to assist the king of Sweden to recover the Palatinate) so that this design failing, in which his honour was now so far engaged, a stain should lie on him through all Europe. Lord Weston carried this story to the king, whether provoked to it out of hatred to the marquis, or moved from his zeal and duty to the king, shall not be determined; though the

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last was pretended by him, in many of his letters to the marquis. But his majesty knew the marquis too well, and understood all his motions and the progress of this affair, too exactly to give any credit to this forgery." And p. 13. "But the marquis was not able to lie under such terrible imputations, wherefore he pressed that Uchiltrie might be put to it, to prove what he had alledged: but all he offered against Ramsay was only a presumption, which Ramsay denied, and Rea affirmed; so that they were both put under bail, and nothing appeared that did touch the marquis: for though Ramsay had been as guilty as the lord Rea called him, that left no imputation on him, since none can be made answerable for those they employ, unless it appear that they followed the instructions given them. So the marquis was dispatched to Germany. Lord Uchiltrie had charged the marquis with Treason, and failing so totally in his probation, was sent down to Scotland to be tried, where he had a legal and free trial for his false charge before the Justice-General, and such assessors as were appointed to sit with him, by the privy-council; and had the marquis repaid him in his own coin, he could not have escaped capital punishment. But he was satisfied with his own justification, and such a censure put on the calumniator, as might deter others from the like attempts. Wherefore he was condemned to perpetual imprisonment in Blackness Castle, and he continued there for twenty years."—He was released by Cromwell. The severity of the Sentence against lord Uchiltrie seems to have deterred the earl of Rothes from maintaining the charge which he advanced against the Lord Register of falsely reporting the votes of the Scots parliament in 1633, respecting the confirmation of the statutes concerning religion, as then professed, and the grant to king Charles the 1st of the power to regulate ecclesiastical habits. See 3 Laing's Hist. of Scotland, 103, 104, and the authorities there referred to.

140. Proceedings in the Court of Chivalry,* on an Appeal of High-Treason: by DONALD Lord REA, against Mr. DAVID RAMSEY, 7 CHARLES I. A.D. 1631. [Sanderson's Charles the First, 164. 2 Rushw. Coll. 62, 106, 112, 142.]

{"The following Case is an instance of awarding a Trial by Duel in the Court of Chivalry, though afterwards the duel was prevented. There are two accounts of it, which we shall submit to our readers. One is from "Sanderson's History of the Life and Reign of Charles the First;" the other from "Rushworth's Historical Collections." Bishop Burnet relates the history of the accusation in his "Lives of the Dukes of Hamilton," principally with a view to justify the first duke of Hamilton, whose name was involved in the affair. See Burnet's Memoirs of the Dukes of Hamilton, p. 11. to 14. The bishop, it is observable, charges Sanderson with giving a journal of the procedure on lord Rea's appeal, in order to impeach the duke of Hamilton's loyalty. In Rushworth there is a Letter from Charles the first to the duke of Hamilton, which explains what was done in the Court of Chivalry, and amply proves, that the king was quite satisfied of the duke's innocence. This Letter forms a part of Rushworth's relation. As to the account in the Annals of James and Charles the first, it is merely a copy of Sanderson, with the addi-

* "It seemeth that by the antient Common Law one accuser or witness was not sufficient to convict any person of High Treason, for in that case where is but one accuser it shall be tried before the Constable or Marshal by combat, as by many records appeareth." Lord Coke's 3d Inst. c. 2, p. 26. See more concerning this Court in 4th Inst. c. 17.

"The Court of Chivalry, of which we also formerly spoke as a military court, or court of honour, when held before the earl marshal only, is also a criminal court, when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it. But the criminal, as well as civil part of its authority, is fallen into entire disuse; there having been no permanent high constable of England (but only *pro hac vice* at coronations and the like) since the attainder and execution of Stafford duke of Buckingham in the 13th year of Henry 8; the authority and charge, both in war and peace, being deemed too ample for a subject: so ample, that when the chief justice Fineux was asked by king Henry the 8th, how far they extended, he declined answering; and said, the decision of that question belonged to the law of arms, and not to the law of England." Bl. Comm. b. iv. c. 19. § 4.

"The form and manner of waging battel upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vastly more striking and solemn. The appellee, when appealed of felony, pleads Not Guilty, and throws down his glove, and declares he will defend the same by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagonist, swears to this effect. 'Hoc audi, 'homo, quem per manum teneo,' &c. 'Hear 'this, O man, whom I hold by the hand, who 'callest thyself John by the name of baptism, 'that I, who call myself Thomas by the name 'of baptism, did not feloniously murder thy 'father, William by name, nor am any way

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tion of the king's Letter from Rushworth." Hargrave.]

SANDERSON'S RELATION.

WHEN friends fall out their faults are found, as appears by the quarrel between Donnold lord Rea, a Scotish highlander, or rather more northward of the isles Orkney, and one David Ramsey, a true Scot courtier, concerning words and designs of treason against the king and kingdom, which because Ramsey denied, they are admitted the Trial by Combate, the manner being as followeth.

The day prefixt for trial was the 28th of Nov. 1631, before Robert earl of Lindsey, lord high-chamberlain of England, and now *pro tempore* deputed lord high constable of England. Tho. earl of Arundel, earl marshal of England, the earl of Pembroke, lord chamberlain of the kings houshold, the earl of Dorset, chamberlain to the queen's houshold, the earl of Carlisle, earl of Mulgrave, earl of Morton, viscount Wimbleton, viscount Wentworth, viscount Falkland, sir Henry Vane.

The place was the Painted Chamber at Westminster: at the upper end the roof a bench was erected four feet high for the constable, and marshal, and lords assistants. Under them seats about a square table, filled with the heralds of arms, and serjeants at arms, and other officers of the court. Directly under the upper bench sate the register doctor Dethick, and over against him doctor Duck the king's advocate for the marshals court. Behind him at the bar were the two pews for the appellant and defendant.

At eight a clock comes the earl marshal (ushered in with nine heralds, and three serjeants at arms) bearing his marshal truncheon of gold, tipped with black, and commanding room, and giving orders, retired into the upper house of parliament, and then returned into the court, as to make way for the high constable, who followed, and all took place in their degrees.

The earl marshal rises, makes obedience to the constable, and passing forward meets sir William Seager king of heralds, and both of them present to the constable his commission, which he received with his hat off: and delivered it to the register to reade, in effect,

'That his majesty being informed by Donnold 'lord Itey, how David Ramsey esq. had plotted, 'and was privy unto divers Treasons and Con-'spiracies against his royal person, government, 'and kingdoms. In the search whereof the 'king had used all ways and means for the dis-'covery of the truth: the one of them accusing, 'the other denying, and so no certain security 'to his own person and his subjects: therefore 'he doth authorize the said Robert Bartie earl 'of Lindsey lord high constable, for to call unto 'him Thomas earl of Arundel earl marshal, 'and with him such other peers, sheriffs, and 'officers, as he thinks fit, to hold a marshal's 'court, for sifting the truth between the said 'parties, &c.'

Then the king of heralds delivers to the constable, his silver verge or staff, half a yard in length, headed with a crown of gold. Then the earl marshal delivered a key to a herald, to fetch in the Appellant ushered in by the herald, and accompanied with his sureties, sir Pierce Crosby, sir Walter Crosby, sir William Forbiez, sir Robert Gordon, and sir William Evers. He was apparelled in black velvet trimmed with silver buttons, his sword in a silver imbroidered belt, in his order of a Scotish baronet, about his neck, and so with reverence entered into his pew. His council doctor Reeves standing by. His behaviour (like himself, tall, swarthy, black, but comely) very port-like and of staid countenance.

The Defendant was alike ushered in by another herald. His sureties were the lord Rox-

'guilty of the said felony. So help me God, 'and the saints; and this I will defend against 'thee by my body, as this court shall award.' To which the appellant replies, holding the bible and his antagonist's hand in the same manner as the other: 'Hear this, O man whom 'I hold by the hand, who callest thyself Tho-'mas by the name of baptism, that thou art 'perjured; and therefore perjured, because that 'thou feloniously didst murder my father, Wil-'liam by name. So help me God and the 'saints; and this I will prove against thee by 'my body, as this court shall award.' The battel is then to be fought with the same weapons, viz. batons, the same solemnity, and the same oath against amulets and sorcery, that are used in the civil combat: and if the appellee be so far vanquished, that he cannot or will not fight any longer, he shall be adjudged to be hanged immediately; and then, as well as if he be killed in battel, providence is deemed to have determined in favour of the truth, and his blood shall be attainted. But if he kills the appellant, or can maintain the fight from sunrising till the stars appear in the evening, he shall be acquitted. So also if the appellant becomes recreant, and pronounces the horrible word of *craven*, he shall lose his *liberam legem*, and become infamous; and the appellee shall recover his damages, and also be for ever quit, not only of the appeal, but of all indictments likewise for the same offence." Bl. Comm. b. iv. c. 27. § 3.

In Co. Litt. lib. 2, c. 3. sect. 102, a case is mentioned which went off by reason of what seems to have been a denial of justice. Lord Coke's words are, 'Rex voluit constituere 'Constabularium Angliæ, &c. & ideò dormivit 'Appellum.' See too sect. 103. 745.

Concerning the Constable and Marshal, see also Madox's Hist. of the Exchequer, 27. Dr. Oldis v. Donnille, Shower's Parl. Cas. 58. Some curious matter concerning Duels, and the Courts of the Constable, Marshal and High Steward, are to be found in the Bodleian Library in Oxford, Tanner's MSS. Nos. 14, 84, 85, 89, 103, 176, 278. and a treatise in MS. by Sir John Burgh in the library of the Inner Temple.

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borough and lord Abercorn: and his deport like himself, stern and brave, a fair, ruddy, yellow-headed bush of hair, (so large, and in those days unusual, that he was called Ramsey Redhead). His apparel scarlet, over-laced with silver, the ground hardly discerned, and lined with sky-coloured plush, but unarmed, without a sword. After his reverence to the court, he faced the Appellant, who alike sterned a countenance at him.

After O yes! the earl Marshal told them the effect of the commission, and the power of this court, which was not of any strange nature, but legal and justifiable as any other trial in Westminster-hall; and that there had been no more nor other trials of this kind of late, we were to attribute it to Gods goodness, the justice of the king, and loyalty of the subject, with the providence of state, and wished there might be no more in time to come; and that to expect any combate, this court he hoped would prevent it by the discovery of the light, and so 'magna est veritas, et prævalebit.'

He referred the further proceedings unto Dr. Duck, the king's Advocate, who spake thus in effect:

That the kings majesty had committed the trial of the business to your grace my lord high constable, the earl marshal, and this court, which course was warrantable by the laws of other nations, and also by our own, who have used the same manner of trial.—That our law admitted sundry proofs for Treason, which in other matters it did not: that all subjects were bound to discover treasons: and cited two ancient civilians, Hieronymus and Tiberius, who gave their reasons for this kinde of trial. And he mentioned sundry records of our own chronicles and examples herein, as the duke of Norfolk combating against the duke of Hartford in Henry 4, his time; Jo. Ely and William Scroop against Ballamon at Burdeaux, the king being there; the lord Morley impeached Mountague earl of Salisbury; and that Thomas of Walsingham and Thomas of Woodstock in their learned writings, expressed sundry precedents for this manner of proceeding; wishing the court in Gods name to go on to the trial, and the Appellant to give in his evidence.

Then the Appellant came up upon the table, to whom the earl marshal delivered the petition, which he had the day before exhibited to the king. And the Defendant being also called up, the petition was read, which was in effect, That he having accused Ramsey of treason, and also Meldram his kinsman, and of confederacy, against whom captain Nothwick was witness, therefore had desired, that the court would proceed against Meldram first.

But he was told by the court, that their cases differing, the Appellant was ordered to deliver in his Charge against the Defendant, which he did, in writing by bill, containing sundry particulars, viz.

That in May last in the Low-Countries, Ramsey complained to him against the court of England. That the matters of church and state was so out of frame as must tend to a change, if not desolation. That therefore he had abandoned the kingdom, to live where now he was, and to expect a mutation forthwith, to which end he had brought present monies to maintain him at 6*l.* a day for three years. That marquess Hamilton had a great army promised to him, for pay whereof the king had given in hand 10,000*l.*, and all the wine customes in Scotland for 16 years, presently to be sold for the armies subsistence. And that he staid for ammunition and powder to come over, for which his lordship was to mediate with his majesty of Sweden and the states, and then link themselves together, of whose minde Rey should know hereafter.

That their friends in Scotland had gotten therefore arms and powder out of England, and that what he should procure in Holland was to be brought over by the marquess; and that all Scotland were sure to them except three. That France and Spain thirsted for England, but Hamilton would defeat them for himself. His onely fear was of Denmark, where he meant to land, and either to take him off, or make a party. That afterwards at Amsterdam, Ramsey with Alexander Hamilton solicited him the lord Rey to be true to them, and to be of their council, though as yet they durst not reveal too much of Hamilton's secrets, but if he repaired to England, he would intrust him with letters; and that his brother in law Sea-port knew all.

This being the effect of the charge. He added,

That if Ramsey would deny it, he was a villain and a traitour, which he would make good, And therewith cast him his glove.

Ramsey denied all, and said, Rey was a liar, a barbarous villain, and threw down his glove, protesting, to gar him dy for it, if he had had him in place for that purpose.

Rey was temperate, without any passion, but smiling, replied, Mr. Ramsey, we will not contend here. Answer to my bill.

Then Ramsey offered some reasons of the impossibility of the Charge, the slender numbers of men from England, but 6,000 raw souldiers, against three kingdoms, whom the first proclamation might dissipate. That the marquess was neither so wicked, nor weak in judgment: and if he should conceit to surprize the king, what hope had he against his children and kindred? And therefore, said he, my lord Rey is a barbarous villain, and a liar, and he will gar him dy for it, or lose his dearest bloud.

He was interrupted by the Earl Marshal, telling him, he must not stand upon conjectures, but answer the bill of form according to law, and was advised to take counsel therein.

Then Ramsey in general acknowledged all the particular circumstances of time and place alleged by Rey, and the discourse to that effect; but concluded, that no treason was intended or uttered, and craved counsel to answer, which was granted.

And so the court adjourned to the 5th of December, but upon a fresh arrest by the Earl

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Marshal they were to put in bail for appearance, which were the old security; and Ramsey ordered to answer upon oath. At which day appearing, the fame of the cause brought thither such a crowd of people as was not imaginable.

Rey entered as before in manner and habit; but Ramsey was new suited in black satten, and presented his Answer in writing to this effect;

That having well considered the time, place, and communication with the lord Rey beyond the seas, (as before urged) he confesses; That Rey demanded of him, whether the marquess Hamilton intended to come over and follow the wars? He said, yes; and told him of his forces 6,000 men, and of the 10,000*l.* in money, and Wine-Customes in Scotland, which he would sell to maintain the army, and that he would come so provided with ammunition, that being joined with his friends he valued no enemy. Upon which Rey replied, that his own two regiments should wait upon him: but the place of these forces to meet was at sea, and there to receive directions from the king of Swede, where to rendezvouz. Upon which Rey said, that his life and fortunes should wait on the marquess; who being told of his friendship, wrote a letter to Rey, which Ramsay delivered, in effect, that Rey would get some ammunition from the king of Swede, which was wanting. And that, speaking in general of matters amiss in England, Rey answered, God amend all. To whom Ramsey replied, by God, Donnold, we must help him to amend all. And to all the other matters and things he utterly denies, and craves revenge upon Rey's person by dint of sword.

Then doctor Eden of council for Ramsey spake to the court, that being assigned his council, his opinion was, that the defendant might decline the combate, and reply to the appellant's bill in brief, with these reasons: First, that by the words in the bill, no man can be charged a traitor by one that is guilty in his own particular, and so is not tied to be defendant, nor to answer such a bill. Secondly, the incertainty and doubtfulness of the words in the charge; so that till the court doth censure them to be treasonable, the defendant is not tied to answer. Thirdly, the Appellant refers the combate till the last, if he cannot in the mean time prove the charge by any other ways; then he offers to make it good by his body. So then, the defendant may forbear his answer, and decline the combate.

And now my lords (said he) I humbly shall acquaint you with the Defendants answer to me in private, which was, That though in law he might, yet in honour and innocency he would not, decline the combate, but being his own consent, his advocate hath the less to say for him. And so time was given for Rey's replication till Friday after.

Rey's councel moved, whereas Dr. Eden had excepted at some words in the Charge, he answered, that whoever was accused of treason, was not to insist, how polluted the answer was, but how to approve and clear himself: then to refer the combate to the last, was well done, *ultimum refugium*, to expose his life, for God, the king and his country.

This speech being somewhat peremptory, and directory to the court, he was told, That the court needed not his direction, as to the Tryall of Combate, their wisdoms would consider of that when it was time; and so the court adjourned, both parties being admitted to have common lawyers; but to plead onely by civilians.

This day come, Rey appears as before; but Ramsey in a new suit, of ash-colour cloth, opened with scarlet colour, the cloke scarlet cloth, lined with ash-coloured velvet, and the whole suit and cloke overlaid with silver and sky-coloured lace.

The former proceedings were read by the register; and thereupon the Appellants Replication presented to the high constable: in effect, That Ramsey in his Answer had cunningly slipt over a part of the Charge, which was, that the lord Rey protested, he was not ingaged in wars, for want of subsistence, and therefore would not hazard in any designe, without sure knowledge, upon which words, depends much of the matter and main of that part of the bill. And so ripping up the several charges of the bill, the strength, reasons, and likelihood, and the defendant's defects in not clearing the chief points, they went on with the councel.

It was his part to inforce the Charge against Ramsey to this effect:

He observed, that the first day, Ramsey denied all the charge, whilest he stood upon positive resolution, but afterwards his councel brought him to particulars, and taught him to answer superficially; first he knew nothing, and yet now so much. No doubt there was some stranger enterprize by the marquesse Hamilton, then to serve the king of Swede, by Ramsey's professing that Hamilton was a protestant, and bore arms for religion, not caring with whom to grapple; from hence observing, that they intended somewhat to attempt of themselves. Ramsey stiled the marquesse his master in discourse, and in many of his letters produced, much of the discovery by Rey was to fish out of Ramsey the truth of his doubtful words; how unlikely it was that Rey having two regiments of old souldiers, captain of the king of Swedes dragoons in good pay for all, should offer to serve Hamilton who was to be commanded by the king.

And that Ramsey might decline the combate, or forbear answering till the last, was a strange opinion of council; because, combate was to be reserved till all other means of discovery fayled, and therefore Rey his reasons were supplimental proofs; and requesting Meldram's testimony; but however he was now ready, if the court thinks fit, to give the combate presently.

And concluded with an example in case of murther. Two men fight in secret, the one is

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slain, the other flies, and though without any witnesse of the fact, his seeking to escape condemns him guilty. So Ramsey having been accused of treason above three moneths by the lord Rey, and both confined, Ramsay dispairing of his cause, seeks his flight from justice by sending to Rey a private challenger, being a sufficient conviction in law, as by ancient presidents in this court: viz. Kiteles, after an appeal, sends a challenger to Scroop, and was therefore adjudged guilty.

Doctor *Duck* answered to all. That first, it was prudence for Ramsey to answer in general negatively, having been newly landed from sea; and might be excused till time and consideration, to refresh his memory, being not upon oath; and as yet, the Defendant need not answer perfectly, till further time and favour, to view the exhibits in court by copies, which he desires.

And directly urged against the lord Rey's replication, not to be allowed; because, Rey, referring himself now to proofs, might have saved the trouble of this court of honour and chivalrie and hazzard of their persons by combate, which intends the trial without proofs; and that the Defendant having ingaged his sureties, but to this day, he humbly desires the time and place to be ordered for the sudden combate, according to the law of arms, and custom of this court; saying, that the duel foreseen, must ensue upon the appeal and denial; and therefore ought now to be granted.

Doctor *Reeves* moved for continuance of the replication, and consented to the combate; the court admitted the replication, and ordered time till Wednesday for exceptions thereto.

Doctor *Duck* offered some reasons to satisfy Rey, and extremely to censure Ramsey, where he was interrupted and told by the earl marshall, that the court will save him the labour and councel, till the rejoynders be put in, and then to be ordered.

Doctor *Eden* shewed, that the copies of the letters exhibited were not given out: nor shall, sayes the earl marshal, till the court have considered of the contents, and so they were read.

The one was from Ramsey to Rey, certifying him of passages in the Low Countreys since their parting, to put the marquesse in minde of directing him how to dispose of the ammunition and arms in his custody; subscribed, "your servant, Ramsey."

The other from the lord marquesse, to the lord Rey, congratulating his love and affection, expressing a great desire to meet him in Germany, upon any termes he would propose; and that Ramsey the bearer was instructed for him to treat with the king of Swede, whom he desires to favour and assist, "which will oblige him his friend and servant, Hamilton."

Doctor *Duck* opened the whole matter, and each particular, insisting, that my lord Rey's evidence being for the king, and he a person of honour, and peer of Scotland, his testimony was sufficient. And moves that Mr. Meldram might be admitted for supply, for though they were not joynt witnesses together, of the words, which made the charge; yet for as much that they were spoken asunder, and agreeing together, made up a full proof: that no testimony may be neglected in matters of treason. That if any part of the charge was denied by the Defendant, and proved by the Appellant, it might convince him in a manner of the whole: and urged the offence of Ramsey's challenging Rey. But more of that hereafter.

But doctor Reeves prosecuted the matter, for that Ramsey's councel endeavoured to prove that he might decline the combate, or forbear answering, because of some words which reflected upon my lord Rey as matter of reproach, that Rey had uttered words of treason to catch Ramsey, and then to turn informer. But (said he) no office can be accounted base, when the king and kingdom's safety is concerned; citing a story out of Livie, that the Romans confederate with the Samnites, were to undergo a base office that stood not with honour, and resolved, so long as it was advantagious to the Romane state, it might with honour be undertaken.

Doctor Eden was earnest to excuse himself for putting in these words against the lord Rey, saying, that his client enforced to have them inserted.

But being a point of honour, the earl marshal interposed, that true it was, the best man may not refuse the basest office to preserve a king and nation; but again, it was most unworthy the degree of honour, for any man to angle and intrap another, and then to present him to that king's justice.

Then the pleaders argued concerning Meldram's testimony, that no proof ought to be omitted for the king; but it was offered for Ramsey to joyn issue upon that point in law; for the bill was laid against him not general, but particular to place, time and matter, viz. that in May last in a ship, and afterwards at Amsterdam, then again at Delph, Ramsey should say such and such words, which if Meldram would justifie, besides himself, they ought to be admitted, otherwise it was no good matter, but must refer to a new bill.

That the Defendant had answered fully, for that the lord Rey profered his service to the marquesse without pressing to know any designe. That nothing in the letters could convict Ramsey. That the lord Rey standing upon his great offices under the king of Swede, and so not necessitated to serve the marquesse, he had not those places of command then, but since; and that since his coming into England, he said that he would have served under the marquess, and concluded that Ramsey and the marquess might use such words, and yet not intend treason to his majesty.

But having in this tryal medled so much with the marquess, the court was fain to enter an order or protection, to clear the marquess his words or actions from dishonour.

Then the court proceeded to examine Witnesses *viva voce.*

Archibal Rauken was to prove the challenge

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as the bringer: upon these questions he confessed, that he was in Ramsey's chamber at Richmond the last of October. That Ramsey did not imploy him to carry any challenge to the lord Rey; but at that time Ramsey told him, that it was his grief to be restrayned not to meet Rey, who was a trayterous villain, and wished to meet him in the open fields at Barn Elms, he would make him dye for it, and tear his heart, with other such words of reproach, and wished this deponent to tell Rey so much, which he did, but it was three weeks after, and then, not until the lord Rey told him, that Ramsey had sent him a challenge; so that, said Ramsey, my message was but a relation, not a challenge.

But Rauken was observed to falter from what he affirmed before Dr. Reeves, and others, viz. to have carried the challenge, and that Ramsey could not deny it; so that Rauken was threatned not to accuse Ramsey.

Gilbert Seaton deposed, that Ramsey said, he had made it come to Rey's ears, to have ended this businesse without troubling the king or lords.

Then doctor Duck summoned up all the proceedings, observing that formerly in the presence of the king, Ramsey had with deep protestations and oath denied the time, place, and matter which he now confesseth, and though then not examined upon oath, yet in France and other countreys, the very holding up of the hand is an oath, and so Tertullian sayes of the Romanes, and Ramsey confessing part, he might be guilty of the whole charge.

Doctor Eden said, that Rey was not a competent witnesse against Ramsey, though for the king, for he was 'particeps criminis; capitalis 'inimicus:' for the first his bill made him so; for if Ramsey spake treason, so did Rey; for the second, it appeareth by Rey's violent prosecution, and if all failed, his sword must make it good; and so the Defendant was not bound to answer, nor to accept the challenge unlesse he will, to which he is so willing.

But doctor Duck said these reasons did not 'currere quatuor pedibus.' Some of the conspirators with Cataline were revealers of the treason, and allowed as witnesses.

Doctor Reeves concluded, that although some of the lord Rey's witnesses did not affirm what they might, it would encourage him to set a sharper edge upon his sword when he entered the lists; and that the God of right would so weaken the heart of Ramsey, that it should fail him when he took his sword in hand.

The holy-daies of Christmass drawing nigh, the court ordered, that either party might repair to sir Henry Martin, and possesse him with further proofs, out of these witnesses already examined, but of no other. And so adjourned the court till Monday the 9th of January, when after some small debates, but no further matter or proofs, the businesse was briefly determined to be referred to the king's pleasure.

Which came to this account. That Hamilton's power with the king got all favour for Ramsey; and well rewarded in due time; and Rey having done the duty of a loyal subject, left the court and kingdom, and returned to his command in Sweden. But this story, though tedious, will enlighten us further to the truths of the Scotish affairs.

RUSHWORTH'S ACCOUNT.

Towards the end of this year (1630), the marquis of Hamilton arrived at the court of England, where was at that time Mackay, lord Ochiltry, a lord in Scotland, by name Stuart, and who once bore the name of the earl of Arran, when by a parliament which contracted a by-name in that kingdom, the Hamiltons were attainted of Treason, but afterwards both blood, honour, and estate were restored to them. This lord had no kindness for the marquis of Hamilton, but nourished a discourse, which Ramsay let fall to the lord Rea when they were beyond seas; and prevailed so far with lord Weston, then lord high treasurer of England, as to impart the business to the king, being a Treason of an high nature (if true) to this effect; 'That he raised this new army, with design, 'when he was at the head of them, to set him-'self up as king of Scotland.' Much credit was given to this design by the lord Weston lord high treasurer, who endeavoured to persuade the king not to permit the marquis to come near his sacred person, and in no kind to have the privilege to lie in his majesty's bed-chamber, lest his majesty's life were hazarded thereby.

The lord Weston pressed this home unto the king, but his majesty kept his thoughts private to himself; and having a great affection to Hamilton, as soon as he came into his presence, embraced him with great kindness, and discovered to him what he was accused of, but said, I do not believe it; and that the world may know I have a confidence in your loyalty, you shall lie in my bed-chamber this night. But the marquis beseeched his majesty to excuse him, till he had received a Trial, and was cleared of the Treason he was accused of; but the king would receive no denial, yet told him he would put the business into a way of examination; but afterwards when the examination was taken, it was found that the one affirmed the accusation to be true, and the other as positively denied it, and that there appeared not then any concurrent proof of the same.

A report of these Examinations was afterwards made to the king's majesty, who was graciously pleased to refer the whole matter to a Trial before the lord high constable, and earl marshal, in the Court of Honour, of which the reader will have a full account towards the end of the next year in its proper time and place. In the mean time, the king caused Rea and Ramsey to be secured in order to that trial: so the marquis proceeded in making provisions for the embarquing of his army, and ordering those forces in Scotland to be in readiness to be shipped, to come to the place of rendezvous when they received orders.

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A MEMORIAL made by Mr. Justice Whitlock in his life-time concerning the lord Rea's Discovery of the marquis of Hamilton's Conspiracy.

'Presently after my return from this circuit, 'myself and the rest of the Judges of the King's 'Bench were sent for by the Lord-Keeper to 'London, to advise with him about the affairs 'of his majesty. We came thither on Monday, '22 August, except the Chief-Justice, who was 'sick. The matter consulted of, was to give 'our opinion, concerning the conference had 'in Germany between certain Scotish gentlemen about the making the marquis of Hamilton the head of a party against the king and 'his kingdoms of England and Scotland.

'The lord Rea, a Scotish baron, did impeach 'Ramsey and Meldrum for moving him to this 'Conspiracy: they denied it punctually, and 'no witness could be produced. Ramsey, a 'soldier, offered to clear himself by combat, 'that he was innocent; and the appellant accepted of his offer. The king was desirous it 'should be put upon a Duel; and we were 'consulted with, 1st. What the offence was? '2dly, Where the trial might be?

'We all with the Lord-Keeper were of the 'opinion, 1st, That it was an high and horrible Treason, if that in the Examinations were 'found true. 2dly, That the Trial might be 'by an Appeal of Treason, upon which the 'Combat might be joined: but the king must 'make a constable *durante bene placito,* for the 'marshal could not take the appeal without 'him: that it must be after the manner of the 'civil law, and we were not to meddle in it. 'Likewise we were of opinion that this proceeding before the constable and marshal was, 'as it was before the statute of the 35 H. 8, 'cap. 2. and that statute devised a way how 'to try these foreign treasons in England, but 'did not take away the other. We were also 'of opinion that the statute of 1 Mar. cap. 10. 'did not take it away nor intend it; and that 'a conviction in this appeal was no corruption 'of blood or forfeiture at the common law.' See Doughtie's Case in Coke's Commentaries, fol. 75, sect. Escuage.

By order of a commission under the great seal, dated the 24th of November, (1631) there began a notable Trial, before Robert earl of Lindsey, constable of England; and Thomas earl of Arundel and Surrey, earl marshal of England, in the Court of Chivalry, judicially sitting in the Painted-Chamber at Westminster; together with other honourable persons, namely Philip earl of Pembrook and Montgomery, lord chamberlain of the king's houshold; Edward earl of Dorset, lord chamberlain of the queen's houshold; James earl of Carlisle; Edmund earl of Mulgrave; William earl of Morton; William earl of Stratherne; Edward vicount Wimbleton; Thomas vicount Wentworth; Henry vicount Faulkland; and sir Henry Martin, Judge of the high court of Admiralty; all of counsel with the court; Gilbert Dethick being Register. And first William Seager, king of arms, presented to the lord constable of England letters patents of the tenor following.

'Carolus Dei gratia Angliæ, Scotiæ, Franciæ, 'et Hiberniæ, rex, fidei defensor, &c. predilecto 'et per-quam fideli consanguineo et consiliario 'nostro Roberto comit. Lindsey summo camerario Angliæ salutem. Cum officium constabular. Angliæ vacans existat, ac Donaldus 'Mackay dominus Rea nuncupatus, in regno 'nostro Scotiæ oriundus, quendam Davidem 'Ramsey armiger. in eodem regno nostro 'ortum, de quibusdam contemptis et proditionibus contra nos in partibus transmarinis 'actis et perpetratis, in curia militari appellare 'intendit, et nobis supplicavit sibi justitiam 'super appellatione predicta exhiberi: Nos in 'hac parte fieri volentes, quod justum est, ac 'de fidelitate et provida circumspectione vestra 'plenius confidentes, vobis concessimus officiam 'constabular. Angliæ (hac vice) ad appellationem predictam Donaldi in hac parte, una 'cum predilecto et per-quam fideli consanguineo 'ac consiliario nostro Thoma comite Arundel 'et Surr. mareschal. nostro Angliæ, audiend. et 'sine debito terminand. et omnia quæ ad offi-'cium constabular. pertinent in causa et negotio predictis faciend. et exercend. secundum 'legem et consuetudinem armorum et curiæ militaris Angliæ, vobis, ut predictum est, authoritatem damus et committimus, tenore presentium: et ideo vobis mandamus, quod circa 'premissa, una cum prefato marescallo intendentes sitis, in forma predicta: damus autem 'ducibus, marchionibus, comitibus, vicecomitibus, baronibus, justiciariis, ballivis, prepositis 'et ministris, et aliis fidelibus nostris universis 'et singulis, tam infra libertates, quam extra, 'tenore presentium in mandatis, quod vobis in 'premissis faciend. et explend. intendentes sint, 'et consulentes, respondentes, et auxiliantes, 'quoties et prout per vos fuerint super hoc pre-'moniti ex parte nostra. In cujus rei testimonium has literas nostras fieri fecimus patentes. 'Teste me ipso apud Westm. vicesimo quarto 'die Novemb. anno regni nostri septimo. Per 'ipsum regem.'

Which letters patents being read by the Register of the court, Donold lord Rea, the Plaintiff, and David Ramsay, gentleman of the king's privy-chamber, Defendant, made their personal appearance. Then the lord marshal spake in defence of the Court of Chivalry, and the manner of proceeding therein, according to the law and custom of arms, shewing;

"That it was legal and agreeable to right and justice, as any judicial process in any other court of this realm: especially when the nature of the cause required it. And that in these latter ages this kind of trial hath not bin frequently used, but that was to be attributed to the pious and peaceable government of the state, under our most happy and prudent king, and his most illustrious predecessors, the kings and queens of England, and the obedience and fidelity of the people of England; both which

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are to be ascribed to the favour of Almighty God, conferring this blessing upon our nation above all the nations round about us."

The Lord Marshal further shewed; "That it was an error in many, to apprehend, that as soon as an Appeal is brought into this court, it was presently to be decided by Duel; when as duelling was the ultimate trial in defect of all others. And even then it was in the arbitriment of the court, whether a duel shall be granted or denied."

The Earl Marshal's speech being ended, Arthur Duck, doctor of the civil law, made a speech concerning the antiquity, jurisdiction, and necessity of the Court of Chivalry, held by the Lord High Constable, with the Earl Marshal, especially in cases of Treason, where the truth can no otherwise be discovered.

Then Rea and Ramsey were called into the inner court, and the one stood on the right hand, and the other on the left, of the lord constable, and earl marshal.

The lord Rea presented his Appeal in writing; and his Petition formerly exhibited to the king, was read in these words:

To the King's most excellent majesty. The humble PETITION of Donald lord Rea.

"Most humbly sheweth; That whereas he having heard sundry speeches fall from Mr. David Ramsey, importing plots and practices against your royal crown and realms, did, according to his duty and allegiance, reveal the same to your majesty; the truth whereof he is ready to maintain with the hazard of his life, and dearest blood, if he be thereunto required. Now so it is (may it please your sacred majesty) that your petitioner being informed, by his counsel, that these trials, by duel, or single combat, are *ultimum remedium;* and that a man may not appeal to this kind of divine judgment, but where all possibility of discovery by ordinary trials fail, and cannot be had. And whereas your suppliant, at such time as he disclosed all the practices which he heard from the said Ramsey, and did withal discover what he heard likewise from Robert Meldrum; against whom also one captain James Borthwick hath been examined, and the examination of Meldrum taken thereupon. And your suppliant conceiving that if Meldrum be guilty, the said Mr. Ramsey cannot be innocent, your suppliant therefore, not out of any inclination to decline the combat (as God who knoweth his heart can witness with him) but only out of his sincere desire to have the truth discovered, in a case so highly concerning your majesty's safety, honour and government, most humbly prayeth, that you would be graciously pleased, that Meldrum may be first proceeded against according to law; and if upon his tryal, the Conspiracy affirmed by your petitioner do not fully appear, he shall then with all alacrity (as in a case which otherwise cannot be cleared) justifie his assertions to be most true: either as a defendant against the said Ramsey, who demanded the combat of him before your majesty, or as a challenger, if the court of Chivalry shall so award; and shall be bound in all duty ever to pray for your majesty's long life and happy reign."

LORD REA'S APPEAL.

The Petition being read, the Lord Constable, with the counsel of the other nobles, declared his majesty's pleasure, that this cause should be tried in this court, and gave the Appeal to be read as followeth:

"In the name of God, Amen. Before you, most illustrious and right honourable lords, Robert earl of Lindsey, constable of England, and Thomas earl of Arundel and Surrey, marshal of England, or your lieutenants in this court-martial: I Donald lord Rea do accuse and challenge thee David Ramsey in the month of May or of June in the year of our Lord 1630, and in the 6th year of the reign of our lord Charles, by the grace of God king of England, Scotland, France, and Ireland, being then alone in my ship within or near the port of Elsinore, in the kingdom of Swedeland, in the upper part or deck of the said ship, when thou hadst this discourse or the like, and spakest these or the like words to me in English, viz. You told me many abuses in the court of England, and that there was nothing to be looked for but desolation and change of religion, and therefore you had retired yourself thence, since no honest man could live there, and with many such discourses you laboured to possess me: to which my answer was, The Lord mend those evils, and no remedy but patience. 'By God, Do-'nald,' said you, (I will use your own phrase) 'we must help God to amend it. You told me you had brought as much gold with you as would maintain you at the rate of 6*l.* a day for three years, and you assured me before that time would expire, God would raise up some men to defend his church, and liberate honest men from slavery. I desired if you could tell if the marquess of Hamilton would come over. You said he would the morrow or next day. After I asked you what content my lord marquess had at home. You said, none. I asked you what religion my lord marquess was. You said, a good protestant, and before it be long he would let the world see his design was for the defence of his religion, and the glory of God, and that he should have an army so well provided with brave men, and all warlike provision, that he should not need to be afraid with whom he encountered. I asked you what advantage was it to us to make a free passage for the Gospel in Germany, if we lost it at home. You said there were many honest men in our land, speaking of Scotland; adding, if we had once an army over, what would you think if we should take a start to settle them also, for ere it be long you will hear our country will go together by the ears. So closing that night's discourse; he says at last, some such thing perhaps is intended, but I will not tell you more, for my master's secrets are dear to me. The third night after, in an island, you told me, that Alex. Hamilton and sir James Hamilton were to go for

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England, and you for Holland, and in the mean while pretended yourself willing to do me service in England. I told you I had a promise of the reversion of Orkney from the king my master; if the marquess would mediate with his majesty for it, he would do me a great kindness, and I said, it were good for my lord to have a friend in that place for his ends. You moreover asked me, if there were good harbours in Orkney, or in my land, or in any part that might be fortified. I said, yes. You said, 'by God, it was to be thought upon;' and you desired leave to think upon it that night, and on the morrow you and Alexander Hamilton did desire me to write a general letter to the marquess, with trust to the bearer Alex. Hamilton, concerning Orkney, lest letters should miscarry, with great assurance of true friendship from your master, if I would continue constant in resolution, and so I gave you my letter.

"Afterwards in March last past, you came to me from the Hague in the Low-Countries to Amsterdam, where you stayed with me eight days, and delivered me a letter from the marquess, only of compliment and thanks; and you told me all went right with the marquess, that he had gotten from his majesty 10,000*l.* in England, and the Wine Customs of Scotland for 16 years, which the marquess would sell, and all things went on without any demur or obstacle, and the only stay was for want of arms, ammunition, and especially powder, and desired me to put in hard with the Swedish ambassador, which I did; and you told me, that the marquess had writ to you, that if the arms and other provisions were obtained, they should be sent to England and not to Scotland; at which you did marvel, because his lordship had changed his resolution, being all the other provisions were sent to Scotland. Also you told me, that my lord had sent over a man to receive them, as I desired. I told you the letter which Mr. Lindsey brought me, desired the arms to be sent to England. You said, though the arms were had, yet you would not send them till you had further order from the marquess, and you desired me to haste to you the answer thereof. In the end you told me you had evil news to tell me, that the marquess's lady was brought to bed of a child.

"Some few days after, in March or April last past, at Delf in the Low-Countries, I told you that I had a letter from the king of Sweden to the king of Britain, desiring some ships for the marquess. You said the marquess and I must beware of that, for then they will think that we mean to take their land from them with their own ships. I asked you, where our forces should meet. You answered me, on the sea. I asked you, where we should land. You said in some part of your old master the king of Denmark's country. You asked further, what think you if we should plunder some nook of his land, and thereafter go where we please; for we think he will be the only man that will be most against us. I answered, I am content; for he rests in him more than you all. I asked if my lord was to raise any men in England. You said, one regiment. I asked you if they would be true to us? You said that there were English that my lord was as much assured of as of any Scots. I asked, where we should make these meet. You said at Harwich or Yarmouth. I asked if they were fortified. You said, that no parts of all those coasts in England or Scotland could hold us from landing. I told you that I feared Mr. Meldrum was an evil secretary. You asked me wherein. I said, that Meldrum had told me many things, and that I thought he had told it to others. You said Mr. Meldrum knew nothing thereof when you came from England, though he might well suspect, and that he spake once to you at that time, as if all were ours, and that you had great patience to hold your hands off him, although he was your cousin. I told you that I was not a soldier of fortune; but had bread at home, and might live without hazarding my life in the fortunes of war; yet notwithstanding that, I would hazard my life and fortune with the marquess, only that I would know the business. You answered, you would tell me no more of your master's secrets; but that you would write a letter with me to the marquess, and when I came there, the marquess would infuse in me that which you would not; withal you desired me not to tell the marquess what had passed betwixt you and me, whereby the marquess should have all the thanks to himself: adding that he was very close, and that he would discover himself to them that he knew would hazard with him. That my brother-in-law Seaforth knew all, and that the marquess trusted him much. I asked you what was done in my business of Orkney. You told me, nothing till my coming, and said, it might be I should have it better cheap than to pay the duty of it; and you told me England had made a peace with Spain, very prejudicial to Holland; and that Spain and France were both striving who should first drink up England, but you hoped we should prevent them both. Besides, you told me the lack of powder was the greatest let. As for arms, we might get help thereof in every house, and that we had reasonable provision thereof already; and that my lord had written to you that he had 90 pieces of cannon great and small already provided. I desired you to go in person and speak to the Swedish ambassador for the powder, and to advertise me in the Brill of his answer, that so I might assure the marquis what he might expect: and you did send a letter by one of your own men to the Brill: to shew me that you were with the ambassador, and hoped to have that which we spake of. You asked my advice whether it was best to cross the seas once, or to go on bravely. I answered, 'delays 'were not good,' which you did condescend unto, or you used words and speeches to that effect.

"But if thou the said David Ramsey shall deny the premises, or say thou hadst not the same discourse, or to the same effect with me,

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at the foresaid times and places; I the aforesaid Donald lord Rea say and affirm, that thou David Ramsey art a false traitor and liest falsly. And in case the premises cannot otherwise be found out by the Sentence of this court, proffer myself ready by the help of God, to prove and justify this my Accusation and Appeal, by my body upon thy body, according to the laws and customs of weapons in a Duel, to be performed in the presence of our lord the king, &c."

Which challenge being publickly recited, the said Donald lord Rea, the party challenging, threw his glove in the Court, of a red or brown colour, for a pawn or pledge, in presence of the aforesaid lord constable, and Thomas lord marshal, in confirmation of all contained in the Bill and Challenge.

Then the said David Ramsey answered, in his own person, and said, "That the said Bill and Appeal was and is false, and that the said Donald lord Rea, the appellant or challenger, did lie falsly, and that he was ready to justify and prove this in Duel, according to the laws and customs of arms, and of this court, by his body upon the body of the said Donald lord Rea, as it should seem good to the court."

And thereupon in confirmation and justification of the premises, he threw his glove in the court, of a white colour, for his pawn, or pledge, in presence of the lord constable, and earl marshal aforesaid; which gloves respectively Richard St. George, otherwise Clarenceux, king of arms, took up and delivered into the hands of the said lord constable, with due reverence, and the said lord constable, together with the earl marshal, committed them to the custody of the aforesaid Register of the court. Then the said Lord Marshal arrested, as well the said lord Rea, the Challenger, as the aforesaid David Ramsey, esq. the Defendant. And the said Donald lord Rea produced sir Robert Gordon, sir Pierce Crosby, sir Walter Crosby, and sir William Forbes, knights and baronets, and William Innis, esq. for his sureties, who obliged themselves all, and every of them, *et divisim et conjunctim*, to our lord the king, for the said lord Rea, body for body, that the said lord Rea should duly prosecute this aforesaid Challenge to the final and last determination of the same; and that in the mean time the said lord Rea should keep the peace of our lord the king, against all and every of his lieges, and especially against the aforesaid David Ramsey, esq.

And the said David Ramsey produced for his sureties, the right honourable James earl of Abercorne, and Robert earl of Roxborough. Then the Earl Marshal aforesaid relensed Donald lord Rea the Challenger, and the aforesaid David Ramsey Defendant, from the aforesaid arrest, and at their request respectively delivered their bonds of suretiships to be cancelled.

After this, there was read in the court, the lord Rea's Petition to the king, for divers noblemen and others to be of his counsel in this cause; whose names he presented in a schedule annexed, as they are here recorded.

To the King's most excellent majesty, the humble Petition of Donald lord Rea.

"Humbly beseeching your royal majesty in this cause of appeal against David Ramsey in the Court of Chivalry, to grant unto the said petitioner, that he may have the parties, whose names are in the Schedule hereunto annexed, to be of his counsel in the said court. And he shall daily pray for your majesty's long life and happy reign over us." Viz.

"George earl of Lyney, lord Gordon; Miles visc. Mayo; Theobald baron of Brillis; Maurice Roch, son and heir of the vicount Fennoy; Donnough Mac Charty, son and heir of the vicount Muskery; sir Robert Gordon; sir Pierce Crosby; sir Walter Crosby; sir William Forbes; Donnough O Conno Sligo; James Hay, esq. of his majesty's body; William Innis, esq.; Dr. Rives; Dr. Duck; Mr. Selden, and Mr. Littleton, of the Inner Temple."

Upon which his majesty issued out the following Order:

"It is his majesty's pleasure, that only these should serve, both for his friends to advise him, and his Counsel to plead for him."

RAMSEY'S DEFENCE.

"In the name of God, Amen. In the presence of you most illustrious and right honourable Robert earl of Lindsey, constable of England, and Thomas earl of Arundel and Surrey, marshal of England, or your deputies in your court marshal; I David Ramsey, esq. Defendent, say and affirm, that all and every the things contained in the said pretended Appeal and Accusation, were and are false, and suggested and proposed against me maliciously, and against truth, excepting what follows at the time and place under-written, I had the under-written discourse with thee, or to the same effect, and no other, viz.

"I David Ramsey being with thee Donald lord Rea, in the month of May or June, as it is in the said bill mentionpd, and in the ship there also mentioned, being in or near the port there mentioned, thou desiredst that I would tell thee, if the marquess of Hamilton would come over; and I answered he would. And you asking me of what religion the lord marquess was, I said, a good Protestant, and before it be long, he would let the world see his design was for the defence of his religion, and the glory of God. And then asking me whether he would come over with an army; I said, yes, with an army of brave men, and all warlike provision, that he cared not with whom he encountred. Which passages, upon often and better recollecting of my memory and thoughts than heretofore, I do now remember. And you the said Donald lord Rea, having then under your command two regiments of souldiers in service of the king of Swedland, and then and there of thine own accord saying to me, thou wouldst get leave of the said king to join your said two regiments with the said lord marquess his forces, and serve the said king in the

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wars under the lord marquess, I kindly accepted that motion of yours, and desired to confirm it in you; and I told you, that Alex. Hamilton and sir James Hamilton were to go for England; and you told me you had a promise of the reversion of Orkney from the king your master, if the marquess would mediate with your master for it; and I and Alex. Hamilton did desire you to write a general letter to the marquess, with trust to the bearer Alex. Hamilton concerning Orkney; and assured you of the said marquess his friendship, if you would continue constant in your resolution, in joining your regiments with the lord marquess, when he should come over, and you gave a letter accordingly. Afterwards in March last, I being then at the Hague in imploiment for providing furniture for the said marquess his companies, which were to go over into the king of Swedland's service, came to you from the Hague to Amsterdam, being earnestly invited thereunto by letters from you; where I staied with you eight days, and delivered to you a letter from the marquess only of complement and thanks for your offer, to join your regiment under the marquess his command. And I told you all went right with the marquess, and that I heard he had gotten from his majesty 10,000*l.* in England, and the Wine-Customs in Scotland for 16 years, which he would sell; and all things for his coming over with his forces went on without any demur or obstacle; and the only stay was, for want of arms and ammunition, especially powder, and desired you to put in hard for that with the Swedish ambassador, which you did after the premises. And in March or April last, in Delf in the Low-Countries, you told me, you had a letter from the king of Sweden to the king of Britain, to desire some ships for the marquess. And you said further, that the king of Sweden said, he had no ships to spare of his own, but he would write to our king for some for him; and that he the said king of Sweden would allow 40,000 rix-dollars for the entertainment of the said ships to be always in readiness upon the motions of his army. You also asked me, if my lord marquess was to raise any men in England. I answered, I heard he was to raise three regiments in England, and three in Scotland. You asked me where these forces should meet. I answered, on the sea. You asked where they should land. I answered, I was doubtful where, because the rendezvouz was to be appointed by the king of Sweden. You said further, that you was not a souldier of fortune, that you had bread at home, and might live without hazarding yourself in the fortunes of war; yet that you would hazard your life and fortune with the marquess. I answered, I knew no more of the marquess his designs, than I had then told you, but that I would write to the marquess to commend to him your forward affection to his service, or to that purpose. I told you, that since my being in Holland, I did perceive the Hollanders did conceive, that England had made a peace with Spain very prejudicial to Holland; and that divers of them had said so in my hearing: which passages concerning the said peace, upon often and better recollection of my memory and thoughts than heretofore, I do now remember. And I also told you, that the lack of powder was the greatest stay of the marquess his coming over; and you desired me to speak myself to the Swedish ambassador for the powder, and to advertise you of his answer, that you might assure the said lord marquess what he might expect; and I did send one of my men to the Brill, called John Thompson, to shew you I was with the ambassador, and hope to have what we spoke of.

" But whereas thou the said Donald lord Rea in thy said pretended Accusation or Appeal dost affirm, that I said other words to thee, than such as are here set down in this my Defence: I the aforesaid David Ramsey say and affirm, that thou liest falsly, and art a false calumniator, and oughtest to be punished with the punishment of a false traitor; and I offer myself ready to prove and justify, by the help of God, this my Defence and Exception, by my body upon thy body, according to the law and custom of arms in a Duel, to be performed in the presence of our lord the king. And I humbly and instantly desire, that a day and place may be assigned for the said Duel; &c."

Then was read in court the Petition of David Ramsey to the king, beseeching his majesty to assign him the person, whose name was written in the Schedule annexed, to be of counsel with him in this cause. The name written in the Schedule was Mr. Dr. Eden. The Witnesses in this cause were commanded to make their personal appearance in the court, and were there examined; and divers letters written, as well from marquess Hamilton as from Ramsey to the lord Rea, were then produced.

Mr. Ramsey had bin released from imprisonment in the Tower upon bail, and his promise to appear before the Earl Marshal of England, or such other persons as his majesty should appoint, at such time and place as should be assigned unto him, upon three days warning; in the mean time to keep the peace, and to confine himself to Richmond, having the liberty of three miles walk, with this acknowledgment, that in case of absenting himself from such appearance, or breaking the peace, he will be accounted guilty of the crime, for which he stood committed. And for the performance of this engagement, the earls of Abercorne and Roxborough entered into a bond of 4,000*l.* to the king.

A while after Ramsey entered in the court a Protestation of the tenor following:

RAMSEY'S PROTESTATION.

" Whereas in obedience to his majesty's commands, and in conformity to this honourable court, I have heretofore, contrary to such intentions as seemed to me most reasonable,

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procured some personages to stand engaged for my personal appearance in this court, concerning this pretended cause; and have, in obedience and conformity as aforesaid, used the counsel of Dr. Eden, assigned unto me for that purpose by his majesty, as defendent in the said cause: and whereas at my first appearance, upon sight of my lord Rea's bill, I accepted of the Trial by Combat, and ever since avoided and waved all courses usually proposed by defendents to avoid the combat, which at this present I am ready to entertain; and whereas since from the premises, and the lord Rea's pretences of proving new matters, the final decree in this cause, to my great prejudice in my other occasions, hath bin from time to time put off, and nothing as I conceive, under favour of this honourable court, proved against me, either to convince me of any matter objected against me, or to urge me by the law of arms to submit myself to trial by combat, if I had a desire to decline it: I do here again once more, and that most instantly, desire a certain day and place to be assigned and decreed for the combat between the said lord Rea and me, for the trial of the matter in issue between us in this honourable court; and I do with all humbleness desire of this honourable court, that after all these delays used on the lord Rea's behalf, I may now betake myself to my said first intentions; and therefore I do protest, that so much as in me lieth, I do now disingage, and do desire this honourable court for ever after this time, to hold for disengaged those honourable personages that are bound for my personal appearance; and I do humbly desire to know what his majesty's further pleasure is concerning me, since I came hither upon his majesty's command by letters, and am here ready to satisfy my loyalty as his faithful servant, with the hazard of my life."

And so instantly desiring and urging to be released of his obligation, and that his sureties might be likewise released, he was remanded to the Tower of London, and his sureties were released, and the bonds were rendered to them.

At another sitting, when Dr. Duck moved divers things in behalf of the lord Rea, declaring, that with due reverence he submitted to the court in all things;

The *Earl Marshal* made answer, That the lord Rea had governed himself in the whole process of the cause with much prudence and moderation, and wished that Ramsey had used the like moderation in his Defence. And he further said, That now it seems necessary to lay open the series of the whole business: and so continuing his speech, he shewed that our sovereign lord the king, so soon as he had knowledge of the crime objected, did use all diligence to find out the truth, and called the parties before him; and the lord Rea constantly affirmed the truth of these things, and offered to justify the same with the hazard of his blood and life; and Mr. Ramsey on the other part with the like constancy denied the accusation, and said, he would prove it false against the lord Rea by duel, if it seemed good unto his majesty; and that the king observing the confidence of the parties, and the defect of other proofs, and the parties free choice of duel, consulted about the way of a public duel by the authority of this court, and took care to be informed of the proceedings and customs thereof. That it was certain, that this court was the only publick judicature, to which the cognizance of treasons committed beyond sea appertained before the time of Henry the 8th; and that the statute of 26th and 35th years of that king, concerning another manner of proceeding therein, was not derogatory to the authority of this court, but only superadded another way of trial. That all private duels were accounted and are unlawful; but publick duels, decreed by the authority of this court, were always granted to be lawful in cases of treason, when for the safety of the king and state the truth would not otherwise appear. That his majesty therefore consented to the requests of these parties, that they should fight a duel for the discovery of the truth in this behalf; and therefore he constituted and confirmed this court under the great seal of England. That the Lord Constable, and he the Earl Marshal, according to the king's letters patents, together with those noble persons that were of counsel with the court, had heard with patience whatsoever was alledged on either side; and that there were three ways of determining things of this nature in this court used by our ancestors.

1. To absolve the accused; which in this case, the nature, quality, and circumstances of the fact and crime objected being considered, cannot be.

2. To condemn the accused, when the truth of the crime objected evidently appeareth by witnesses, or any other way; which in this case hath not been, nor seemeth possible to be, when out of the accusation it self, it appeareth, that the words were spoken secretly, and not before witnesses.

3. By way of publick duel, to the decreeing whereof the lord constable and himself, with the assent of those honourable persons of counsel with the court, did intend to proceed.

Then the Lord Constable together with the Earl Marshal demanded of the parties, whether they had any thing more to speak or propound in this cause. They severally answered they had nothing more. The forenamed lords asked the lord Rea, whether he would finally acquiesce in his forementioned Bill of Appeal. Whereunto he answered he would therein acquiesce. Then they asked Ramsey, whether he would acquiesce in his Answer to the Bill of Appeal. Whereunto he also answered that he would therein acquiesce. After this, the Register read in court the lord Rea's Bill of Appeal, and Ramsey's Defence in the presence of the parties. Presently the lord Rea sealed his Bill with his seal at arms, and subscribed his name with his own hand. After the same manner Mr. Ramsey sealed and subscribed his Answer.

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Then the Lord Constable taking the Appeal in his hands, and folding it up, put it into the glove, which the lord Rea had cast forth in the court for a pawn in this behalf; and held the Bill and glove in his right hand, and in his left hand the Answer and glove or pawn of David Ramsey; and then joining the Bill and Answer, and the gloves, and folding them together, he, with the Earl Marshal, adjudged a Duel between the parties under this form of words:

'In the name of God the Father the Son and 'the Holy-Ghost, the Holy and most Blessed 'Trinity, who is one, and the only God and 'Judge of battels; we, as his vicegerents under 'the most excellent prince in Christ our lord 'and king, by whom we are deputed to this, do 'admit you the aforesaid Donald lord Rea, the 'party challenging, and you the aforesaid David Ramsey, the defendent, to a Duel, upon 'every accusation contained in this bill and 'the answer to the same; and we assign unto 'you the 12th day of the month of April next 'following, between sun and sun, in the fields 'called Tuttle-fields, in or near Westminster, 'in the presence of our lord the king, to do and 'perform your parts to your utmost power respectively.—And we will and enjoyn you the 'aforesaid lord Rea the Challenger, to be in 'the aforesaid fields, and within the list there, 'between 7 and 9 of the clock in the forenoon 'of the aforesaid day. And we enjoyn you 'the aforesaid David Ramsey the Defendent, 'to be in the fields in the aforesaid list between '9 and 11 of the clock in the forenoon of the 'said day, upon peril attending you respectively 'in that behalf.'

Which Decree and final Sentence pronounced,

The lord *Rea* craving pardon of the court, spake to this effect. First, he gave thanks to the lord constable, the earl marshal, and the rest of the lords, that they had with so much patience and justice heard and examined this cause, and for the justice therein exercised, especially for the Sentence already given. Then he protested before Almighty God and that court, that he had revealed nothing against David Ramsey, or any other, for malice, or hatred, or hope of reward, either gain, or honour, but only out of his faithfulness to our lord the king, and for the safety of his flourishing kingdoms, knowing that nothing is more pernicious to kingdoms and commonwealths than intestine wars. He professed that if he himself had not revealed the premisses, but some other acquainted with the treason had first discovered it, he without all doubt had deserved the death of a traitor. And whereas it might be said, that he by revealing it had hazarded his own life: to this he answered, that he was unworthy of all honour, yea of life itself, that was not ready to lay down, much more to hazard his own life for the safety of king and kingdom. And whereas he might seem in the process of this cause to have declined a duel; he desired to be understood that whatsoever was done in that behalf, he did in hope and expectation, that the treason, which was communicated to many, might be some way brought to light; for he did neither distrust his own cause, nor fear the person of his adversary, nor any other in so just a cause, only in this he grieved, that an adversary, equal to him in birth, degree, and nobility, was not offered. And whereas many wondered that he would hazard his life for revealing words, whereof he was doubtful, whether they would amount to treason or not; he said, he knew much more concerning the treason, than what was contained in this bill, which, by the interposing of authority, was for just causes yet to be suppressed.

As for the duel now decreed, he professed, that he embraced the sentence with all chearfulness, and desired no further delay of the combat, than that in the mean time he might provide himself with such necessaries for this duel as became his stock and kindred, and the combatant and champion of so great a king. That he had no private hatred to the person of David Ramsey, but was now to encounter him, being by the court declared his public enemy. And so having prayed to God for his majesty's safety, and happy government, and imploring the favour of the court, he made an end of speaking.

After this the court assigned to both parties a day, whereon to make such propositions as they would think fit.

Then the lord Rea desired, that the crimes and words, by him objected in his bill against David Ramsey, might be declared treasonable, and that Ramsey were guilty of treason, if he uttered those words: which the court with an unanimous consent did declare so, and adjudge.

Ramsey moved, that a shorter time, and some day within the 12th of April, might be assigned for the duel, saying that he would soon compel the lord Rea to confess the falshood of the crime objected, if he would meet him in place convenient.

The Lord Marshal answered, that the day was determined; and further intimated to both parties that they were to be attached and kept in safe custody, if they gave not sufficient caution for their appearing at the day and place appointed, and in the mean while for keeping the peace. For the performance whereof on his part the lord Rea produced sureties, namely sir Pierce Crosby, sir William Forbes, sir Walter Crosby, knights and baronets, and William Jones, esq. who bound themselves to the king body for body.

Then Mr. Ramsey being asked, whether he would bring forth sureties, answered, that he was ready in the word and honour of a gentleman, to oblige himself to whatsoever in that regard should be by the court enjoyned; but as for sureties that he had none, or at least desired none; that it was troublesome for him to engage noble persons, who had in other respects interposed in this behalf. Whereupon the lord Rea's advocate desired, that Ramsay be com-

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mitted to the Tower till the day appointed for the combat.

Then Robert earl of Roxborough publickly offered, and said that himself and James earl of Abercorne were ready to put in caution for Ramsey, if the court would admit them; and Walter earl of Balclough made the same offer; and the court admitted them, (although the lord Rea's advocate alleged many things to the contrary) and they became bound body for body. Whereupon Ramsey was released from his imprisonment in the Tower.

The lord constable and earl marshal admonished both parties to keep within the bounds assigned them, to wit, that the lord Rea should not go westward beyond Charing-cross, nor Mr. Ramsey beyond Whitehall eastward. These bounds they might not pass without the special licence of the court, or some just and reasonable cause.

The weapons, which the court assigned to the combatants, were a spear, a long sword, a short sword, and a dagger; each of them with a point.

Then the lord Rea presented these Protestations to the court.

First, he did humbly desire of the right honourable judges the lord constable and earl marshal, that his arms and weapons might be assigned him for to aid himself therewith against his adversary in the day and place to him assigned, and also in any other day and place, if any should be assigned him; and that he might have no weapon of advantage, and that he might be received in the lists or field with those arms as shall be assigned him, and armed in what sort he should please; and that he might have with him all other things needful and accustomed by right to aid himself at need against his adversary, although they be not expressly written; and desired that his adversary should have no other weapon, nor of other size than those, that he the said lord Rea should have; and if the said adversary should bring into the list any other weapons, or of other size than the court should assign him, that such weapon should be taken from him, and that he be allowed no other.

It seemed rensonable to the court, that he should be received into the lists armed as is fit: and as for the weapons, was to have a spear, a long sword, a short sword and a dagger, each with a point, as above said, and for the rest the court would do reason, according to the custom and law of arms.

Item, the said challenger did pray, that his counsel might be received into the lists or field with him, for to counsel him what should be needful, and that he might have a chirurgeon with his ointments and instruments to serve and aid him when need required; and he did pray, that his counsel might remain with him, until the words *lesser les armes* were cried.

The court willeth, that he shall have sufficient counsel, a chirurgeon with his ointments and instruments within the said lists, as appertaineth, until the words *lesser les armes* be pronounced.

Item, he did pray, that he might have, within the said lists or fields, a seat or pavilion, or other coverture to rest himself; that he might have bread, wine, or other drink, iron-nails, hammer, file, scissars, bodkin, needle and thread, armorer and tailor with their instruments, and other necessaries to aid and serve him in and about his armour, weapons, apparel and furniture, as need required.

The court willed, that he have a seat and such coverture as he shall please, without fixing any thing in the ground, bread, wine, and other necessaries, in such cases requisite, till the words *lesser les armes* were pronounced.

Item, he did pray, that he might have liberty to make trial of his arms and weapons within the field, to put them off, and to put them on, and change them at his pleasure; to nail, fasten, or loose his arms and apparel, and other things needful; to eat and drink, and to do all other his necessities.

The court granted, until the words *lesser les armes* were pronounced.

Item, he did pray, that after he did once come into the field and lists, that his adversary should not be permitted to make him stay and attend too long, under pain of being convict.

To this the court returned answer, The court will do you reason.

Item, he did pray, that if it should happen, either by the delay of his adversary, or any other impediment, that he should not be able to prove his intent upon his adversary in the day assigned him, between sun and sun, that then he might have further time and day allowed and assigned him for the proof thereof on his said adversary.

To this the court answered, The court in this case will do as anciently hath been used according to the custom and law at arms.

Item, he did pray, that the field and lists might be well and safely guarded for him until the end of the battel, and as well in the night as in the day, until that with the aid of God he should make good, and prove his intent upon his adversary.

It was answered, The court will do herein as is right.

Item, he did humbly pray, that if God should so dispose, as that he died in the prosecution of this his rightful appeal in this behalf, that then his heirs, without any impeachment or hindrance, might take his body and give it Christian burial, in such place as he shall appoint by his last will and testament.

It was answered, This must be at the king's pleasure.

Item, he did pray, that notwithstanding that the custom of arms will, that he should bear into the field certain things necessary for him, that these, or some of these things, may be brought by others in ease of him, and that they might be saved and carried back for him, if in case God should please to give him the victory, as he may of his special goodness and mercy.

Hereupon this order was made by the court: The court willeth, that you do herein ac-

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cording to the custom of arms used in like cases before this time.

Item, he did desire, that the same day when with God's help he did intend to prove his intent upon his adversary, he might have all other things necessary for him, and accustomed by right and law of arms, although they were not expressed in these his protestations.

To this it was answered, The court herein will do that which shall seem reasonable unto them.

Item, he did pray, that these his protestations, nor the copy of them, might be delivered nor shewed to his adversary, nor to any of his counsel, or other person, whereby his said adversary might have knowledge thereof: further praying, and desiring, that these his protestations and demands might be graciously granted unto him, by those honourable lords, as the right and law of arms did require.

It was answered, The court would herein do that which should be reason.

Item, he did pray, that it might be lawful for him to go or ride into Tuttle-fields, in or near Westminster, at his pleasure, and so often as he should think fit, to view the ground which should be assigned him for the proving of his intent, and for such other ends as should be most for his advantage for the proving of his intent upon his adversary.

To this the court answered, It seemeth reasonable unto the court, that at convenient times, which should be signified and expressed under the hands of the lord constable and earl marshal, what should be lawful for him to do as was desired.

Item, he did humbly pray, that since by the law and custom of arms, and of the honourable court, the defendant is never to be allowed counsel, nor to have any assistants, nor to have any petitions of favour granted, except in due time he shall have desired, or shall have protested that he would desire them; and that in this case his adversary publickly hath protested against the having of counsel, and all other aids and assistants in this court, as by the acts of the court appeareth; he humbly prayeth, that he might not have any counsel, nor aids, or assistants assigned unto him in this behalf; and that no petitions or protestations, if he shall make any, might be granted unto him; and in this he humbly desired the justice of that honourable court.

Answer was made, The court would do herein upon consideration, as to the custom and law of arms appertained.

The dimensions of the Weapons were as followeth:

A long sword, four foot and a half in length, hilt and all; in breadth two inches.

Short sword, a yard and four inches in length, hilt and all; in breadth two inches.

Pike, fifteen foot in length, head and all.

Dagger, nineteen inches in length, hilt and all; in breadth an inch.

The weapons were not to exceed this proportion; but the parties might abate of this length and breadth if they thought fit.

These protestations and petitions were accepted and registered.

Afterwards Mr. Ramsay presented a petition to the lord high constable, and to the earl marshal:

RAMSAY'S PETITION.

To the right honourable the lord high constable and the lord marshal of England; The humble Petition of Mr. David Ramsay, gent. of his majesty's privy-chamber in ordinary.

Shewing; That in regard there can be no president shewed forth by authentical record, whereby the choice of arms was ever heretofore permitted or granted to the challenger, or refused to the defender, suitable to the custom and law of all Christian nations; as likewise in regard the challenger himself, as I suppose, being ashamed of his protestations and demand for defensive armour, has in good company denied the same, and ascribed it to your lordships imposing; he therefore according to the said law of nations, and custom of the kingdom, doth humbly intreat, that there be no other arms allowed for the trial, than such as he hath bin already suitor for, viz. rapier and dagger, as being in the number of such as your lordships were pleased to nominate, which are the most common in all gentlemen's opinions, and that are carried by all and every man that is acquainted with the management of them.

Lastly, intreating, that if there chanced to be found any want or mistake in the formality of this, that your lordships will be pleased to pass over the same, and attribute it to the absence of the lawyer allowed by your lordships, having now no other counsel than the justice and equity of his demand. And as in duty bound, he shall never be wanting, either in action or speech, to shew his gratitude for these your lordships so just and noble favours.

To the foregoing Petition, this following Answer was returned decimo Aprilis 1632.

The first part concerning my lord Rea, the lords having called sir William Balfour, (the witness vouched by Mr. Ramsay) and heard him, but could not prove what was alledged.

The second part concerning the election of arms, the lords thought it was not fit to be granted, the custom of this court being otherwise, and other arms being already assigned by the court.

On the 10th of April, Rea and Ramsay appeared again before the court, sitting in the council chamber at Whitehall; at which time the lord high constable and the earl marshal signified to the parties, that it was the king's pleasure, for certain just and urgent causes, to prorogue the day of combat, from the 12th of April to the 17th of May; and they prorogued the same accordingly; and required Rea and Ramsay to appear in Tuttle-Fields, upon the day last assigned, at the hours appointed in the former day; for the performance whereof, both the challenger and the defender produced their

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several sureties, and the cautions and sureties for the former day were by the court remitted.

The lord Rea desired to know the pleasure of the court, whether he might use defensive arms; and in case he might, whether according to his own discretion, or as the court shall regulate.

The judges of the court answered, that the offensive weapons and their dimensions were assigned by the court already; but both parties might use defensive weapons at their own discretion.

May the 12th, the court reassembled, and the parties were called, and answered to their names.

Then the constable, together with the marshal, declared, that upon hearing and examination of this cause, they had not found David Ramsay guilty of treason, nor was the treason intimated made appear by the lord Rea, though he had so long time attempted it; yet they found that he had seditiously committed many contempts against his majesty, the reformation whereof his majesty reserved to himself; and therefore the court decreed, that they (the said lord Rea and David Ramsay) should both be committed to the Tower of London, till by sureties to be approved by his majesty, they gave in sufficient caution, that neither in their own person nor by any in their families, nor by their procurement or assent, they would attempt any thing one against the other, and that so long, till it seemed good to his majesty to set them at liberty; and so they were both arrested by order of the lord constable and marshal, and by serjeants at arms delivered over to sir William Balfour, lieutenant of the Tower.

Then a letter was brought from his majesty by Richard St. George, king of arms, to the lord constable and marshal, by which his majesty revoked his letters patents, given to the said lords for the trial of this cause, not willing to have it decided by duel. And so there was nothing more done in it.

On the 8th of May this year, [1632] a period was put to the great trial in the court of honour before the lord high constable, and lord marshal, between Rea and Ramsay, concerning the forementioned accusation of high treason against marquess Hamilton, which begun to have a hearing in November the last year, and was now decreed by that court in this year to be determined by combat: which in regard it is a trial remarkable after the proceeding of the civil law, we have given the reader an account thereof at large. However, take his majesty's thoughts of it, as it is expressed in this letter to the marquess.

"James; Since you went I have not written to you of Mackay's business, because I neither desire to prophesy nor write half news; but now seeing (by the grace of God) what shall be the end of it, I have thought fit to be the first advertiser of it to you. I doubt not but you have heard, that (after long seeking of proofs for clearing the business as much as could be, and formalities which could not be eschewed) the combat was awarded, day set, weapons appointed: but having seen and considered all that can be said on either side, as likewise the carriage of both the men, upon mature deliberation I have resolved not to suffer them to fight. Because, first, for Mackay, he hath failed so much in his circumstantial probations, especially concerning Muschamp, upon whom he built as a chief witness, that nobody now is any way satisfied with his accusations. Then for David Ramsey, though we cannot condemn him for that that is not, yet he hath so much, and so often offended by his violent tongue, that we can no ways think him innocent, though not that way guilty whereof he is accused; wherefore I have commanded the court shall be dismissed, and combat discharged, with a declaration to this purpose, that though upon want of good proof the combat was necessarily awarded, yet upon the whole matter I am fully satisfied that there was no such treason as Mackay had fancied. And for David Ramsey, though we must clear him of that treason in particular, yet not so far in the general, but that he might give occasion enough by his tongue of great accusation, if it had been rightly placed, as by his foolish presumptuous carriage did appear.—This is the substance, and so short, that it is rather a direction how to believe others, than a narration itself; one of my chief ends being that you may so know David Ramsey, that you may not have to do with such a pest as he is, suspecting he may seek to insinuate himself to you upon this occasion. Wherefore I must desire you, as you love me, to have nothing to do with him.—To conclude now; I dare say that you shall have no dishonour in this business; and for myself, I am not ashamed that herein I have shewed myself to be, Your faithful friend, and loving cousin, CHARLES R. London, May 8, 1632."

Chief Justice Dyer reports two cases of Wager of Battel; the first is Reade *v.* Rochforth, and others, 2 and 3 Phil. and Mary, Appeal of death. One of the Appellees pleaded Not Guilty, and ready to defend it with his body, and waged his battel. On this plea plaintiff demurred in law, and the demurrer in law was adjudged against the plaintiff, wherefore he was barred of his Appeal against him who waged battel, and that he should go without day. Dyer's Reports 120, a. The other is Lowe and Kyme *v.* Paramour, Trin. 13 Eliz. In a writ of right the tenant chose trial by battle, but when every thing was prepared and performed, at the day and place appointed for the battle, the demandants being solemnly called made default, whereupon final judgment was given against them. Dyer's Rep. 301, a. In this last case is given some account of the apparatus prepared for the combat; and Mr. Vaillant the learned editor of the last edition, refers for more particulars to Minshew's Dictionary, from which the following extract is made:

"Combat in our common law is taken for a formall triall of a doubtfull cause or quarrell by

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the sword or bastons, of two champions. Of this you may reade at large, Paris de Puteo de re militari et duello. Alciat de duello. Hotoman. disput. feudalium, cap. 42. As also in our common lawyers of England, namely Glanvile li. 14. c. 1. Bracton lib. 3. tractat. 2. cap. 3. Britton cap. 22. Horns Mirrour of Iustices, lib. 3. cap. des exceptions in fine proximè ante C. Iuramentum duelli apud Dier. fol. 301. nu. 41, 42. ¶ Staunf. Plees of the Crowne, lib. 2, fo. 176. b. and 177 a. saith that it is an ancient triall in our law, and much used in times past, as appeareth by divers presidents in the times of Edward the 3rd, and Henry the 4th: which is not yet out of use, but may be by the law in use at this day, if the defendant will, and nothing can be drawen in conter-plee thereto. And it is said M. 37. H. 6, f. 3. that to wage battle, or to combat, is by the civil law: but Moile saith it is by our common law, and as Stamford Plees of the Crowne, fo. 177. a. saith, That they shall come armed into the court, and ioine issue: the plaintiefe beginnes his appeale, &c. and the defendant pleads not guiltie, and (as Britton setteth it downe, fo. 41.) undertakes to defend it with his bodie, &c. And after, one taketh another by the hand, and first the defendant saith in this manner: Heare you this, you man whom I hold by the hand, which are called Iohn by your christian name, that I Pierce, such a yeere, such a day, in such a place, the aforesaid murder of N. neither did doe, nor goe about, neither purpose, nor assented to such a felonie, as you have alleged. So God me helpe, and his Saints. And after the accuser saith: Heare you this, you man whom I hold by the hand, which are called P. by your christian name, you are periured: For on such a day, such a yeere, in such a place, you did such treason or such a murder, which I have alleged against you, or whereof I challenge you. So God mee helpe, and his Saints. Then they shall be both lead into a certaine place, where both further say, Heare you this, iustices, that we I. and P. have neither eat nor drunke, nor done any other deed whereby the law of God should be abased, or the law of the divell advanced. And foorthwith there shall be an oyez or proclamation made, that none shall bee so bold but the combatants, to speake or doe any thing that shall disturbe the combat or battle: and whosoever shall doe against this proclamation, shall suffer imprisonment for a yeere and a day. Then they shall fight with weapons, but not with any iron, but with two staves or bastons tipt with horne, of an ell long, both of equall length, and each of them a target, and with no other weapon may they enter the lists. And if the defendant can defend himselfe till after sunne set, and as my author saith, till you may see the starres in the firmament, and demand iudgement if he ought to fight any longer, then must there be iudgement given on the defendants side. And Bracton agreeth hearewith in these words: 'Quod 'si appellatus se defenderit contra appellantem, 'tota die, usque ad horam qua stellæ incipiunt 'apparére, tunc recedat appellatus, quietus de 'appello, ex quo appellans se obligavit ad 'convincendum cum. una hora diei, quod qui-'dem non fecit.' When the defendant doth plead to the appeale not guilty, and undertakes to defend it with his bodie, he must throw downe his gauntlet or glove into the court; and if the plaintiefe doth enter reioinder, to the battle, then must hee take up the glove or gauntlet; but if the plaintiefe doth conter-plead unto it, then must hee suffer the glove or gauntlet to lie, and the other shall demurre in law or void him of his appeale, because he refused his glove or gauntlet. When they are sworne, they must produce mainprisers or pledges to performe the combat or battle, and then the court shall appoint them a day and place to fight, and as Fitz. p. 385, further saith, that the challenger shall be at libertie, but the defendant in the custodie of the marshall, and the marshall shall array them both at their owne charge, and that must be the night before the battle, for that they may be ready in the field or lists by sunne rising. The formes of battle described 17 Edw. 3. et 9 H. 4, differ from that described by Bracton and Britton, and that described by Dier, Termino Trinitatis, anno 13 Eliz. as hee sets it downe betweene one Cheuin and another Paramour a Kentish gentleman, about the triall of land, and levying a fine thereof: and on the issue Paramour chose the triall by combat or battle, and had a champion one George Thorne a gentleman of Kent and no doubt his dearest friend, that would enter the lists to such a hazard of life, &c. And the other had one Henrie Nailer a master of fence, and the court awarded the battle, and the champions were mainprised and sworne (Quære formam iuramenti) to performe the combat or battle, apud Totehill in Westm. 18. Iunij. prox. post crast. Trinitat. which was the first day of the vtas of the terme, and on the day appointed was there a list made foure-square on even ground, every square 60 foot, and East, West, North, and South: and the place and seat of the iudges was made without, yet close upon the lists, and a barre made for the sergeants at law, 'et circa horam deci-'mam eiusdem diei,' three iustices or iudges of the Common Pleas, viz. Dier, Weston, Harper, (the fourth, namely Welsh, was away by reason he was sicke) did repaire to the place in their roabes of scarlet, with their other habits and coifes, and the sergeants at law also: and there a proclamation being made with three Oyez, the demandants were first called for, and they came not. After that, the mainpernours of the champions were called to bring forth first the champion of the demandant or challenger, which came into the place in rugged sandals, bare legged from the knee downward, and bare headed, and bare armes to the elbow, being brought in by the hand of a knight, sir Ierome Bowes by name, who carried a red baston, of an ell long, tipped with horne, and a yeoman carrying the target, made of double leather, and they were brought in at the north side of the

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lists, and went about the side of the lists, untill the middest of the lists, and then came towards the barre before the iudges, with three solemne congies, and there was hee made to stand at the south side of the place, being the right side of the court. And after that, the other champion was brought in, in like manner, at the south or contrary side of the lists, with like congies, &c. by the hands of sir Henry Cheney knight, &c. and was set on the north side of the barre (quite opposite to the other champion) and two sergeants being of counsell of each partie, in the middest betweene them: This done, the demandant was solemnly called againe, and appeared not, but made default; upon which default, Barham sergeant for the tenant, praieth the court to record the nonsuit; which was done: Then Dier chiefe iustice reciting the briefe, the matter, and issue of the battle or combat, and the oath of the champions to performe it, and the prefixed day and place, gives finall iudgement against the demandant, and that the tenant shall hold the land, to him and to his heires for ever quietly, from the said demandant or challenger, and their heires for ever, and the demandants and their pledges, 'de prosequendo,' to be at the mercy of the queene, &c. And then was there soleme proclamation made, that the champions and all others there present (which by estimation were about 4000 persons) should depart in Gods peace and the queenes. And so they departed with a shout, God save the queene. Likewise, according to the lawes and ancient customs of the realme of England, 9 Iacobi Termino Hilarij. a gentleman, by name Mr. Egerton, having challenged another gentleman, one Mr. Robinson, for the killing of the brother of M. Egerton, slaine in the field upon a quarrell betwixt the said M. Egerton slaine, and one M. Morgan, with whom (as it is said) the said M. Robinson at the same time went as a friend into the field, &c. The proofes being no more apparent, and the defendant challenged, &c. as by the formes of our ancient lawes first above recited, it was granted by the iudges of the land, that it should be tried by combat: The glove or gauntlet was cast downe in the open court, *ex parte provocantis*, and received in due forme, *ex parte defendentis*. The oath was administred solemnly, and pledges put in by each partie, foure sufficient men to answer for either, body for body. But an errour or scape being made in the plea, the bill was frustrated, so that they came not at all to the lists. An antiquarie, Verstegan by name, in his booke intituled, a Restitution of decaied intelligence, in antiquities concerning the most noble and renowned English nation, sets it downe in these words, and saith thus: "In the triall by single combat or camp-fight, the accuser was with the perill of his owne bodie to prove the accused guiltie, and by offering him his glove, to challenge him to this triall: the which the other must either accept of, or else acknowledge himselfe culpable of the crime whereof he was accused. If it were a crime deserving death, then was the camp-fight for life and death, and either on horseback or on foot. If the offence deserved imprisonment, and not death, then was the camp-fight accomplished when the one had subdued the other, by making him to yield, or unable to defend himselfe, and so bee taken prisoner. The accused had the libertie to choose another in his stead, but the accuser must performe it in his owne person, and with equalitie of weapons. No women were admitted to behold it, nor no men children under the age of thirteene yeares. The priests and people that were spectators, did silently pray that the victory might fall unto the guiltlesse. And if the fight were for life or death, a beere stood ready to carry away the dead bodie of him that should bee slaine. None of the people might crie, scrike out, make any noise, or give any signe whatsoever. This was so strictly and severely punished at Hall in Swevin, (a place appointed for camp-fight) that the executioner stood beside the iudges, ready with an axe to cut off the right hand and left foot, of the partie so offending. Hee that (being wounded) did yield himselfe, was at the mercie of the other, to be killed, or to be let live. If he were slaine, then was he carried away, and honourably buried: and he that slue him reputed more honourable than before. But if being overcome he were left alive, then was he by sentence of the iudges declared utterly void of all honest reputation, and never to ride on horseback nor carrie armes." Verstegan. p. 64.

The last case of Trial by Battel was 14 Car. 1. A. D. 1638. 2 Rushw. Coll. 788, Claxton *v.* Lilburn, (father of John Lilburn the famous republican). Upon one point in this case, Rushworth records the opinion of the Judges as follows:

"The tenant waged Battel, which was accepted; and at the day to be performed, Berkley, Justice there examined the Champions of both parties, whether they were not hired for money? And they confessed they were; which confession he caused to be recorded, and gave further day to be advised. And by the king's directions, all the Justices were required to deliver their Opinions, whether this was cause to de-arraign the Battel by these Champions? And by Bramstone, Chief Justice, Davenport, Chief Baron, Denham, Hutton, Jones, Cook, and other Justices, it was subscribed, That this exception coming after the Battel gaged, and Champions allowed, and Sureties given to perform it, ought not to be received."

Of the Trial by Battel Mr. Barrington (Obs. on Stat. De Magnis Assisis et Duellis et St. 8 Ric. 2) has collected some particulars, and has referred to some curious passages on the subject, in the writings of English and French authors. He observes on the ludicrousness of some of the circumstances contained in Rushworth's account (printed in the text) of the proceedings in this case of lord Rea and Mr. Ramsay. He also relates a story from Grafton of a citizen of London of strong make but faint heart, who, entering the lists against an antagonist both

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weak and puny, was made drunk by his friends with the design of raising his courage; and so fell an easy prey to his adversary. Mr. Barrington could find no reference in the indexes to any bill for abolishing the duel by champions on a writ of right, but cites an entry in the Lords' Journals, Mar. 19th, 1629, of such a bill having been twice read and reported: and observes that it is very remarkable that the time when the Trial by Ordeal was disused, does not appear. Concerning the Trial by Ordeal see Blackst. Comm. b. 4. c. 27, and the fifteenth volume of the Archæologia, in which are published "Some Remarks on the different kinds of Trial by Ordeal which formerly prevailed in England, by Robert Studley Vidal, esq.;" wherein he announces his intention of publishing "An Inquiry concerning the forms and ceremonies used in some of the antient modes of trial in England, particularly in the fire and water ordeals, the corsned, the judicial combat, and other *Judicia Dei.*" Mr. Barrington (Obs. on Westm. the First) says, "That in the arraignment of prisoners, the question 'Culprit, how wilt thou be tried?' is improperly answered, By God *and* my country. It originally must have been, By God *or* my country." Upon this Blackstone observes, "A learned author, who is very seldom mistaken in his conjectures, has observed that the proper answer is, 'by God 'or the country,' that is, either by ordeal or by jury; because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation, that the trial by ordeal used formerly to be called *judicium Dei.* But it should seem, that when the question gives the prisoner an option, his answer must be positive: and not in the disjunctive, which returns the option back to the prosecutor."

Doubtless the superintending providence of God was appealed to and was supposed to direct the judgment, to whatever mode of trial recourse was had. *By God and my country* therefore would be in contradistinction from, *By God and the Battel, By God and the Ordeal,* &c.

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41. Proceedings in the Star-Chamber against HENRY SHERFIELD,* esq. Recorder of Salisbury, for breaking a painted Glass-Window in the Church of St. Edmonds in the said City: 8 CHARLES I. A. D. 1632. [2 Rushw. Coll. 153.]

The Information was thus opened:

MR. *Attorney-General* (sir Rob. Heath) hath exhibited an Information, in the behalf of his majesty, against Henry Sherfield, esq. an antient bencher of Lincoln's-Inn; for taking upon him, of his own authority, to deface a Parish-Church in the city of New-Sarum, in the county of Wilts, and that in opposition to the church government, established by the laws amongst us.—His majesty's Attorney, in the said Information, setteth forth, That his majesty is in his kingdom, next under Christ, the supreme Head: that all Churches are sacred, and both founded and maintained by regal and sovereign power; that no subject can meddle with them, in doing any thing for their ornament or structure, without licence of the bishops in their several dioceses, or the ordinary for the time being, who derive their authority from the sovereign power. —That the party delinquent was an inhabitant of the parish of St. Edmonds, in the city of New-Sarum.—That in the same Church was an antient and fair Window, containing a description of the Creation: That in January, quinto Caroli, the Defendant, and some factious persons, intending to deface it, there met and agreed so to do.—John Davenant bishop of Sarum commanded the contrary, and accordingly made a public act thereof.—But in Oct. following, he the said Defendant got the keys of the Church, upon pretence to walk there, and then locked the door, and contrary to the bishop's appointment, he beat down the said Window, and utterly defaced it; and when he had thus done, he did boast and glory in that he had so done, and reported that himself was a Defacer of Idolatry.—And for punishing of this great crime is this Information exhibited, by his majesty's Attorney in this honourable court.

Mr. *Herne.* The Defendant humbly offers to the consideration of this honourable court, that he is aged, and has grey hairs upon him. That among all the crosses of his life hitherto, he doth not account this the least, That he is this day not only suspected, but accused as an enemy to his majesty and his religious government; and the thing that he is especially accused and charged with, is, that of breaking the Glass Window, whereunto himself giveth this Answer:

That in the Time of king Hen. 3. this church of St. Edmonds in Sarum was built, and that there was a College of priests there; for there was an house adjoining, called The College to this day. That by the act in the time of Hen. 8, this college came to the crown, and there remained until king James granted it to Gouge and Lloyd, who afterwards granted the same to Bartholomew Tookey, and others, to the use of the parish of St. Edmonds, together with the advowson and free disposition of the vicaridge there, which they have by grant from his said late majesty king James.

And though he did conceive the said Church

* Vide infra Laud's Case, eighth day of his hearing.

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to be a lay-fee, yet he offereth this, that what he hath done, was not to usurp authority over the bishop of Sarum, nor in opposition to his majesty's government: But the parishioners, and such as are vestry-men of the said parish, have time out of mind assembled, and met upon occasions, in a little room called the Vestry, in or near to the church of St. Edmonds; and there they have used, time out of mind, to make orders, whereby new windows have been made, divers seats in the church altered and new made, and many other things done for ornament, and otherwise, in the same; and this without any order from the bishop of Sarum, or any other ordinary, for the time being.

For this Window that is charged to contain the History of the Creation, he answereth,

That it is no true relation or story of the Creation, in that true manner as it is set down in the book of Moses; but there are made and committed by the workmen divers falsities and absurdities in the painting of the same Window, as that he hath put the form of a little old man in a blue and red coat, for God the Father, and hath made seven such pictures; whereas God is but one in Deity: and in his order of placing the several days works of God in the Creation, he hath placed them preposterously, the fourth before the third; and that to be done on the fifth, which was done on the sixth day; and in one place he hath represented God the Father creating the Sun and Moon with a pair of compasses in his hand, as if he had done it according to some geometrical rules.

That this was not one of the greatest and fairest windows in the said church, it contained only four lights; for the cost at first in setting it up could not be more than 40 shillings: and that which is broken is very little damage to the Window, and may be repaired for a very little cost.

He conceiveth, for his defacing of this profane Representation of God the Father, it is not so heinous a crime as deserves the sentence of this honourable Court; and for his Defence he saith, That he hath for many years past (he setteth down for thirty years past) been settled and resolved in his judgment, and that upon good and sound authorities (as he conceiveth) that it is utterly unlawful to make any such Representations of God the Father; and by such authorities as were set out and declared in the time of queen Elizabeth, and otherwise, for the taking down and abolishing superstitious Images and Pictures, especially in the Churches.

He was thereupon the rather emboldened to desire and endeavour the taking away of the said Window; and because it had been a cause of Idolatry plainly to some ignorant people. He saith he was placed in the church in such a seat as that the said Window was always in his eye, during his abode in the church; and not out of opposition to the king's majesty, but by special order and agreement of the Vestry, about January 1629, (wherein it was ordered that Mr. Sherfield might, if he thought fit, take down the said Window, and set up new glass for the same) he thereupon did with his staff pick out some of the glass in that part of the Window only which represented the Deity; but for the doing the same through combination with others, and by force, he denieth the same: and that he should do it contrary, and against the command of the said bishop of Sarum, and his said act, and letter supposed to be sent, this he also denieth, and saith, that he had no notice thereof in any part.—And to all the rest of the Misdemeanours and Offences charged in the information, he pleadeth Not Guilty, and submitteth himself to the Judgment of this honourable court.

For the King.

Solicitor General (Sir Richard Skelton). For that divers things seem to be set forth in the Defendant's Answer, which have not been opened; we that are of counsel for the king, desire that the Answer may be read; and the rather, because he hath thereby confessed more than we have proved, or indeed could prove against him.

Whereupon the Answer was read in effect as followeth:

The ANSWER of Henry Sherfield of Lincoln's-Inn, in the county of Middlesex, esq. to the Information of sir Robert Heath, kt. his majesty's Attorney General.

All advantages of exception to the uncertainties and insufficiencies of the said Information to the Defendant, now and at all times saved: This Defendant saith, That k. H. 3, founded in New-Sarum the college of St. Edmonds, and the church thereunto belonging. That there belonged unto the said College and Church, a provost and 13 priests, which had maintenance there allowed them. That in the time of k. H. 8, by the act of dissolution, the said college and church, with the revenue thereof, came to the crown, and so remained till septimo Jacobi, who granted the same to Gouge and Lloyd, who alienated it to Baylie, who conveyed the whole premises to Bartholomew Tookey, one of the defendants named, who, in 13 Jacobi, for many good uses, conveyed the same to the use of the parishioners of the same church.

That this Defendant is one of them, so that the right of the said church is in the said parishioners, who are seized thereof, as of their lay-fee; and the said church is exempt from the jurisdiction of the bishop of Sarum; and that they, as lawful owners, had lawful power without the bishop to take down or set up any window, and to do any other thing in repairing or adorning the said church, and for reformation of such things as are amiss in the same.

And that he, this Defendant, and the rest of the parishioners being Vestry-men, have met, and have used to meet for a long while, and their predecessors, time out of mind, in the

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Vestry-house, and there have made orders for the taking down, and setting up again, parts of the church. They have taken down glass windows, they have removed altars, roodlofts have been pulled down, seats pulled down and altered, the pulpit taken down and set in another place; and these and many other things without any special licence of the king's majesty that now is, or of his father king James, or of John lord bishop of Sarum, or of his predecessors.

That at a meeting of the said Vestry-men of the said parish, this Defendant being one of them, in or about January, 1629, it was ordered, that this Defendant might, if he pleased, take down the said Glass Window, being in the south-side of the said church, so as at his own cost and charges he would repair the same with new plain glass. And this Defendant being to come to London, desired it should be done before his return; and that the glazier might not mistake the window, he pulled down with his staff two or three of the small quarrels of glass, and so left it to the church-wardens to be done.

That he is accused to be an opposer of his majesty's government, and of the reverend bishops; and this by the procurement of those that are ignorant of the thing, which this Defendant accounteth a very great affliction.

He saith, That this Window, and the painting therein, was not a true Representation of the Creation; for that it contained divers forms of little old men in blue and red coats, and naked in the heads, feet and hands, for the picture of God the Father; and in one place he is set forth with a pair of compasses in his hands, laying them upon the Sun and Moon; and the painter hath set him forth creating of the birds on the third day, and hath placed the picture of beasts, and man and woman, the man a naked man, and the woman naked in some part, as much as from the knees upwards, rising out of the man; and the seventh day he therein hath represented the like Image of God, sitting down, taking his rest: whereas this Defendant conceiveth this to be false, for there is but one God, and this representeth seven Gods; and the Sun and Moon were not made on the third day, but on the fourth day; nor the trees and herbs on the fourth day, but on the third day; nor the fowls on the third day, but on the fifth: and man was not created on the fifth, but on the sixth day; nor did the Lord God so create woman as rising out of man, but he took a rib of the man, when he was in a deep sleep, and thereof made he the woman, in all which the workman was mistaken: in regard of which falsifications, this Defendant deemeth, that this was not a true Representation of the Creation, though it be so pretended, but rather an abuse of the true and lively Word of God, which to pull down, as aforesaid, cannot be any offence in him, this Defendant, as he conceiveth, at least in that manner as in the information it is pretended. But in as much as he is accused of infidelity and impiety to Almighty God, and to be disaffected to the king, therefore this Defendant humbly craveth leave to declare his opinion in the thing itself.

And he saith, that he believeth it altogether unlawful to make the Representation of the true God in any church, or wall, or window; and this he hopeth to make appear by the Scripture, by orthodox Writers, Councils, and Decrees of Emperors, and by a certain Book of the now bishop of Sarum (Dr. John Davenant) written on one of St. Paul's Epistles, in the 97th and 98th pages; king James's Book, intitled his 'Premonition to all Christian kings 'and princes;' the Book of Homilies, set forth by authority, and therein the Homily against Idolatry in particular: That this being so false a Representation, and so profane a setting down of the Image of God the Father seven times, he, this Defendant, being a parishioner, and troubled therewith in conscience by the space of twenty years, for that he could not come into the church, but he must see it, sitting right opposite to it, he was much grieved thereat, and wished a long while that the same were removed, and yet in respect of himself laboured still to disaffect his thoughts; but seeing the dishonour done to God thereby by some ignorant persons, (as this Defendant was informed by the pastor of the said parish) and fearing that others might offend in Idolatry, he (by order of the Vestry aforesaid) did take down some little quarrels of the Window; and it was done by him only, without any disturbance, and he did it only in such places of the glass as the Representation of the Deity so falsified was: he did it not to arrogate to himself authority, but as bound to do what he did to preserve a good conscience; it was not done riotously, nor by combination with any others. And he saith, That he never deserved, nor will deserve such a bitter charge, as, through the malice of his enemies, is laid upon him by the said Information. And he saith, that he, and other of the Defendants, were justices of the peace, and not altogether private persons, and they were parishioners, and entrusted, as aforesaid; and the taking down of the Window seemed to be warranted by the statute of Edw. 6, and by the late queen's injunctions, set forth in print in the first year of her reign, whereby it was commanded that all idolatrous and superstitious pictures, roodlofts, altars, and other relicks of idolatry, especially in churches, should be defaced and abolished, but the wall preserved, and this to be done by the church-wardens, and these injunctions being by act of parliament, they are still in force, as he conceiveth. And in the 13th of Eliz. in the convocation held by the Archbishops, amongst other Canons, this for taking down and defacing idolatrous Pictures and Images was one, and made an article, that the Church-Wardens shall inquire whether it be done accordingly: and the same ordered by the Convocation, in the 1st of king James. He saith, That he doth not countenance any contemners of the Church,

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nor ever did: that the painted Window aforesaid was one of the meanest Windows in the said church, containing but four lights, whereof all the glass at first was worth but 40*s.* and all that was taken down by this Defendant, was not worth more than 18*d.*

And this Defendant denieth that the bishop of Sarum sent to him to forbid the taking of it down; and denieth that he had any notice by way of act, letter or monition to the contrary, or that any such came to his hands. But this Defendant saith, That he often attended the lord bishop, as well upon this defendant's own business, as on the bishop's occasions; and yet his lordship never used any speech thereof to him at all. And therefore this Charge, that it was done by this Defendant against the bishop's directions, is not true, as will appear by Proof. But this Defendant doth aver, what he hath done is lawfully done; and to all other the Offences, &c. he pleadeth Not Guilty.

Sol. Gen. Here is a confession of the fact, and a justification; and therefore we made no examinations or interrogatories; for as I said before, so I make bold to say again, that he hath confessed more than we could prove against him. The Question is, Whether a parishioner may of himself undertake to pull down and set up what he conceiveth to be idolatrous, and so take upon him to be a reformer? In this Gentleman's Answer, you see how curious he hath been in confuting the painter that is dead 100 years ago. (Nay, 'it hath been there these 300 years,' said the Archbishop of York.) From the 5th of January 1629, till October following, he could find no opportunity to execute the Vestry's order; and yet he saith, shortly after the order, he did with his staff take down some of the quarrels of the Window, &c. First, for the manner of coming into the church, we shall read a Witness or two for that.

DEPOSITIONS of WITNESSES on the King's part read.

Bowen the Sexton's Wife saith, That Mr. Sherfield came unto her (her husband not being at home) and said, Woman, bring the keys of the church-door, and let me into the church; whereupon she presently brought the key, and opened one of the little doors of the church, and Mr. Sherfield went in, and made the door fast unto him, and stayed there alone by himself. That when he went into the church, he said, Now, woman, go about your business, while I walk in the church. That thereupon she went into her house, and after she had tarried a little in her house, her child, that was abroad gathering of sticks, came in, and brought her two or three pieces of the Glass Window, and said it was done by a man all in black. Thereupon she went to a private door and looked into the church, and she saw Mr. Sherfield standing upon a seat some four foot above the ground, and so he stood breaking the window with a black staff with a pike in the end of it. That the Window was broken in eleven several places. And after she went by the same window, and saw it broken; but being on the outside, she did not then see it, yet she heard one groan, which she conceived was Mr. Sherfield fallen from the seat whereon he stood, to the ground. And she the rather believeth it was Mr. Sherfield, because he afterwards sent for a horse, and rode home. That afterwards the window was broken by another, and a pitch-fork left in it; and divers other windows were also broken, but by whom this deponent knoweth not. That therefore a watch was set, and continued for a fortnight, to see who should attempt to break any of the windows of the said church.

Elizabeth Bowen, the Sexton's Daughter, saith, That Mr. Sherfield came to this deponent's mother, about three or four of the clock in the afternoon, a little after Michaelmas, and commanded her mother to open the church door for him, and she did open it: when he was in the church he said, Get you about your business; and when her little brother brought in part of the Glass of the Window, saying, Somebody was within breaking some of the windows of the church, she then run out of her father's house and went unto the church, and saw him beating of the ladder, and heard him talk to himself, and thereupon said to her mother, That she thought Mr. Sherfield was mad. That thereupon Mr. Sherfield came out of the church, and went into the clerk's house; and after he had been there a little space, he went again into the said church, and bolted the door after him on the inside, but she peeped in at the door, and saw him break the window with his black staff, which had a pike in the end of it. That the staff broke, and he fell down into the seat, and lay there a quarter of an hour groaning; but what hurt he had, she knoweth not. That he afterwards kept his house for a month. That the Window was broke afterwards, and one John Palmer seen there about four of the clock in the morning.

Dr. *Webb* of Steeple-Ashton saith, That Mr. Sherfield coming thither to keep a court-leet, he afterwards went with this deponent into the church of Steeple-Ashton to view it, and he asked this deponent why they should bestow so much cost in their windows; and he declared his dislike thereof, giving these reasons, to wit, That it made the windows darker; and it was the occasion of idolatry: and he conferred with this deponent about the window now in question, which he said he would have taken down; but the bishop's chancellor opposed him, and said, He knew no cause why he should, for that it was a lay-fee.

John Lymminge of the city of New Sarum saith, That he hath been thirty years a parishioner, and two years ago he was church-warden of the parish of St. Edmund's in the city of New Sarum; that then the order was made, when he was church-warden. That he was present in the vestry at the making thereof. That Mr. Sherfield moved the matter to the

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rest that were present, and they all consented thereunto, saving two, who said, They desired to have the lord bishop's leave for doing it. To whom Mr. Sherfield said, Do not trouble yourselves, I will give my lord bishop satisfaction. That the bishop afterwards sent for this deponent, being then church-warden, as aforesaid; and he went to his lordship, who told this deponent, He had heard of such an order or agreement to have been made at the vestry, and asked this deponent if it were so? This deponent answered, That it was so: that thereupon the lord bishop said, Let it not be done, and gave directions and commandment to this deponent, not to give notice of this inhibition therein to the rest of the vestrymen.

Francis Roberts, servant to the bishop's Register, saith, That an Agreement was brought to the bishop under Mr. Sherfield's hand, and the hands of divers others, by Mr. Sherfield; and the effect of the order was, as he taketh it, for the taking down of the Window, in the south porch of the church of St. Edmond's in the city of New Sarum. That the lord bishop caused this deponent to take a copy thereof, which he did; and thereupon the church-wardens were sent for, and were forbidden by the bishop to put the same in execution, and made a public act thereof, which this deponent wrote.

It was urged by those of the King's Counsel, that the Answer was not in this rightly opened, and was therefore one of the reasons why they desired the Answer itself to be read. In the Answer he justifieth the act as well done; but the counsel that opened the same, did now shew it so to be.

Mr. *Herne*. In opening the Answer, we declined, as but an opinion of the Defendant, and from this a man may recede: It was not the point in issue, therefore we were advised not to stand upon it; and we do acknowledge the church to be a parochial church, and subject to the bishop of Sarum.

Whereupon sir *John Finch* desired that John Lymminge's Deposition might be read again, and it was read to this purpose, 'That Mr. 'Sherfield said he would satisfy the bishop, 'urging that this was after the bishop's inhibi-'tion:'-but this did not appear to the court.—Sir John Finch concluded the Evidence on the king's part: the question is not what is fit to be in a church; the matter is, that he hath taken upon him to determine what is fit. He is an antient reader, and well read in the law; but our law saith, (and this every one knoweth, that hath sucked the least sweetness from the Books of the Law), That the church must be governed by the reverend bishops of the church. That it was a parochial church he knew well, for that himself was a parishioner: and though his counsel decline this, yet his Defence is, that it is a lay-fee, and that he might well do as he did, to pull down the Window. He is well acquainted with the bishop, and yet would never desire his leave in taking it down; but he goeth to the vestry for power to do it, and yet there it is his own motion; and when some questioned their own power to do it, he beareth them in hand he will satisfy the bishop. When he cometh to Steeple-Ashton to Dr. Webb, there he saith it is a lay-fee; for he being a justice of the peace, that seemeth to add another wing to bear him up: But the matter's not in question, it appertaineth to the ecclesiastical jurisdiction. For the bishop's inhibition, that Mr. Sherfield, being a vestryman, should not have notice of this, this is very improbable. If it had been done in execution of the vestry's agreement, why then was it done so privately, and not some of the vestry called to be with him? But to have the doors shut, to do it with such privacy and so many colours, as reading in a book in the church, walking and viewing of the clerk's house; this could not be but that he feared something, and that this was the inhibition.

Note, This was a great defect in the Proof of the king's part, that the relator could not prove that Mr. Sherfield had notice of the bishop's inhibition: nay, he had not the act of the bishop, which was so easy to be had, to shew in court, for which the bishop of London was much displeased, and so was the Lord-Keeper.

To remedy this, if it might be, the bishop of London (Dr. William Laud) desired that Dr. Lynn, the bishop of Sarum's chancellor, who was the relator in this cause, might be heard what he could say to this point. And he was permitted to speak, yet could not directly say that Mr. Sherfield had any notice of the bishop's inhibition; yet he mentioned a letter that was sent to him to give him notice of the bishop's commands to the contrary, but it could not be proved that ever any such letter came to his hands.

For the Defendant.

Mr. *Herbert*. That the Information contained seven several Charges against the Defendant; for five of which, that is to say, 1. That he being factiously disposed, and disaffected to his majesty's government, on his own authority took upon him to deface the parish church of St. Edmond's in New Sarum. 2. That he is an opposer of the authority of the reverend bishops and their government. 3. That he is an encourager and maintainer of all such as are ill-affected persons to their government, and contemners of their authority. 4. That the defacing of the Window in question was done by combination and confederacy between him and ten others, Defendants. 5. That this was done riotously and routously with force and arms.

For all these I appeal to this honourable court, what colour of Proof hath been made; only it hath been proved that the Defendant himself took down a little of the glass of that Window. And there hath been some offer of Proof made, that it was done against the Lord Bishop of Sarum's Inhibition. And whereas

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the said Dr. Lynn, the said Bishop's Chancellor, hath endeavoured to prove some things out of course for this last Charge, we shall desire and beseech your lordships to consider that he is the prosecutor of the cause against the Defendant. For the manner of the prosecution, it hath been very violent, injurious, and savouring of malice. He was the man that went to these Witnesses and forty other persons, to raise up and frame a Charge upon the Defendant. He exhibits a foul bill, or causeth the same to be exhibited against the Defendant, and ten others. And then falleth off from all those ten, and desireth that two of the defendants might be witnesses for him; and when he had thus done, never used them. And this, my lord, hath been the manner of prosecution.

For the taking away of the Glass Window, it is true, we confess we did take down part of the glass; but for the second thing, it doth not appear that he had notice of the Bishop's Inhibition. And whereas sir John Finch hath insisted upon some probabilities for Proof hereof; we hope this cause shall not be sentenced according to probabilities. Now though the Charge of those five before mentioned be not proved, nor any interrogatory administered to prove them, yet we shall desire leave to offer our Proofs to the contrary to your lordships considerations.

And first, as to the Charge that we are ill affected to the Church Government, and an encourager of those that be like minded, and this for private ends, and out of a private spirit: We answer, That Mr. Sherfield the Defendant hath on the contrary, in all his actions, been conformable to the canons and constitutions ecclesiastical, the Rites and Ceremonies of the Church of England. That he hath been so far from encouraging such factious persons, that he hath been very active in his place to punish Separatists. And that he did not this (in removing this little quantity of glass) of his own head or private spirit; but it is true, he conceived it to be idolatrous, and so was it thought by the pastor of the church, and by all the men of the vestry thought fit to be removed. What we did therefore, was no way out of a singular or private spirit; nor our own authority, but by order from the vestry; not in opposition to the church government, or governors; but as in respect to the nature of the thing. Besides, all the Canons, Constitutions, and Commands for taking away such superstitious and idolatrous relicks, we shall prove, in fact, there has been much idolatry committed therewith. We say, that of a long time there have been meetings in the vestry by some antient men of the parish, and this by power from, and under the ecclesiastical governors; and this they have used to do, they have ordered many such things, and they agreed this Window should be taken down by Mr. Sherfield, if he thought fit, and to set up new glass. We go not about to entitle the vestry to any jurisdiction; we say they are respondent to the bishop, and he may punish them if they abuse their power: but though they have not legally a jurisdiction, yet *de facto* they do meet, and do such things, though it be not justifiable; yet this is the question before your lordships, Whether those of his majesty's learned council can make it a crime, Yea, or No? The curate and church wardens assented, as is required by the statute.

The queen's Injunctions, 1 Eliz. give power to the commissioners and others to take away things of this nature, especially in churches, preserving the walls, &c. So in the Articles set out in 13 Eliz. to enquire whether they were removed, Yea or No. Afterwards there was the like in the first of king James; and the Canons contain one particular of the like power given to the church wardens to enquire of such matters, &c.

Depositions of Witnesses on the Defendant's part read.

John Joye of the city of New Sarum, gent. saith, That he hath known the Defendant above 20 years, and hath ever since observed him to be conformable to the church of England; and that the Defendant, when he is in health and at home, is present at divine service and sermons, and that during all the time of this deponent knowing of him, giving good example by his religious and pious carriage unto others; and that this deponent hath known this Defendant divers times to have received the sacrament of the Lord's supper kneeling.—That this deponent is a parishioner within the parish of St Edmond's in Sarum, and a vestryman.—That the Vestrymen of the said parish have met, and used to meet as often as they thought fit, and used to make orders for repairing and adorning the said parish church, and have hitherto many times ordered the taking down of seats in the church, and the setting up of new, taking down of windows, walls, and pieces of the same church. And this deponent remembereth, that about 20 years since, a new pew was erected in the middle of the church for the minister to read prayers in; and 14 years since a new pulpit was set up, and part of the minister's seat was again altered; there was also a new loft made for ringing of the bells, and thirty seats were taken down and new made, and a glass window in the Towers was quite taken away; and all this was done without any special order from the bishop of Sarum, for the time being, or any other ordinary, and never any doubt or question was made thereof.—That upon the 16th Jan. 1629, at a meeting in the said vestry, by the vestrymen, it was ordered, that the Window in question should be taken down, and the reason why, as this deponent remembreth, was for the darkness caused by it, and for that it was superstitious; and that five of the said vestrymen were Justices of the Peace within the said city of New Sarum.

Mr. *Herne* noted, that the Defendant's Witnesses are Justices of the Peace, and such as have been mayors of the city, and are aldermen there; but the other's Witnesses are poor people, and silly women led by Mr. Chancellor.

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This Witness and many others, testified the Defendant to have been conformable during all the time of their knowing him, and observant of the rites and ceremonies of the church of England.

Peter Thatcher, clerk, vicar of the parish church of St. Edmond's in New Sarum, saith, That he hath known the defendant, by the space of 8 years last past; that when he is well, and in good health, he cometh to church, and there stayeth all the time of divine service and sermon, and hath received the Sacrament of the Lord's Supper kneeling. That there was an order made in the Vestry, where this deponent was present, for taking down of the Window in question by Mr. Sherfield. That he hath seen the said Window since it was broken; that the Story intended thereby to be set forth, may well enough be discerned, and this, upon his certain knowledge, for he took special notice thereof, upon Saturday last, before his Examination; that there are no letters in the Window aforesaid, describing the Representation of the Creation. That it may be amended for a very small matter. That it is not so good work as some other windows of the church. That he hath heretofore seen an accompt, made in the time of Henry 7, of Charges in setting up certain Windows in the said church, which are all painted glass; and there was set down a particular of 94 foot of glass, set up at 3*d.* a foot, and this Window in question containeth 72 foot of glass or thereabouts.

Note, That in the time while this Deposition was reading, Mr. Sherfield caused a map of the said Window to be presented to the lords, representing the said Window, and all the several breakings of the same, set forth in colours like the window itself, which was inspected by the lords.

The Bishop of *London* at this time took some exception to the testimony of the last Deponent, Peter Thatcher, for that he saith he knoweth he cometh to church, and stayeth there all the time of divine service; whereas he knoweth that this Thatcher himself hath not read all the divine service in a whole year together; he hath not done it heretofore, whatsoever of late he hath done for by-respect.

Then proceeded the Deposition of the said Peter Thatcher.

That the Picture of the old man in blue and red, is taken to be the picture of God the Father, the Creator of Heaven and Earth; and that he is taken to be there represented creating the birds and beasts, the sun and moon, and speaking to Adam and Eve, &c. That, as this deponent taketh it, there are many mistakes, falsities and absurdities contained in the said Window. That he saw Emma Browne bowing to the Window aforesaid, on which occasion (this Deponent coming in the mean while) he asked what was the cause she so bowed. To which she answered, I do it to my Lord God. Why, said this Deponent, where is he? Said the said Emma Browne, In the Window, is he not? This deponent thinketh he told this Defendant of the same, but doth not remember the time when.

Michael Mackerell, of the city of New Sarum, gent. saith, That he hath known the Defendant, by the space of 20 years and more, during all which time he hath been conformable to the church of England, and duly repaireth to the Church and Sacrament, &c. That this Deponent knoweth he hath called divers in question for their Inconformity, and divers have been accused for Anabaptists and Separatists before him, and other justices of the peace in the same city, and some of them were imprisoned, some bound to their good behaviour, and some otherwise punished by his means; and the deponent set down the names of those who were called in question for Inconformity in particular.

James Palmer, of the city of New Sarum, senior, aged about 80 years, saith, That in the said parish of St. Edmond's, for 50 years past, he hath known divers of the parishioners to have met from time to time in the vestry of the said church, which is part of the same church, or adjoineth thereunto; and they have ordered many things for reparation of the said church, without the bishop of Sarum, or any of his predecessors; and divers of the said parish are, and have been called, and have been and are vestry-men of the said church, and they have done divers things in the church without the bishop's leave, as namely, the place of reading the Service was altered from out of the choir, and appointed and ordered by them to be read in the body of the church, without license from the bishop: And therefore the parishioners did not ask leave in this case, of the bishop, to remove the said window.

The *Bishop of London*. Often Vestries take upon them that authority which pertaineth not unto them, and usually transgress their bounds; they were made by the bishops heretofore, where they are granted and suffered, and in many cases, by the common law, we cannot do without them. The truth is, that the Archdeacon in every diocese was wont to be 'magnus 'oculus episcopi,' to view and inform the bishop of the things fit to be reformed. But you will say, Shall not those men repair, nor do any thing in the church without leave? Yes, they may, but not doubtful things; therefore for such things they should ask license of the bishop at their perils.

The *Lord Keeper*. So for mending of a wall, or repairing things not well done in the church, vestry-men may do it; but when they do ill, they are to be punished.

February 8.

This day the Defendant's counsel proceeded in reading their Witnesses for their Defence.

William Antopp of the city of New Sarum, gent., saith, That heretofore, about 9 or 10 years since, he took notice of one William Trumpetter, who came as a stranger into the town; and this deponent after understood his

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name was Aldersey. That this Deponent hath observed the said William putting off his hat to the said Window; and that the said William's master, called Beech, did kneel down and pray before the Crucifix in one of the windows. This Deponent had conference with the said William, and with his said master, the said Beech; and in their talk they much commended Pictures in Church-Windows, and praised Cellarmine's Writings; wherefore this Deponent did conceive them both to be Romish Recusants: And this Deponent saw the said Trumpetter kneeling and praying towards the said window; and the said Beech kneeling before the Crucifix, beating his breast, which this deponent did conceive was idolatry.

Here the Defendant's Counsel offered to speak something to discharge the Defendant of that point, as to the doing of the said act contrary to the lord bishop of Sarum's Inhibition.

Whereunto Mr. *Attorney* said, That this was not worthy to be insisted on, because they had come short in Proof against him: But as for Mr. Chancellor's enquiring into the said offence done, we conceive it was rightly done, and proper for him to do it; for that this fact is of a mixt cognizance, ecclesiastical and temporal; and therefore, he being an ecclesiastical officer, it was not a fault, but a commendable thing in him strictly to enquire of the thing as he did, and it was his duty so to do. And for the preparing and pre-examining of the witnesses, we say, in this case by him it was lawfully done, and they were justly prepared.

The Defendant's Counsel proceeded, and read divers Statutes and Proclamations, and other Records and authorities in justification of the Defendant's fact, as concerning the nature of the thing. And first was read the particular Injunction in the point, set out 1 Eliz. the 23d Article or Injunction; Church-Wardens are to see the Churches kept clean, and all loathsomeness by dust or otherwise removed; That they have in the Churches the Holy Bible and Homilies, late set out in print against Rebellion, and other outrageous crimes. That there be in every Church a fair joining Table, and a convenient Pulpit, &c. Also they shall see that all Shrines, Coverings, and Candlesticks, Pictures, Pilgrimages, Relicks of famed Miracles, Rolls of Wax, and superstitious things, be taken away and defaced, preserving nevertheless the walls of the stone buildings of the Windows.

Archbishop of York (Neale). The Church-Wardens executed this by direction of the queen's Visitors, not upon their own authority.

Then was read the Article touching this matter, set forth in the Book of Articles, in the 13th year of the late queen. The title of which book is, 'Articles agreed upon by Mat-'thew Archbishop of Canterbury, and the rest 'of the Reverend Bishops, 3 Aprilis, 1571. The Article itself runneth thus: *Item.* Whether all Shrines, Coverings, Rolls of Wax, &c. and pictures of false and feigned miracles, be moved and abolished.

Bishop of London. I do not think that the Story of the Creation was a Picture of false Miracles.—The canon of 13 Eliz. was, That the Church-Wardens should enquire and make presentment of such things to the bishop or ordinary; but it gave no power to them, being but lay men, to do what they would in reformation.

Archbishop of York. The Injunctions were in 1 Eliz. when the Church was very much out of Order; and this was done by special commissioners, and not by the Church-Wardens power.

Then was read the Canon made 13 Eliz. the 18th Canon, That the Church-Wardens should see the Church kept clean, the Holy Bible to be in the Churches, and the Holy Homilies lately set forth against Rebellion, a fair joining Table for the Celebration of the Communion; and all roodlofts, wooden crosses, pictures of false and feigned miracles, and all other relics of superstition destroyed and demolished; the walls of the Churches to be new whited, and sentences of Holy Scripture to be written upon them in great letters, and a bason to be in the Church wherein baptism is to be administered.

There was the like made in 1 of king James, and 2 Jacobi, 1603, Canon 85, That the Windows of the Church be well glazed, the pavements even and decently kept: the like care to be had for the Church-walls and Churchyards, that they be shut in with pales, walls, and rails, as hath been accustomed. And the officers are to see that the peace be well kept, and that the Book of Homilies be in the church, which speaketh against idolatry and superstition, &c.

Mr. *Herbert.* The matter before your lordships in judgment, is the removal of some few parcels of glass out of a Church-Window. Now, upon things thus opened, whether this be a crime punishable in this court, we humbly leave to your lordships to judge. But if it shall be conceived to be an ornament to the Church, and so a fault in any to remove it without the bishop's leave; we say it is true, we did it, but not upon our own private head, the Vestry agreed upon it.

And whereas it hath been objected, and charged, that the Defendant did this to encroach upon the Church-Government, we hope it doth not so now appear to your lordships; but that he is a good constant observer of the Church of England. And for the taking down of this glass, we have shewed what we did simply, and not so much what our own opinion was, but as it was conceived idolatrous by others.—If this be a fault, it is then because it seemeth to derogate from the honour and authority of the Church and done in opposition to the bishops jurisdiction; or else it ariseth out of our Answer, in that we justify the doing thereof, as in our lay-fee. But we have shewed he did not this to make a power in the vestry against the power of the bishop; no, this was an act of duty to the bishop, and punishable by him if it were not well done: so

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we do not divide the power from the bishop, but the question is upon the exercise of this power, whether the vestry-men, when they have done well, are to be reprehended; or whensoever they do any thing about the church, whether they must still go to the bishop for leave?

But though this be not an offence in the nature of it, yet it is said, that to us it is an offence, because of our Justification; which is not only *de facto* that it is done, but that it is rightly done by the vestry as their act in their lay-fee, which is exempt from the bishop's jurisdiction.

To this we answer, That this was only the opinion of the Defendant, it was not the issue; but his disposition is not to stand out in a thing, which afterwards appeareth unto him to be otherwise; he did conceive it was a lay-fee, and was their impropriation: and though he said it was exempt from the power of supreme authority, the archbishop or the king's majesty, yet he did it as the act of the Church-Wardens, which is subject to the bishop.

For the act itself, the taking away of some little quantity of glass, we have shewed you the usage of the vestry, what they have done in other cases; and if every alteration in a church should be prosecuted as a crime in this court, I suppose the court would be overmuch filled with prosecutions of this nature. Thus much for the Matter of the fact; then for the Manner of doing it, it is pretended, that it was done against the bishop's Inhibition.

The Defendant hath denied this point upon his oath, and sheweth probability to the contrary: my lord bishop had long and often conferences with him, but never spake to him of this thing.

Next, for that circumstance, that by this example of his breaking the Window, some others have done the like; but in the Books we find only that somebody did break the windows again after this, but who it was, is not set down. Two or three times a year for glass windows to be broken by accident is a common thing. We find also that after this a pitch-fork was found hanging in the Window; we say that this was discovered only upon Proof, and was not in the Pleading: but the men that examined this, said that it was a madman indeed that came that way, and threw his pitch-fork there, and this might have been proved. And shortly after many more glass windows were broken, but where or in what Church it doth not appear as I conceive. And whereas it hath been said by a silly maid that she thought Mr. Sherfield was mad; and it hath been said, he went about like a madman: We say, that if his faithful care and industry in that city for the good thereof, if his advice in all the kingdom so well known be respected, he is not to be accounted a madman: he did not come in a mad and braving manner, but secretly, and this is proved by the mother and daughter; we say the more privately it was done, the less offensive it was: which we submit to your lordships, and the whole Cause together with it. The Charge against the Defendant is, that he did dishonour to the Church: but we say that the act was to do honour to God.

Bishop of London. Was not this done contrary to the bishop's Inhibition? Let me ask this question of the Defendant's counsel. Why did Mr. Sherfield promise to satisfy the Bishop? Did he give this satisfaction before he did the fact? This I must needs declare to your lordships, that my lord bishop of Sarum hath written to me, and by his letters it appeareth sufficiently how this matter was carried and what passed about it: If it please my Lord Keeper, it may be read. (But this being out of course, and a thing to which the Defendant could make no Answer, was not approved of.) There hath been no fault in the bishop of Sarum; but the business on the prosecutor's part hath been as ill followed as ever I saw: And on the other side, by the Defendant's counsel, as well defended; so much I must say for them.

Sir *Richard Skelton.* This offence is clearly against the bishop's authority; and the greater by his Defence set forth in his Answer; and by what the Defendant hath shewed, it appeareth he did this by his own authority. The Order or Agreement of the Vestry is no more but this: You may, if you please, do such a thing: Mr. Sherfield may, if he please, take down the Glass Window; that is to be understood at his peril, they would not stand to it. This, especially in a man of his example, is not to be passed over in these times. I undertake there are some spirits now, that if they had been alive in Solomon's time, would have gone nigh to have done violence to the Cherubims; God knoweth what would have become of them!

Mr. *Herne.* As to my lord of London's objection, that it seemeth it was done after the Inhibition, Mr. Sherfield, upon his oath, denieth that he had notice of it. Mr. Chancellor himself saith, he had not notice till after the fact: He was often with the bishop, and he never used any words about it to him.

Bishop of London. He undertook to satisfy the bishop (and the bishop, you are to know, is not bound to give notice to every man of his public act;) but your Proofs are, that the vestry have done these and these things, without the bishop; they prove matter of fact, but what was done heretofore, maketh not much for an evil custom.

Attorney General (William Noy). We will not talk of the authority of the Vestry against the Bishop's authority, they were at first made and suffered through negligence of the prelates themselves. The vestry consists of the minister and curate, and some lay-men, I do not say lay-elders; they here agree for the taking of this Window down, but the question lieth not upon their power, it lieth upon the fact itself, confessed by the Defendant himself: and, I say, if he had not confessed and proved more against himself than the relator himself hath done, he might (I think) have gone without the censure of this court. It is proved by the

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Defendant's Witnesses; and that he did it, is confessed; but he alledgeth in his excuse, that for 20 years he observed this window, and he took offence at it; he sat in a seat in the church, and he could not choose but gaze on it; he could not rest with a good conscience, but the Window must be taken down: But in all these 20 years he never complained to the Ordinary; but after 20 years he proposeth it to the vestry; there were present the churchwardens, the vestry-men, and Mr. Thatcher the minister; some were so wise as to question whether the bishop's consent were not to be had unto it: To this the Defendant saith, he will satisfy the bishop, but never offered to do it: Afterwards it is agreed Mr. Sherfield may take it down, provided he make it up again with new plain glass. The bishop, hearing of this, sendeth for one of the churchwardens, and makes a publick act to prohibit the taking of the Window down, and suspends the power of the vestry, if they had any: of this the bishop is not bound to give notice: The Defendant must do it afterwards at his peril, and he told others that the chancellor opposed it.

For the Manner of it, when he cometh from London, he went in secret manner, it was between four and five of the clock, when at that time of the year it was between day and night, growing to darkness: And he went by himself, he took no glazier with him, nor any other to witness his act, no not so much as any one of the vestry-men, upon whose authority he said he did it; and thus in private and secret manner he committed this exploit. It is said by the Witnesses on his part, that some did, by occasion of it, commit Idolatry, but Mr. Sherfield knew not of it, (for any thing that appeareth; besides, he did not follow the Vestry's order in doing it, for he broke it down, he did not take it down: he taketh offence at the painted errors, but he hath broken it, and never mended it again: But he breaketh that part only which offended him, the head and the feet: If this had been done in the execution of a publick act, he would surely have had some witnesses of it; but he had none, he bolted himself into the church, that none might see him, he was not willing to be seen; so it was clandestinely done: If it had been done by him upon the order, he would have consulted with the glazier; wherefore certainly he executed his own humour, and not the vestry's order.

It hath been farther said, to excuse the Defendant, that he may and must do it; but of how dangerous consequence this 'may and 'must be,' is, I shall endeavour briefly to shew unto your lordships. He takes notice, first, that the church is a lay-fee, and being in the parishioners, and himself a parishioner, that he may therefore do it: but from this they have already started, and they may and must do it; for they well know it is a parochial church, and endowed with a vicarage, which if they should have denied, we have the record itself ready here in court to prove it.—But yet they say, there hath been a vestry even from the first foundation: and they have done, and used to do divers such things; they have made seats, pulled down seats, removed the place for reading the service out of the choir into the body of the church, taken down walls of the church, and the like, without the bishop's leave or license, and therefore may take down this Window.

My lords, there is a great deal of difference between repairing and reforming: Reformation ought to be made always by the supreme power, not by private men: but when private persons, or a vestry, will take upon them reformation, I make bold to say, it is the highway to pull all out of order with their reformation. Something was said, as if the reason why the Window should be taken down, was, because the painting darkened the church: But if this had been all, I should not have spoken much against it. But it was done for reformation, his conscience could not bear it. If it should be lawful for private men to do thus much, what will they do next?

Nay, some hold our church is idolatrous and unclean, because Common Prayers are said in them, and Masses have heretofore been said in them; and therefore these reformers would at the next bout take away our churches also; this must be next. As to the kneeling down to the windows by some; it may be some will do so to a Saint, or one of the Prophets of the Old Testament, when they see their pictures in a church or chapel, (as in Lincoln's-Inn Chapel) which if they do, then Mr. Sherfield must pull such windows down, or somebody else to whose conscience it is a trouble. Again, because it is a Cause of Idolatry in others, therefore must Mr. Sherfield pull it down; but it is such Idolatry as must be concealed from the ordinary. Suppose another man come, and say it is no cause of idolatry, and therefore it shall stand still: Thus they differ first, and then they fight for it; next they have partakers on both side, and so an insurrection may come of it, which has many times taken its beginnings from less occasions than this: And though, God be thanked, in this case it was not so, yet it might have been, and may be so, if such things should be allowed, in other instances of like nature hereafter. But he may and must do it, because of the late queen's Injunctions and Articles, &c.

The Injunctions and Articles are but to authorize the Ordinary to enquire of such things fit to be reformed in churches by the churchwardens, and other officers: and they are to present it to them, and so they are to be reformed by the power of the Ordinary in every diocese and jurisdiction: And he meaning was, that all relics of idolatry and superstition should be taken away; but every memorial, or story of a saint and prophet, is not a relic of idolatry or superstition. Any monument of superstition, or of feigned or false miracles, may be taken down; but monument, or pictures for memorials of saints or prophets, are

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not idolatrous or superstitious. If they should be so, because some men conceive them so, and then they may pull them down of their own heads, why then, many might, and I doubt not but some fiery spirits would, take upon them the boldness, to pull down all cathedral churches, because they are made in form of a cross, which some of the precise sort cannot abide: And so, because churches stand for the most part east and west, they would pull them down, because, forsooth, they hold it superstition. But reformation is, and always hath been a work of public authority, and some men have been punished in this court, heretofore, for offending in this kind.

In the queen's time, many went abroad, of their own heads, to break down crosses, images, and pictures of all sorts, in the 44th Eliz. At Banbury they pulled down the cross there. And in the 12th of king James some were brought here in this court, *ore tenus*, and sentenced for the like. And by the Sentence you shall see what name is given to those men, who pulled down crosses; I shall read but these two records, and say no more.

The Records were read by Mr. Robert Page, the Recorder's Attorney.

'By the Queen, a Proclamation against pulling down of Images and Pictures: Whereas many violent persons have of late of their own authority gone about to deface the Walls and Glass Windows of Churches and in their violence have pulled down Tombs and Monuments of noblemen, and gentlemen deceased, to their dishonour, and to the breach of our peace: Therefore a strict commandment is given that all men forbear to break the Pictures set upon tombs or graves, and not to break the pictures or portraitures of the noblemen, or others in churches, church-walls, windows, &c. nor any images whatsoever, without the advice of the ordinary, or the advice of the queen's majesty, or her council, &c. Give 44th Eliz.'

The other Record is this:

'In Camera Stellata anno regni Jac. duodecimo. Whereas William Dale, John Eden, Hugh Jones and Richard Jackson, and other refractory Puritans and Brownists, did deface divers Crosses in high-ways, in the night-time: For this the Judgment of this Court is upon their confession in open court, that the said William Dale, John Eden, Hugh Jones and Richard Jackson, shall be bound to the good behaviour, and acknowledge their offence at the assizes, and every one of them pay 100 marks fine to the king's use.'

Your lordships see now that the defendant might not do it as he did, nor was he bound to do it at all; we therefore leave it now to your lordships to censure.

THE SENTENCE.

Chancellor of the Exchequer (Lord Cottington). This Cause, may it please your lordships, is of great weight, and well deserves the consideration of this Court: it is brought by his majesty's Attorney General against this Defendant, Henry Sherfield, and some others; but the rest are not proceeded against. His offence, as it hath been proved by witnesses, and confessed by himself, is the wilful breaking of a Glass Window in a church in Salisbury, which window anciently stood there; and this he endeavours to justify. That these, and such like, are the acts of Puritans and Brownists, it appeareth upon record. His Answer, I conceive, to be against him, though he now quits that part of his justification, and it sheweth his spirit. It is said he is a wise man, and an old man, learned in the laws, and that grey hairs are upon him; but it had been a better argument of extenuation to have said he was a weak man, a poor man, or a mad man. He took scandal, and it was an offence to his conscience; but this was a tender and scandal-receiving conscience; he must have the window removed.

This, and such like matters may go very far, and great mischiefs may arise by it, as there have of late years both here in this kingdom and in France. He did not only do this, but he boasted of it when he had done, as if he had reformed Superstition: one Day's Work, in the representing the Creation, is set before another; and the Picture of the little old man in blue, must be the picture of God the Father. But this is as light as to affirm, that Idolatry may be committed to any thing, which for ornament the painter hath made. But for the making of pews in the church, pulpits, &c. this is but reparation, from this they come to reformation. Six of the vestry, at least, conceive they have power to pull down this Window, they agree it shall be taken down, and Mr. Sherfield may do it if he please, &c. This was in Jan. 1629, 5 Car.; but it was not done till Oct. following, and then it is not taken down, but broken down. I verily believe, though it appears not in proof, and therefore as a *non liquet* I pass it by, that he knew of the bishop's Inhibition. But, say they, why then should not the bishop speak to him of it? He saith it is a lay-fee; and said, that before the fact Mr. Chancellor opposed him. The violent manner of his doing it, is both proved and confessed. It is said he is a justice of peace, I hope your lordships will take order he be justice no longer. It is proved he received the Communion kneeling; why did they not prove likewise that Mr. Sherfield was baptized? Who doubts that Mr. Sherfield was baptized? There was a strict inquisition to prove the fact; it was well done so to enquire, you see the ill example of it, others followed it. They say it was a madman who did it: this was not proved: but it was more like he was mad himself; it was indeed the act of a madman, and fit for none but madmen to imitate.

For his Answer, I take it to be full of singularity and pride; and notwithstanding any thing contained therein, or in the Proof, I hold this

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his action a great offence, an offence of great scandal and presumption as to him that knows the law. If he or others had been minded, upon good advice, or in good way to have presented this or the like thing fit to be reformed, to the proper ordinary, or to the king's majesty, being the supreme head, he and they should have done well, and have had a great many thanks for so doing: but though it were fit to be removed, it was not in his or the vestry's power to do it. I take it, it differs not from that case adjudged here in this court the last day, when a great many poor men, who had a Right to Common, but in claiming it made a riot, were justly punished. So here, though this Window were scandalous, yet a private man, nor many private men cannot take it down: for what, as Mr. Attorney said, if one half the town would have it stand, and the other half would have it down, what must follow but insurrection? So that here is in this a great deal of disobedience, and that done in the singularity of his spirit in contempt of the Church; he hath thereby touched upon the regal power, and encroached upon the hierarchy of the bishops, who have their authority from the king. I come now to my Sentence; 'I will have him to be no more Recorder of 'this city, That he be bound to the good be-'haviour. That he make a public acknowledg-'ment of his fault in that Church where his 'fact was done, and in the Cathedral Church, 'and that he may pay 1,000*l.* fine to the king's 'majesty.'

Lord Chief Justice of the Common Pleas (sir Robert Heath). In this cause, brought by Information by myself, when I was his majesty's Attorney-General, against Mr. Sherfield and others, the relator hath only proceeded against this one Defendant. Upon all that hath been said on both sides, these things come to my consideration, the fact, and the circumstances of aggravation: for the first of these, I shall agree it to be an offence; but I shall not agree in the manner of punishment, set by my lord that spake last. I dare not give encouragement for any private man to do any public thing in church or commonwealth of his own authority, it is a very pernicious and dangerous thing; but yet I shall not sentence him for some things, which in the first place I shall make mention of.

1. That he should do it by Confederacy and Conspiracy with others, and that riotously: it is true, it is thus charged in the Bill; but this is not proved, nor any other, than Mr. Sherfield himself prosecuted. I must confess, I was informed that the Cause was much fouler than it is, and many others were suspected to have an hand in it; and this was the reason of the Charge in the Information.

2. It may be he took just scandal at this superstitious Window; and had he only moved it at the vestry, this alone had not been so great a fault, if he had done according as the Vestry ordered.

3. That he did it contrary to the command and direction of the bishop; but this I dare not say is so fully proved, as on it to ground my Sentence, though I verily think, as to my own private satisfaction, he could not but know of the bishop's Inhibition. However, seeing it is not proved, (though if it had been carefully followed, I doubt not but it might have been made appear sufficiently; for the bishop of Salisbury himself, and many others, might have been examined in it) I pass it over as a thing not manifest.

4. That this was done out of the spirit of contradiction, and in opposition of the Church-Government: I condemn his rashness and heat of spirit in doing it without the bishop; but I cannot perceive that it was done to oppose the bishop, or ecclesiastical government. If this had been proved, or did appear in his actions, I should have accounted it the greatest matter against him; as for his inward thoughts, I dare judge no man's conscience.

5. That he did this in a profane manner, and that it was a breach of piety towards God. I must confess I think not so, but rather that the offence was fit to be removed; he was grieved, and his conscience offended at it; and I verily think, if the bishop had been told of it in a decent manner, he would have reformed it.

6. That it was done riotously; but it is clear there was no riot in the manner of doing this thing: and so I hold this no aggravating circumstance, he did but satisfy his ill-grounded conscience.

7. That when he had thus done, he boasted of it; this appeareth not, no man seeth this proved: nay, in his answer, opened by his counsel on his oath, he saith he accounteth it a great cross to him, and is very sorry for it.

As to his place and authority, his wisdom and gravity, and his profession, these excuse him not, but rather increase his fault. As to the colourable pretences by him used in acting this business, I do not take these, or his secret going about it, to aggravate his fault; I think Vestries have too great power, and often take upon them to do things beyond their power; and yet I know nothing to the contrary but the reverend bishops may abridge that power when they will. As to this action of his, I find that he did it not 'contra voluntatem episcopi, sed 'præter;' that he was the first mover of the matter to the Vestry: this is not a fault in him, I think, but well done of him; and yet when the vestry had done this, and the Defendant executed their order or agreement, I do not see, but the bishop, if they had done ill, might have punished them. Give me leave, I beseech your lordships, to speak thus much: a judge must not speak his own imaginations, but according to Proof; he is bound ever to give Sentence *secundum probata*, not *probabilia*. That he undertook to satisfy the bishop, this I think is proved by one single Witness; but yet this action of the Defendant, I conceive to be an error in the Defendant. The Vestry (he should have known) are but private men, and have no jurisdiction to reform, whatsoever they

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have done in matters of repair heretofore. But if this, or such like things should be permitted in the Church-government, to be done upon private authority, why should not the like men do the like in the commonwealth? and then we should be at an evil pass. We read in the Book of the Judges of Israel, when there was no king in Israel, private men did what was good in their own eyes, and many erroneous things and slaughters fell out thereupon.

There was cause, I am satisfied, that this Window should be removed. It was made for the Picture of God the Father, and so it was generally conceived to be: but though it was idolatrous, and their bowing to the same was conceived to be idolatry, they should therefore have told the bishop of it; which seeing neither Mr. Sherfield nor the Vestry did do, he is not in this to be excused. I shall therefore agree to sentence him for this fault; but I shall forbear to put him from his place of Recorder in the said City: it is not an offence in him as Recorder, nor as Justice of Peace. I hold every man that is sentenced should, as near as may be, be sentenced *eo modo quo offendit*, and therefore I think not fit that he be put from either of his places, for else we should for this one offence censure him as worthy to be cut off from his places, and so good for nothing. And I shall forbear to bind him to the good behaviour, for he is a gentleman of reputation in the country where he dwelleth; and I have observed, that a gentleman is not bound to the good behaviour, but for very foul and enormous offences. But I would have him to make acknowledgment of his Fault unto my lord bishop of Salisbury, and before such as he shall call unto him: and I would have him give some satisfaction, and this in the very kind that he hath offended, at the discretion of the Bishop. For the Fine of 1,000*l.* set by my lord, that spake last before me, I hold it to be too much for an error, being there appeareth no contempt: I shall therefore think, and so set 500 marks to be enough.

Lord Chief Justice of the King's-Bench (Sir Thomas Richardson). My lords, Mr. Attorney General is plaintiff against Henry Sherfield, esq. We are not to take notice of any more Defendants, because they are not proceeded against; for this cause, my lords, I hold it comes fitly and properly before your lordships here. This is rightly *crimen stellionatus*. There be many covers in it; for it is of mixed cognizance, and therefore fit for this court, which I ever held to be the greatest court, except the parliament.

In delivering of my mind, I shall crave pardon; if I speak any thing which shall be mistaken. For the fact, (as it appeareth unto me upon the Proofs) it was the breaking of a certain Window of painted glass, not one of the greatest in the church: it was a private Window, and it was privately done by him with his black staff. His motive to do it was this, There was offence in this Window, and he conceived that it was idolatry, or the cause of idolatry. The offence was, that God the Father should be pictured there in the form of an old man in blue and red. I have no reason to think Mr. Sherfield took this to be made for God the Father; for he never was nor never can be pictured. Who knoweth him so well? Moses himself saw but his back parts. But give me leave, my lords, as for Idolatry. This worshipping of idols is the greatest sin of all others; it is a spiritual idolatry; it is to give God's honour unto creatures: For the 'Homilies of the Church, I think they are very excellent things (and so they are without doubt;) and there is an excellent Homily against Idolatry: so that Mr. Sherfield, and others, taking offence at the pictures in this Window, (although I see not why it should be taken for God the Father) they might, to avoid occasions of evil desire, endeavour to remove the same. But then I hold he should have gone to the proper judge that hath power. And here I find fault with him, that in the 20 years of his continued offence thereat, he would never resort to the bishop to complain thereof: This was certainly 'scandalum acceptum, et non datum.' He should have gone to the bishop; but for his colour to do the same, by the order of the vestry, I think it a mere colour. Two withstood this motion, eight or six consented to the taking of it down. I marvel any question at all was made of it; for I know Mr. Sherfield is as well beloved of the citizens as any man can be; and, I presume, he might command an order in the vestry: but, I say, the vestry hath nothing to do to reform, it wholly belongeth to the bishop. And the power of the church-wardens, by the Canons and Constitutions, is but to inquire and present; but the bishop, the supreme ordinary in his diocese, and the archdeacon, who is 'magnus oculus episcopi,' are the proper agents in a work of reformation; what mischiefs would else ensue? There was a special commission in Henry 8's time. I know who were commissioners, and have seen the commission: They did strange things; but I have seen again as strange stories of things befallen those houses.

In 3 Edw. 6, cap. 10. it was enacted, That Reformation in the churches should be made by Archbishops and their Commissaries. This was repealed by queen Mary, but set on foot again 1 Jac. and these times must follow the wisdom of an act of parliament. Again, of what dangerous consequence is this act of Mr. Sherfield's? If these men should be permitted to be reformers, they would reform some things that need no reformation. I have seen, in some churches in my circuit, some Stories of the New Testament, some in windows, some in needlework, and woven-work; God forbid these should be taken away.

The manner of his doing of it I like not. He did not take it down, but break it down in the head and feet, which offended him: This should have been the act of public authority; he presumeth to do it in the church, a sacred place, and ever privileged: Therefore it was an offence to use any violence in it, though but to

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the windows, and therefore to be punished. I think churches too little regarded; I hold it very ill that he did it so in private. He might rather have taken a glazier with him. Yet I hold clearly, he doth not disaffect the government. To my knowledge, he hath done good in that city since I went that circuit; so that there is neither beggar nor drunkard to be seen there. For ecclesiastical government, he is outwardly conformable: I have been long acquainted with him; he sitteth by me sometimes at church; he bringeth a Bible to Church with him (I have seen it) with the Apocrypha and Common-Prayer Book in it, not of the new cut.

That he should do it against my lord bishop's special direction to the contrary, I do not think so. There is but one that proves his undertaking to satisfy the bishop. And for the Inhibition, he had no notice of it, for aught is proved; nay, he expressly denieth it upon his oath, wherefore I do not believe he had notice.

To speak somewhat of the Offence that sticketh upon him, the breaking of the Window; I assure myself, if Mr. Sherfield had gone and acquainted the bishop with this order, when it was made, this cause had been prevented; but done as it was, it was disorderly done, and without warrant. This therefore is an offence done by the Defendant; and it is an offence, in arrogating to himself power and authority not belonging to him, and his zeal and good intention shall not excuse him: Zeal must not transport a man out of his calling, nor beyond his bounds; if it doth, it ceaseth to be zeal, it is rashness and boldness, it is (my lords) presumption. I proceed to my Sentence, wherein I must crave liberty (and in all things whenever I speak in this place) to use my own conscience; and I shall ever hold this rule, to judge and inflict punishment, 'secundum quantitatem delicti.'

For this Defendant, I think him transported with a little indiscreet zeal; and he would not seek remedy for his grievance of his ordinary, that he might have had leave to do this deed, but rather do it of his own head, and this by colour of the vestry's order, nothing to the purpose. And this, my lords, is rather an error, in not doing what he ought to have done, than any great offence in doing what he ought not.

My lords, this I remember always, that every punishment here must be 'ad reformationem, 'non ad ruinam:' therefore I shall not agree to discharge him of his Recordership, nor of his place of Justice of Peace in that city. For binding him to the good behaviour, I humbly crave pardon to dissent from that; he is a grave bencher, and a learned man, and a gentleman well governed hitherto, howsoever his indiscreet zeal transported him into this error. This is the first offence that ever you heard of him. I shall agree for his Submission and Confession of his fault to my lord bishop of Salisbury, to be made before his lordship, and such as he shall call unto him: But, my lords, for his Fine to the king, 1,000*l.* is too much, and 500 marks is too little; I shall therefore go between both, and set 500*l.* and imprisonment according to the course of the court.

Secretary *Windebanke.* I agree in Sentence with Mr. Chancellor of the Exchequer, 1,000*l.* Fine, Acknowledgment in both Churches; to be put out of his place, and imprisoned.

Secretary *Cooke.* His majesty's Attorney General Plaintiff, and Mr. Sherfield, an antient gentleman, is Defendant. In my Sentence I shall endeavour to keep a good rule, which is this, not to make faults where they are not, nor to make them greater than in themselves they are. The Information hath charged seven several crimes upon the Defendant; but of all these, nothing but one, touching the defacing of such ornaments, sticketh upon him: But is this so much? This picture was made for the picture of God the Father. So I thought also, I confess, whosoever was mistaken: for Images in Churches, there hath been heretofore much trouble about them. The first trouble that I have read of, was in or about the second Nicene council; and we read, that imagery, or image worship, grew up after it had slily crept in, in this manner.

First they were made for Stories, to teach that to the eye which the word doth to the ear. Then they began to gain some shew of reverence at their approach unto them; but not to the images, the reverence was done to God. Afterwards they came, as we read, (out of the windows and walls) into the church, and at last upon the altars, and then to be worshipped and offered unto. Howbeit, this was but a relative worship, as they would excuse it; nay, as St. Gregory de Valentia saith, they did in his time give co-worship to the Images with God: But our Church doth not allow any adoration to be given to any image or picture whatsoever, nor the image of God the Father to be in the church.

This is the matter of his Accusation: So that as unto the matter, the taking away of such a picture is no offence; but in the manner of doing it, is the greatness of the offence. Reformation in a private man, is deformation, it is not to be permitted: I shall ever be as ready to punish such as any. But that he did this of his own head, without leave of the churchwardens, and against the bishop's Inhibition, it doth not appear to me as it standeth before us. I conceive he had some opinion that the Vestry, or his own authority, might allow him in that which he did, and warrant him in it; but he should then have done it according to the authority. I think he did this out of a little more zeal than he thought to be in others; and I find that he did it without acquainting the bishop therewith: but it is fully proved that he is conformable, and therefore it doth not appear to be in opposition of the reverend bishops.

I incline to my lord the Judge's opinion that spoke last, that it was done out of zeal; and he himself answereth, it was done out of tenderness of conscience: yet I say, that private men are not to make batteries against glass windows

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in Churches at their pleasure, upon pretence of reformation. Notwithstanding, I conceive the danger of example to encourage others to break down such windows, will not be so great, as the occasion of triumph to ill-affected persons would be, if this court should too severely punish an error in pulling that down which the church disalloweth. Therefore an Acknowledgment to the bishop of Salisbury, in the presence of such others as he shall appoint, that he hath not done well in not asking his leave, would do well; and I hold it fit it should so be: And that he be admonished to conform himself to the government; but I acquit him (for my part) of his Fine, and all other punishment.

Sir *Thomas Jarmin.* The cause before your lordships, is upon Mr. Attorney General's Information against this gentleman, Mr. Sherfield; and it is for doing of a thing, which, if it had been done with answerable circumstances, had been no fault in him, 'sed bonum est ex integris 'causis.' So that the not doing of this thing in a right manner, maketh it an evil; but not so great an evil, in my opinion, as by our sentence to ruin him. But it is a great error for men to be zealous in their private spirits, and to put themselves forward upon public actions belonging to the supreme government. I hold that the practical solecism, by overt actions, is the greatest opposition against authority. These are to be vigilantly met withal; but for this gentleman, some things here spoken make me pity his case: besides his doing the fact in such manner as he confesseth, there is not any one thing else brought home upon him by two witnesses. To speak my Sentence shortly; As I shall not say any thing to encourage those hot-spirited men, so I shall still bear and remember that excellent and just saying, mentioned by one of my lords the Judges, that we are to judge *secundam probata*, not *probabilia*; and therefore I agree with the same lord in all the Sentence.

Sir *Henry Vane.* As to the cause, before this court, at this time, it is (my lords) a crime in the Defendant; none differeth from this, that he hath done that which befitteth not his wisdom and experience. I have learned long since, that ignorance doth not excuse an offence, either in church or commonwealth: and I hold that this offence of conscience is not to excuse him; for he went not to the bishop to complain of it, all these 20 years that he was troubled at it. I heard some commend his manner of doing it. I am not of that mind, he could not but know, that if he had an order he must pursue it. I must confess, I do admire, that he (being a lawyer) should be ignorant of the Proclamation to the contrary: but he is a learned man, a Recorder, a Bencher, and a Parliament man; I have known him give grave and wise counsel in that place: all these aggravate his offence, and make it wilfulness in him. But for his conformity, and yet doing a thing contrary to his profession of conformity, I ground my Sentence the heavier upon him. He shall pay (I think fit) 1,000*l.* he shall make acknowledgment of his Offence in the cathedral Church of Sarum before the Bishop, Prebendaries, and Canons, but not be put out of his Recordership.

Sir *Thomas Edmonds.* I agree with my lord Heath for 500 marks fine, acknowledgment before the bishop of Sarum only, and such as he shall please to call unto him.

Bishop of *London.* If there be 'defensio 'facti,' or 'confessio facti,' or else two Witnesses, I think any one of these three will be a sufficient proof to convict a man of an offence; and I have observed there are all these together, in this cause against Mr. Sherfield. He confesseth that he broke the Windows, and setteth forth his justification in his Answer to Mr. Attorney's Information; and this was done by him with his pike-staff, as is testified by two witnesses, such as they were; yet they were eye-witnesses, which is the strongest testimony. I am persuaded, as I am a private man, that at least he heard of the bishop's Inhibition; I do not say, but *ignorantia facti* may excuse a man in such a case, at least *a tanto*, though not *a toto* perchance; but *ignorantia juris* never doth excuse: yet, because it is not directly proved that he had notice of the act of Inhibition, made by my lord bishop, I shall forbear to give my Sentence touching this particular, the rather because he hath cleared himself of it by his oath; and yet I have met with as strange an equivocation in some of late as almost hath been heard of, I have not read the like; but seeing there is not plain proof, I must not judge him other than an honest man.

Mr. Herbert hath defended this as well as ever any did a cause to my knowledge. As for Vestries, which were made and suffered first by negligence doubtless, yet being of continuance, we cannot so easily restrain the power which they use. I have had experience of what I speak herein, in a parish church within my diocese, St. Lawrence by name, there is a Vestry: it fell out once that they could not agree upon some election, I interposed as Ordinary; I had no sooner done this but I was inhibited by the archbishop of Canterbury; afterwards, by his grace's means, it was referred to me to end, which I endeavoured; but then a Prohibition at the common law was sent me; so that it is not an easy matter to restrain a custom.

But it is not in the power of a Vestry to remove or displace any thing in the Church that is doubtful; and though they made an Order, in this case, for the taking down of the Window, yet it was Mr. Sherfield's fault to go so disorderly to work; his violent and riotous breaking into the church, and upon a consecrated thing, is criminal in him.

Whereas divers things touching his conformity have been proved, I am confident upon good information, had the cause been followed as well as defended, (but it was ill followed by them that prosecuted, and unworthy their

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places) many more things might have been proved against him; and that it would have appeared, he had done more harm underhand in his place, than good otherwise. But for his trouble of conscience, which should impel to this action; it troubled not much, for he kept it in, and nourished it until it grew, as you see, to a great head, so that at last it hath brought him hither, even to the sentence of this court.

My conscience being laid at stake, I am not of opinion, that Images and Pictures were not in the Church until the time of Gregory the Great: nor am I of opinion that the first trouble about them was at the second council of Nice. St. Gregory, who was 600 years after Christ, in his 9th book and 9th epistle, written to ——, saith of Images, 'vestustas admissit, &c.' But 200 years before this, we find that Gregory, surnamed the 'Divine,' otherwise called 'Gregory Nazianzen,' when the Emperor laid siege to the city of which he was bishop, in his Oration to the said Emperor, to move him to pity, saith, That the citizens, above all their losses, spoiling of the city walls, ruining of their houses and temples, took to heart the pulling down their statues; 'Et hoc acerbum,' saith he. Nay we find them in the church 200 years after Christ, they were upon the chalice, and that is ever upon the altar.

In Tertullian's time (who was one of the ancientest Fathers) there was painted upon the Chalice the picture of the Shepherd bringing home the lost sheep upon his shoulders; and this was objected against Tertullian himself, who in his latter time fell into the opinion and error of the Montanists, who are against second Marriage and Repentance after Baptism, affirming that no Repentance is left to him that sinneth after Baptism; against which error, the church used this symbol of the shepherd bringing home the lost sheep.

Again, in the time of that ancient Father Irenæus, who is held to be the Scholar of St. John, they had the Picture of Jesus Christ; and they had it from the Gnosticks, who had adorations with it, and sacrifices: and therefore the holy father condemned that picture, because, saith he, the Gnosticks did that to this Picture which the Heathens did to their Idol Gods. But it hath been a distasteful thing to remove Pictures and Images. We read, that the bishop of Cyrene broke the Pictures in the Churches, which his people took so ill, that they rose against him, and were hardly appeased.

And of late times we have had experience of like mischiefs in France and the Low-Countries about this matter. And we know what rebellions were raised in the beginning of the Reformation here in this kingdom and in Germany: when Carolostadius and his company went about to pull down, and deface the Images in the churches, what a stir was there? If Luther himself had not come back and appeased the Multitude by his timely advice, that the work of Reformation was to be left to the supreme magistrates, (which was well done of him, and a thing wherein he shewed his wisdom) much more mischief would have ensued. I do not say these things to any such purposes, as that Images should have any part of Divine adoration.

When these were brought into the Churches, as one side fell to worshipping them, so the other side fell to breaking and defacing them, which bred many broils; and amongst the rest, one very sharp contention by reason of the prevailing of Worshippers of Images, was stirred in the time of Constantine the Great; for I read the Empress gave her voice against her son Constantine to put him off from the empire, because of his defacing of the Images, which they had in their Churches. But for that gross Council of Nice, (pardon me this gross term, but they deserve it in my opinion) they decree the same honour was to be done to the Image as to the Life, whether it were the picture of man, or of God, or of Christ. And then another Decree in that Council was, that a man must rather endure penury than do violence to a Picture: and their absurd distinction of Latria and Doulia, &c. Yet this I say, there is a great deal of difference between an Image and an Idol. But then, if men give worship to them as to the other, it is unlawful.

As for the Injunctions in the queen's time; this was done by public authority, and done in every place by their proper Judge.

And, touching the matter in question, I do not think it lawful to make the Picture of God the Father: but it is lawful to make the Picture of Christ, and Christ is called the express Image of his Father. I do not mean to say that the Picture of Christ, as God the Son, may be made; for the Deity cannot be pourtrayed or pictured, though the Humanity may. I do not think but the Representation of God the Father (as in the Prophet Daniel he is called the Antient of Days) hath been allowed (though erroneously) to be made, like an antient old man: and this the Lutheran party hold too; but whether it be idolatrous or superstitious or no, this I hold not to be the question. And I shall crave liberty not to declare mine opinion* at this time, whether it ought to be removed: but the Defendant, Mr. Sherfield, did this in contempt, at least in neglect of the Church's authority, and the authority of the king's majesty; for the church derive their authority from the king, as well as the Civility. I shall therefore sentence him for breaking this Window, whether it were fit or no to be in the church; if it had been white glass, it would have been the same thing to me; it was a violent and raging act, and it is now a business of great weight and ill consequence, and therefore fit for the timely censure of this Court. And I say farther, if it had been the Idol of Jupiter,

* "But he shewed his opinion, when upon his promotion to the See of Canterbury, he caused the same kind of Pictures to be set up in his Chapels at Lambeth and Croydon." 2 Rush.

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and they had professed Divine Worship to it, it had not have been lawful for Mr. Sherfield, or any private man, to deface it; and this I shall prove and maintain by Scripture.

The Idol of Jupiter was but as the golden calf which Aaron made, before which the People of Israel committed Idolatry; yet we see Judgment was executed by the supreme magistrate, by command from God, and the tribe of Levi was commanded to kill the Idolaters.

Then again, there was a Brazen Serpent appointed to be set up by the Lord himself; and afterwards it became an Idol, and the people committed idolatry with it; yet none of all Israel presumed to break it down, but Hezekiah the king did it. Also the Calves of Jeroboam, set up at Dan and Bethel, were plain Idols, yet they continued a long time, and were not pulled down until Josiah the king did it, and this he doth by his supreme power; and the king did this by the priests of the first and second order. Both these appear in their Stories in the 4th book of Kings, the 18th and 23d chapters.

As for the Second Commandment, 'Thou shalt not make any graven Image,' or Picture, to thyself: no, take heed, worship it not howsoever it be; if thou dost make an Image, yet thou shalt not worship it. But there is no command or example for breaking of Images (when they are made) without public authority. You shall see this plainly in that Altar set up by the Reubenites and Gadites at Jordan, this was conceived by some of the people to be an idolatrous thing, at least an intention in them to set up another manner of worship, and Jerusalem was the place of worship only: there was an embassage sent unto them, and Phineas and other princes were employed in it; they did not presently fall upon them and break down the Altar, though they had special and strict command to overthrow and break down all idolatrous and heathen Altars, Groves, places of Idolatry and Images; but this they were not to do presently, they were to tarry until the land was theirs, in their own power, as you may see in the 7th and 12th chapters of Deut. But you will say these were for the Jews, but not for us in the times of the Gospel. In St. Augustin's time the people committed Idolatry with their Images, and many there were that would have pulled down the Images (the causes of this Idolatry.) St. Augustin adviseth, No, first preach them out of men's hearts, and he called upon the ministers so to do; but you shall not pull them down (saith he) until the Supreme Power doth it, or power were given them. Thus, if it were Jupiter's Picture, Mr. Sherfield or any others are not to pull it down until power be given them, and Gerardus the Lutheran is of the same opinion.

The Homily against Idolatry (so much magnifyed) plainly shews it to belong to the supreme magistrate, and has reference to such pictures as are upon Walls; but Stories upon Glass Windows were not here meant. And as for my lord bishop of Salisbury, book of his worthy Lectures* at Cambridge, upon the 4th chapter of the Epistle to the Colossians, upon these words, 'Walk wisely towards them that are without,' what saith he? Why the very same that St. Austin did before, that a private man hath neither *vocationem* nor *potestatem* to do it; thus if he had read a little farther he should have found direction to have walked wisely. And indeed, those that are out of the Church must be dealt wisely withal. When you see these things, you cannot, as the Israelites did not, deface them, for they belong only to the supreme power. And you shall see St. Paul's practice in the 17th Chapter of the Acts of the Apostles; he saw they had set up an Altar to the unknown God, yet he went not to pull it down, but to teach them that God which they knew not, even as St. Austin afterwards advised.

So I come to this which is the Work of the Day; this is a violent, riotous and prophane entering into the Church by him, to break this Window down with his pike-staff: and as the matter standeth proved to me, it seemeth there are these circumstances of Aggravation of his fault.

1. The first circumstance of aggravation is, That when he went about the taking down of this window, he went not unto the bishop, but chose another way. 2. He was 20 years offended at it; and in all this time, we think some good spirit might have suggested unto him better advice, if he would have followed it. 3. By his Office and authority, his fault is the greater and more scandalous. 4. By his age, being grown grey, he should have learned wisdom. 5. That when he went to do this, he went in private, which some have said to be well done, but I am not of that opinion: true, if it had been a work of necessity in him to take it down, he might have done it, but then he must follow his order, and he should then have taken a glazier with him to have taken it down, and not brake it down with his staff. 6. His Offence is the greater by his office of justice of peace; certainly herein he was not *conservator pacis*, for besides the force and violence, there might have been much discord and blood-shed about it, as was well observed by Mr. Attorney. 7. By the doing of this act contrary to his Conformity, there have been the like insolences done in the same Church, for which I think there is a cause against some of them depending in the High Commission Court; there was the Tomb of a dead bishop there, his bones taken up, his skull made a mazer in an Apothecary's shop, (as I am informed) his dust thrown about, and all to bury a tanner's wife. 8. In regard of his tenderness of Conscience, which he alledged for himself: my reason is, for that, if he were of a tender conscience indeed; yet in this thing I shall sentence him, for not going to the bishop to reveal it to him; if it were but a shew of tenderness,

* Davenant on the Colossians, cap. 4, 5. p. 389.

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then surely there was the more wilfulness in his offence, and this can be no excuse. 9. His fault is aggravated from his Profession. It is an honourable profession; and as it is a great offence in a divine to infringe the law of the kingdom wherein he is born and bred up, so is it also a great offence, if those of the profession of the law vilify the poor laws of the Church. Thus much let me say to Mr. Sherfield, and such of his profession as slight the ecclesiastical laws and persons, that there was a time when churchmen were as great in this kingdom as you are now; and let me be bold to prophesy, there will be a time when you will be as low as the Church is now, if you go on thus to contemn the Church.

To proceed, he went into the Church. It pleased God to give him a fall upon the place, and if it had not been God's mercy he had broken his back upon the edge of the pew; yet all this while these things have not wrought him to any Confession that he hath done amiss; nay he saith, he was persecuted for God's Cause, (as I am informed) but I think he persecuted the poor Sexton of the Church, they put him in prison, and there kept him, and would have kept him, if my Lord Bishop had not sent bail; and if it had not been for the bishop, they would have turned him out of his place. And then, just upon the fact committed, cometh a new Lecturer to town, and he pitcheth upon the text, Psalm cxix. ver. 121. 'I have executed Judgment and Justice; leave 'me not to mine Oppressors.' I have been the willinger to render this account at this time, because some are ready to slander us, as maintainers of Popish Superstition, and I know not what. As for my Sentence, I agree with my Lord Cottington.

Lord *Wentworth.* This is an offence, my lords, committed by a man, of learning and judgment; the persons of men and times may aggravate offences. Men now in these days make themselves wiser than their teachers; whereas it is said, he did this out of conscience and zeal, and with an intent to honour God, he is out of his element. Uzzah touched the Ark with a good intention; but because he did this without warrant he was secretly punished; it is not for a Divine to meddle with 'Littleton's Tenures,' nor a Lawyer with divinity, to govern matters in the Church. The Vestry had no power to reform, nor authorize Mr. Sherfield to do this thing: and I hold it a very great boldness in him, to justify his fact under these pretences: for things which Vestries undertake to do of themselves, if it be well done, it is well; if it be not, let them look to it. But for their frequent and ordinary transcending their power, it is high time that the bishops be directed by the king's majesty, to regulate all such things, and to reduce all these vestry-men into order and obedience. I shall not forbear to punish an offence of this dangerous consequence upon that ground for fear of giving an occasion of triumph to some. I think his impunity will be rather an encouragement, to men of other minds, to set their hands to the like, of which there is great danger. I shall not therefore in my Sentence go any thing less than any of my lords here before me have done; 'That he be not any longer Recorder of 'that city; that he be bound to the good be-'haviour;' I see no reason but a gentleman may be bound to the good behaviour: for his public acknowledgment, I think it necessary to be made in both Churches; and that he pay 1,000*l.* fine to his majesty's use.

Sir *Robert Naunton,* master of the Court of Wards and Liveries, gave not his Sentence because he was not in court the last day, at the beginning of the hearing.

Lord *Newburgh,* chancellor of the duchy of Lancaster, forbare to give his Sentence for the same reason.

Viscount *Falkland* agreed in his Sentence with my lord Cottington, 'for 1,000*l.* fine unto 'the king, &c.'

Viscount *Wimbleton* agreed in his Sentence with my lord Heath, 'for acknowledgment of 'his Fault to the bishop, and such as he should 'think fit to call to him; and to pay a fine of '500 marks to the king's majesty.'

Earl of *Holland.* He was not present at the beginning of the hearing of the cause, and therefore did forbear to give his Sentence.

Earl of *Devonshire.* He agreed with my lord Cottington for 1,000*l.* &c.

Earl of *Dorset.* I conceive, my lords, that the prosecutor of this cause is much to be blamed, and did the court legally take notice of a prosecutor, where the king is a party, I should give my vote to fine such a man: he hath here made a great noise of terrible things, (seven in number) but hath not endeavoured to prove many of them. I shall speak somewhat of the matter in question that sticketh upon him, and not meddle with what hath not been proved. And first is to be considered what was done; a Window in a Church was broken, because of the Image of God the Father which was in it, in those places of the head and feet of the Representation of the Deity; this, if it had been done by the proper Judge, had been well done. If all unlawful pictures and images were utterly taken out of the churches, I think it were a good work; for at the best they are but vanities and teachers of lyes. For the Antient of Days in Daniel (I take it) this doth not give warrant to frame a picture of God like an old man; but it sheweth the eternity of God, that he was before all times and days, and it cannot be taken to be the portraiture of any other: for this being made to represent the Creation, it must needs be intended for the picture of God the Father; for what man did help God about the Creation? This therefore is unlawful, no man ever saw God, nor did he ever appear in any likeness to man. But we picture Christ, because he took upon him man's nature, and was man as well as God; and the Holy Ghost appeared in the similitude of a dove: but I wish there were no

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image of the Father, neither in the Church, nor out of the Church.

Secondly, I note the mind wherewith it was done, and it was out of a little too much zeal, his conscience was tender. This, if it had been guided well, would have been worthy of praise. I do not speak this to make as if men may take upon them to meddle in what belongeth not unto them; yet there is difference between a fault done of zeal, and the same thing done out of malice.

Next let us consider the authority whereby he did it; and herein especially Mr. Sherfield had no power. The Vestry had no power, neither could they give any to another; it was therefore an error in him to conceive, that because they used to meet and do things for repair and ornament in the church, that therefore they might do this, being a piece of reformation; I say, it was his error to do it without the bishop of the place. I would not be mistaken, as if I speak or did any thing against the authority of the reverend prelates: for I take it, whensoever that authority goeth down or decayeth, the monarchy dieth with it, I think they are inseparably joined together. But this was an opinion of his, that it was their lay-fee; and if he repent him of his opinion, recant it, and depart from his justification, (though his Answer be otherwise) I shall not take upon me to destroy a man for such an offence. Then in what manner did he it? Privately and without noise; and this I hold to be a diminution of his fault, for secret evils are not so bad as when they are openly done; the same evils done in chambers, are not so bad as if they were done in the market-place.—And it cannot aggravate his fault, that he is conformable: I say, in my opinion it was very necessary for him to prove himself a conformitant; and being charged in the information to be otherwise minded, he did well and wisely to clear himself by proof.

I come to my Sentence. I shall not sentence him for three or four Papists, nor shall I forbear to sentence him for three or four Schismaticks; the reason why I shall not sentence him, is to avoid the tumults of the rude ignorant people in the countries where this gentleman dwelleth, where he hath been a good governor, as hath been testified, and is well known, and no doubt hath punished drunkenness and other disorders; and then such persons shall rejoice and triumph against him, and say, This you have for your severe government. This I think would be no good reward for his care. The reason why I shall sentence him, is because he hath erred in his manner of doing this thing, in going on his own head without the Ordinary, to a work of this nature; and this I shall hold to be an offence in this Defendant, or a misdemeanour, but not a crime. I would not have him to lose his place therefore, nor to be bound to the good behaviour; I would notwithstanding have him make such Acknowledgment to the bishop of Sarum, and in such manner as he shall think fit: but I do not set any Fine upon him.

Earl of *Pembroke* and *Montgomery*, Lord Chamberlain, he gave no Sentence at all.

Earl of *Arundel*, Lord Marshal. I find fault with this gentleman for keeping close his Offence of Conscience, which he saith he had at this Window, by the space of 20 years together: He should in all this time have revealed his mind to the bishop, who had been able to direct him; but upon the matter, he goeth on his own authority to break down this window. This being long kept in his heart, breaketh out to deface the Image of God in a man. Besides, he leaveth the ordinary, who hath power, and goeth to the Vestry, who hath none; and in his fanatical humour he proceedeth, and breaketh the order of the Vestry. God gave him a warning; he fell upon the seat, and hath had time enough to think of it since, and in all this time he never came to acknowledge his offence. I agree therefore with my lord Cottington.

Earl of *Manchester*, Lord Privy Seal. In this cause, my lords, I shall propound two things to be considered, the fact itself, and the circumstance of it: For the fact, the breaking of the Window because of idolatry. If this had been in a man's lay-fee, then he had been bound to have pulled it down; but being in a parochial church, it is to be done by the Ordinary, or by his appointment. This therefore being done by Mr. Sherfield, upon some opinion that he had in the power of the Vestry, it was an error to him, but pardonable. It doth not appear that this was done contrary to the Inhibition of the bishop, 'Non notum est judici, 'quod non notum est judicialiter,' he had not therefore notice of it: For my lord of London's aggravating circumstances, it is true, if the thing were done, as it is charged in the Information, then those would be all against him; but we see there were causes it should be taken down; it is proved some did adore it. How long soever pictures and images have been in the churches, I hold it a very offensive thing to make such a picture, or representation of God. I will mention but one author, which was before all them who were named, the prophet Isaiah, 'What likeness or similitude will you make of 'me, saith the Lord?' Yes; but idolatry lies in the worshipping of the image. Take a wise man's counsel, The painted picture inviteth the ignorant to idolatry. I profess it would offend my conscience to see it, I am of such a pure conscience.

But there are three other things for which I shall censure him. 1. His pretending the Order of the Vestry. 2. That he would neglect authority, which is near unto Contempt. 3. His passion in doing it himself, and not by others.—This Cause and Sentence hath many judges, even so many as hear it are judges of it. All may take notice, that our votes are to maintain order and government, yet not to uphold superstition. I will be short, I will sentence the Defendant, but not fine him; 'to 'make Acknowledgement to the bishop,' not to disrecorder him: The fact deserves not a fine.

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Archbishop of *York* (Dr. Neale). May it please your lordships, this gentleman, Mr. Sherfield, is informed against by his majesty's Attorney-General, for entering with force into the church of St. Edmond's in the city of Salisbury, and there undertaking, without the Ordinary of the place, to be a reformer of idolatry, in breaking a Glass Window in the same church, which he did of his own authority. In his Answer upon the matter, he setteth forth a justification.

First, he saith it was the lay-fee of the parishioners: but this will not help him, for it is a parochial church. Next, he had Warrant for what he did, as he pleadeth, That he did it by order of the Vestry: I wonder what is the Vestry, and what power and authority they have? It is a place where anciently the ornaments of the church were kept; since those things were gone, there were meetings by the parishioners to agree on matters of repair and assessments, and rates for the church, and the poor; and they did meet sometimes in the church, and sometimes in the Vestry, no man of the parish was excluded. Afterwards, to avoid tumults and multiplicity of voices, some bishops had appointed, by special instruments under their episcopal seals, that such and such, to a set number, should be Vestry-men, and be so called, and shall order matters for the repair of the church, or bread and wine for the Communion, and such like things, as the charges about bells, &c. And here I shall make bold to remember a story to your lordships of what passed between my lord Burleigh, myself, and Dr. Bancroft, the then bishop of London, when I was vicar of Cheshunt. I was then a young man, and I had an opinion that there was somewhat in a Vestry; and had a purpose which I acquainted my lord and honourable patron withal, to have some authority deputed us in our Vestry, by the bishop of London our ordinary; I had my lord Burleigh's letter of commendations, and special request to the bishop for the same. His lordship's Answer which he gave me was thus: 'If you have occasion to repair the church or the bells, to 'make rates for the poor, and such like things, 'this you may do; but if you think otherwise, 'or aim at any other power, it shall not be 'allowed you, and you smell of the presbytery; 'therefore, I pray you, commend me to my 'lord Burleigh, and tell his lordship I will not 'incur a *præmunire*, for I have somewhat to 'lose.'

I conclude: The Vestry hath no power to make reformation, nor can the Defendant derive any power from them; Therefore, as for the matter of offence, the picture of God the Father, no man ever took upon him to paint the essence of the Deity. But the question is, whether it be lawful to express God the Father by any representation? I think it not unlawful in itself. The eternity of Alpha and Omega doth appear in Christ, and Christ is the Image of his Father. As for those divine Homilies of the church, set forth in king Edward's days, and that in special against Idolatry, we know the times did not bear them: nor are they to be taken or understood, as not to allow any manner of pictures or images (though it may seem so) of Christ upon the Cross; but it is like the forbearing of food for a time, as St. Paul saith he would, for fear of giving offence or scandal unto others, who are weak; I say that for the crucifix, there may be a very good use made of it. As for the purpose, he that shall look upon a crucifix not to adore it, or give any divine worship thereunto, he must needs think with himself, how can I but grieve and mourn for these sins of mine, which could not be expiated but by my Saviour's blood upon the cross? And then I cannot but think of the great love of our Lord Jesus Christ to mankind, that vouchsafed to die for my sins. And then, it serves to increase my confidence in him, by considering that he has given himself for me, and promised that I shall not want any thing that is good for me; and that he will not deny me my prayers in any thing which I ask agreeable to his will; so that this must needs work a deep impression on my heart. I thus think; but when it cometh to be superstitious, or that some make it a cause of idolatry, I must confess, I would then rather want the thing, and all the good uses of it, than incur the danger of propagating idolatry. That reverend Jewel, bishop of Salisbury, in his time had a commission, and he took down all idolatrous Windows in the churches, and set in place thereof clear glass; but he left alone this Window; and surely, if he had thought it to be idolatrous, he would have reformed it. And we have the Creed of Athanasius which hath these words, 'That Christ is of one substance 'with the Father;' therefore the Image of the Son is the Image of the Father, and therefore it cannot be idolatry simply to make it. But grant that it was a cause of idolatry, might Mr. Sherfield or the Vestry take it down? He saith in his Answer, That himself and four others of the Vestry are justices of the peace, and not altogether private men. I would ask him this question, Whether as justices of the peace, they are to meddle with Reformation in the Church? It is plain they are not; yet, as a private man, he hath undertaken to break this Window; whereas the agreement of the Vestry was to take it down: Neither was it meant that he should do it himself, but by the glazier, and set up new glass in the room of it; but he hath not followed this neither. My brother, that sitteth by me, hath very well and learnedly spoken of the authority by which these things ought to be done. I cannot add to what hath been said by him; I shall therefore, because much time hath been already spent, only insist on one thing in the Defendant's Answer, and so conclude my Sentence. He saith, the authority which the late queen had to reform and set forth those her Injunctions, were given to her by the parliament. This is not well spoken. The statute of 1 Eliz. is but an Act Declaratory, not to be taken as if without it the

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queen had no power to meddle with those things of the church; for this authority was invested in the crown, and is still without the parliament. He that said 'per me reges regnant,' giveth this authority to the king. It is good to meet with growing evils, we know not how great a fire may be kindled with a small spark. I cannot therefore do otherwise, but agree to fine and censure him highly, having offended with so many circumstances of aggravation, as have been well opened by divers of your lordships before me; therefore my Sentence is, that 'I concur with my lord Cottington in all the parts of his Sentence.'

Lord *Coventry*, Lord Keeper of the great seal of England. This Cause, my lords, I doubt not will produce a good effect; for this great audience consisting of gentlemen from all parts of the kingdom, cannot but be satisfied that we think it not fit nor lawful to represent the Deity by picture, and consequently we condemn Romish superstition; and on the other side, that we are resolutely bent to maintain the government by the reverend Fathers of the Church, the bishops. And all this I think fit to be carefully expressed in drawing up the Sentence. This I must premise, that when I speak my conscience I be not mistaken, I am no worshipper of graven images; nor on the other side, am I of that peevish turbulent humour with others. For the Charges in the Bill, if they had been proved, I should for my part have trebled the Fine set by any of your lordships. There was never cause worse prosecuted, yet we are to consider how much standeth proved against the Defendant. The Prosecutor causeth the Information to be exhibited against this Defendant and ten others; but those ten are not so much as pressed to answer.

First, to speak to those things that are not proved, but only charged upon him. 1. He is charged with Inconformity, therefore it was necessary for him to discharge himself of it by his Proof, which he hath done, and no doubt remaineth in me to the contrary; for the prosecutor, though apt enough to charge him with this, yet he exhibiteth not a witness or interrogatory to prove it. 2. That he did this in Contempt of the Ecclesiastical Power, and contrary to the lord bishop's Act of Inhibition; but it is not proved he had any notice of it before the act was done, and therefore the oath of the party is to be believed: nay, there was no endeavour to prove it, so far as I see. And I like not so well Mr. Chancellor's moving the bishop to make an act to continue this Window, if it were for any other cause than to preserve the ecclesiastical jurisdiction. Mr. Chancellor should have done well to have declared this dislike and scandal to the Window to my lord bishop of Sarum, and he, no doubt, would have removed it. I do not say the bishop or ecclesiastical judge is bound to give notice of his judicial acts in their ordinary proceedings in course of the ecclesiastical laws, and their own jurisdictions: But if you will charge a man upon a contempt in a criminal court, as here you must, then prove he hath notice of the Inhibition: for else it is but *ignorantia juris*, which in the ordinary way will not excuse; and yet if it were *ignorantia juris*, I do not see but in so high a course of prosecution as in this court, it might in some cases diminish a fault: but this is *ignorantia facti* in this case. 3. That he did profanely demolish this Window, containing a representation of the Creation. This giveth occasion to look a little into the nature of these pictures; I conceive them to be unlawful and irreligious pictures of God the Father. Two of the Witnesses say they were idolatrous, and made to represent God the Father; that it is God the Son's picture, there is no proof. I think that opinion of making the Image of God according to that of Daniel, calling God the Antient of Days, in the form of an antient man, is, as my lord of London hath said, erroneously grounded; and also to bring God as he appeared unto Daniel to be presented in the Creation, which was long before, is somewhat improper. 4. Then that Mr. Sherfield boasted of it, it is not proved that he did, and it is evident that he doth not boast of it.

Now for what is charged upon him, and sticketh, that under colour of the Vestry's Order, he did the same, and without the bishop of Sarum. And for an answer what Vestries are, I read not of a Vestry in our Book of Common-Law; I read much of church-wardens, and their doings. If it be a meeting of the minister, church-wardens and parishioners, it is a good meeting, and they may well deal in matters of reparation, not reformation; and this is not derogatory from the authority of the bishop, but subordinate to it. But it may be through the neglect of the prelates, the vestries do encroach upon their government; and will be more disorderly, if they be not regulated. My lord of London did, in the beginning of this cause, well declare, that the archdeacon is 'magnus oculus episcopi;' it were fit for these to do their duties, and so such things should not be left to be done unto these men of the parish, I mean to these Vestry-men. Now, in the Vestry they make an order that this Window may be taken down by Mr. Sherfield. I do not say nor believe they have power to reform; yet he proveth by way of prescription for 69 years they have made reparations and meetings. But howsoever he doth not pursue his order; and this indeed was not discretion in him. But if he had taken down white glass, I do not see any reason why I should sentence him; this being not prosecuted in an ecclesiastical ordinary course. The council on both sides have carried themselves in the cause extremely well; and for their yielding it to be a parochial church, it is well done, and no fault is to be put on the party for his protestation; for I cannot think but when he made his Answer, he was of opinion it was a lay-fee, he sweareth it; and being he now confesseth it to be subject to the bishop, his fault is a great

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deal the less, in as much as it now appeareth, he doth not oppose the ecclesiastical authority.

I am glad to hear what I have heard this day from my lords who have spoken, and from my lords the reverend bishops. I say, it appeareth that nothing hath fallen from them or any here present, to allow the picturing of the Deity, or the worshipping of images. I am much inclined to that opinion of Mr. Secretary Cooke, 'That he be sentenced by way of Re-'prehension and Admonition; I hold fit that 'he make his acknowledgment before my lord 'bishop, and repair this broken Window in de-'cent manner.' I am loth he should be put to any heavy Fine, the rather because he hath not been prosecuted in an ecclesiastical course; therefore I give no Fine at all.

The Votes of the said lords and others of his majesty's privy-council, were thus disposed. Nine agreed to set 1,000*l.* Fine upon Mr. Sherfield the Defendant, and he should be put out of his place of Recorder, be bound to the good behaviour, and make open acknowledgment of his fault in the church of St. Edmonds, where the offence was done, and likewise in the cathedral church of Sarum, before the bishop there, and the deans and prebends of that church.—And nine others, my Lord-Keeper's voice being one, agreed that he should not be disrecorded, that he should make Acknowledgment in private to the bishop of Sarum of the said offence, and in such manner, and before such persons as the said bishop of Sarum should think fit. And for the king's Fine, these were again divided; four, whereof my Lord Keeper was one, gave no Fine at all, and five did give their voices to set a Fine; four of them set 500 marks, and one of them, viz. my L. C. J. Richardson, set 500*l.* which fine of 500*l.* was taken for the king, because according to the rules and orders of the court of Star-Chamber, when there is difference of fines in an odd, the king is to have the middle fine. Therefore the Sentence of the court was, and is thus entered:

'The Defendant being troubled in conscience, and grieved with the sight of the pictures which were in a Glass-Window in the 'church of St. Edmond in New Sarum, one of 'the said pictures, to his understanding, being 'made to represent God the Father; did procure an order to be made by the Vestry, 'whereof himself was a member, that the Window should be taken down; so as the Defendant did, at his own charge, glaze it again 'with white glass: and by colour of this order, 'the Defendant, without acquainting the bishop, or his chancellor therewith, got himself 'into the church, made the doors fast to him, 'and then, with his staff, brake divers holes in 'the said painted Window, wherein was described the Creation of the World; and for 'this offence committed, with neglect of episcopal authority, from whom the vestry derive 'their authority, and by colour of an order of 'vestry, who have no power to alter or reform 'any of the ornaments of the church, the Defendant was committed to the Fleet, fined '500*l.* and ordered to repair to the lord bishop 'of his diocese, and there make an acknowledgment of his offence and contempt, before 'such persons as the bishop would call unto 'him.'

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142. Proceedings against WM. PRYNN,* esq. in the Star-Chamber, for Writing and publishing a Book intitled, "Histrio-mastix, "or a Scourge for Stage-Players," &c.; and also against MICHAEL SPARKES, for printing, and against WILLIAM BUCKNER, for licensing the said Book: 9 CHARLES I. A. D. 1632-3. [1 Clarendon's Hist. 73, 158. 2 Rushw. Coll. 220.]

THE 7th of February 1632-3, Mr. William Prynn, utter-barrister of Lincoln's-Inn, was brought to the Star-Chamber; together with Michael Sparkes, William Buckner, and four other Defendants, upon Mr. Attorney Noy's Information; which being opened by Mr. Hudson of Gray's-Inn, did set forth, That about 8 Car. Reg. Mr. Prynn compiled and put in print

* "Mr. William Prynn now published his 'Histrio-Mastrix' or Book against Stage Plays, licensed by the chaplain of archbishop Abbot; wherein, with very profuse collections, he exposed the liberties of the stage, and condemned the very lawfulness of acting. In his way of writing he could not refrain from over-doing any subject and from many appearances of railing. And because the Court became now more addicted to these ludicrous entertainments, and the queen herself was so fond of the amusement that she had bore the part of a pastoral in her own royal person; therefore this Treatise against Plays was suspected to be levelled against the practice of the court, and the example of the queen: and it was supposed an Innuendo, that in the Table of the Book this reference was put, 'Women actors noto-'rious whores.' The Attorney-General prosecuted Prynn for this Libel in the Star-Chamber, where he was sentenced to imprisonment and other penalties. The misfortune was, that bishop Laud was the instrument and abettor of this process against the Book and the Author, by shewing the book to the king, and pointing at the offensive parts of it; and then by em-

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a libellous volume, entitled by the name of "*Histrio-mastix,*" against plays, masques, dancings, &c. And although he knew well, that his majesty's royal queen,* lords of the counsel, &c. were in their public festivals and other times, present spectators of some masques and dances, and many recreations that were tolerable, and in themselves sinless, and so published to be, by a Book printed in the time of his majesty's royal father; yet Mr. Prynn, in his Book, hath railed, not only against stage-plays, comedies, dancings, and all other exercises of the people, and against all such as behold them, but farther and particular against hunting, public festivals, Christmas-keeping, bonfires and maypoles; nay, against the dressing up of a house with green-ivy. And to manifest his evil and mischievous design in publishing of this Libel, he hath therein written divers incitements, to stir up the People to discontent, as if there were just cause to lay violent hands on their prince; and hath expressed in many speeches against his majesty, and his houshold, infamous terms unfit for so sacred a person. He hath cast an aspersion upon her majesty the queen, and railing and uncharitable censures against all christian people. He hath commended all those that are factious persons, that have vented any thing in any book against the state, as the factious Book of Dr. Leighton, Jo. Mariana a jesuit, to draw the people from his majesty's government, which is of most dangerous consequence to the realm and state. His Book is of above 1000 pages: and he dealt with one Michael Sparkes for the publishing, licensing, and printing thereof, who is a person that is a common publisher of unlawful and unlicensed books; and dealt also with Mr. Buckner, another Defendant, for the allowing of it for the press; and with the other four Defendants to print part of it, and publish the same: and by this means this Volume was allowed and published, to the great scandal of the whole realm. And to have this punished according to the demerit of the cause, is the end of Mr. Attorney's Information.

Mr. *Atkins* of Lincoln's-Inn (afterwards a Judge in the court of Common-Pleas) opened Mr. Prynn's Answer; That he, the said Mr. Prynn taking into his serious consideration the frequent resort of sundry sorts of people to common Stage-Plays about the city of London; and having read divers councils, laws and statutes of this and other realms, against the frequenting of common stage-plays, and the judgment and opinion of several divines, and other antient authors, and divers English writers allowed by public authority, and his own judgment running with those; not intending to reflect, or to have relation to the king, queen, state, or government, or your lordships, did about seven years ago, compile this book entitled *Histrio-mastix;* which is no more but a collection of divers arguments and authorities against common Stage-Plays. That about four years since, he did commit the same to Michael Sparkes, one of the Defendants, to be commended to such persons as then had authority to license books for the press. Sparkes did carry it to Mr. King, belonging to the late Archbishop of Canterbury; and before he had perused this book, Mr. Buckner had authority to allow of the books, to the press: Sparkes brought this book to Mr. Buckner, who kept it by him three months, in which time he did fully peruse it. In the interim, he gave part of the book to Sparkes to print, and kept the rest till he had perused it, and said, that he should have that also to the press. In October following, he carried this copy with the licence, and caused them to be entered into Stationers-Hall, and did compound with those that had authority for the printing of this book. It was printed publicly, and not secretly; and because there was some of the copies close written, he caused these to be brought again to peruse, to the intent that he might not be deceived in them; and as he saw cause, corrected them accordingly. That in Easter-Term was twelve-month, the Epistle, and the whole First Part of the Book was printed; and he had time to examine it between Easter-Term and Trinity, and then he did make such alterations as he saw cause, viz. in p. 711. &c. And afterwards the Second Part, and two sheets of the index of the book was likewise printed, and these were likewise brought to Mr. Buckner; so that the whole Book with the Index, was bound up about Christmas following, which was Christmas was a twelve-month. Mr. Buckner sent for Mr. Prynn, and the stationer was desirous that the Book might be published, and that he might send some volumes to him: but Mr. Buckner said, he could wish the word 'Pity,' in such a page might be left out; and I wish with Mr. Buckner, that 'Pity' might be added to every page of the Book. So when Mr. Prynn saw all this from him, that had licence to allow printed Books, he conceived it a sufficient warrant for his proceedings. And for that which is alledged in the Information, of Mr. Prynn's commending Dr. Leighton, for which the doctor received a Censure in this

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ploying Dr. Heylyn to pick out all the virulent passages, and give the severest turn to them; and lastly, by carrying those Notes to the Attorney-General for matter of Information, and urging him earnestly to proceed against the Author: which though a prelate might do with sincere intention to suppress libelling, and to assert a respect to crowned heads; yet it was looked upon, by some serious men, as a giving countenance to the licentiousness and profaneness of the Stage, which ought rather to have been reproved and restrained by a christian bishop." Kennet.

* "The Queen had acted a part herself, in a pastoral at Somerset-House: and this Book of Prynn's was shewed her as levelled at her, there being a reference in it, Women Actors notorious Whores; though in truth the book was published six weeks before the queen's acting." Whitlock's Mem. p. 18.

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court, in the quotation whereof, viz. his Book, and of others, he adhereth to their meaning so far as, and wherein they are agreeable to the law: and this book was printed long before Dr. Leighton was questioned in this court. And as for encouraging of others to be factious or seditious, he saith upon his oath, That he was so far from disloyalty, schism, or sedition, or neglect of the king, state, or government, that he hath with much joy, chearfulness, and thankfulness to God, ever acknowledged his, and the rest of the king's subjects happiness, by the peace we have under his majesty's happy government: and this Answer and intention is sincere, though other construction be made thereupon. He saith, he hath taken his oath of Supremacy and Allegiance in the University and Inns of Court where he hath taken his degrees. That it never came into his thoughts to approve of Schism or Sedition: and if any thing in his Book, contrary to his meaning, hath a mis-construction towards his majesty's government, state, or your lordships, he doth prostrate himself at his majesty's royal feet, and crave pardon and grace. And he doth appeal to your lordships interpretations of those parts of his book: and doth withal desire your lordships favour, and to take it into your consideration, that he hath been a year prisoner in the Tower: and this is the substance of his Answer.

Mr. *Jenkins* of Grays-Inn opened the Answer for four of the Defendants. First, for the poor Widow he saith, for any manner of combination, or knowledge of this book, or of the contents of it, &c. she knoweth nothing. For the rest, they all say, They being illiterate, were not able to judge whether it were fit to pass the Press, or not; that the Book was licensed to be printed, allowed after it was printed, and before it was published, and it was entered in the Stationers-Hall, and the warden there allowed and subscribed it to be a book passable. The book hath been three years in the press. All this time was spent before it was printed: there were searches made during this time, and they came unto the press. They saw the Book there in a public way, and not in corners, or privately printed, as is alledged in the Information; and it was printed and published, and some of the books sold by Sparkes: and Sparkes saith, the printing of this book cost him almost 300*l.* and saith upon his oath, he sold not many books. And for the charge upon him, of being a common printer of unlawful books, he saith, He hath prospered in his calling; and some other stationers having an eye upon him for his thrift, have envied him in publishing of books, and leaveth it to my lords the bishops, to know what success he hath had in the High-Commission.

Mr. *Lightfoot* of Gray's-Inn opened Mr. Buckner's Answer. He saith, That he was chaplain to the late archbishop of Canterbury, and doth approve of the church without any scruple, and of all the ceremonies of England. Church-music he doth allow of; bowing at the name of Jesus: plays, music, and dancing, he doth esteem them just and lawful. And for those censures against ecclesiastical persons in this book, he doth, and ever did abhor and detest them. He confesseth he licensed part of the book, but never gave order to disperse the book; but when he heard it was published, he did endeavour to suppress it: and to the rest of the Information pleadeth Not Guilty.

Then, Mr. *Noy*, Attorney General, spake as followeth: This volume of Mr. Prynn's is written by himself, without the help of any man. There are passages in it that reflect upon the king, state, and government, &c. other things reflect upon the church and clergy; but for that there is no charge in the Information, which I did conceive fitter to be left out, and withal I received a command for the same: therefore finding the Church so deeply wounded by Mr. Prynn, I do leave her to avenge herself of him, and to inflict such punishment on him as he deserves. I shall be an humble suitor to the court, that they would be pleased to commend the prosecution of those things that concern the Church to the High Commission. There are divers particulars wherewith he is not charged within the Information by way of crime, and so it is not proper now to bring him into question for them. As for mentioning of Ceremonies, &c. of dedicating Paul's to Diana; of the Discipline of the Church; the complaint of new erected Altars: I wonder what Altars he means, I hope the church will examine in due time; as also who he means by his 'modern innovators' in the church, and by 'cringing and ducking to 'Altars,' a fit term to bestow upon the church; he learned it of the canters, being used among them. The Music in the church, the charitable term he giveth it, is, not to be a noise of men, but rather a 'bleating of brute beasts; 'Choristers bellow the tenor, as it were oxen; 'bark a counter point, as a kennel of dogs; roar 'out a treble, like a sort of bulls: grunt out a 'bass, as it were a number of hogs:' his complaint for suppressing repetitions by way of Conventicles; all his general censure of all the bishops, and of all the clergy; they scorn to feed the poor; the 'silk and sattin divines:' very charitable terms upon them of the church! Christmas, as it is kept, is a 'devil's Christmas;' nay, he doth bestow a great number of pages to make men affect the name of Puritan, as though Christ were a Puritan, and so he saith in his Index. Then concerning the Images in the Church, he speaketh against them, and putteth that now in print, which was contained in an Answer in this court. Also for the Sabbath-day, whether to begin on Saturday night, and end on Sunday at six of the clock. These are things proper to the examination of the Church; and whatsoever becometh of the rest of the cause in this Court, yet I commend these things to the consideration of the Church. I wonder what the man means to bring these things under the title of Stage Plays; Pluralities under the

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title of Stage Players. He had an end in it; he had an end in it.

Now concerning the Book itself: This Book, said Mr. *Noy*, it is the witness, it doth testify what was his intention, and by the Book he is to be judged. If it had been found in the street, and of Mr. Prynn's compiling, and brought to this court, and consideration taken of it, the court would proceed without a party against Mr. Prynn. And here Mr. Attorney recited a precedent of one that wrote a book, and it was brought to the council. It was demanded, who was the accuser? answer was made, the Book was the accuser: shall the heretic go unpunished? This Book it is Mr. Prynn's doing, he doth put his name to it, he swears that he did write it all.

Then for the time of compiling it; seven or eight years ago it was compiled, and it is grown seven times bigger than at the first. Mr. Prynn about eight years since, shewed it to Dr. Goade, who told him so good causes of dislike, that might make any reasonable man give it over. About seven years ago he came to Dr. Harris, to desire his opinion of the Book; and he told him it was unfit and unworthy to come to the press. In the Parliament time, before the year 1630, he gave some part of it to be printed; but it came not to Mr. Buckner till long after. Sparkes said, he would print any thing in Parliament time.

Now we are to consider two things, from the first compiling and printing of this Book, to the last: First, how it grew in volume; for after it was delivered to the press, it hath grown up with divers things, which then were impossible to be known at that time, when it was delivered to the press; which appeareth by this. In 1628 was the parliament, and in 1631 St. George began to look abroad into the world. This man bestows eight whole pages upon St. George, for being so bold to look out. He saith, that St. George the Arian was a Cappadocian, though born in Cilicia, a part or province of Cappadocia, &c. and that St. George's advocate was an Englishman, born in Gloucester; and that St. Basil the Great was bishop of Cæsarea in Cappadocia, the native country of St. George the Arian. Certainly he could not tell that St. George would then remove himself abroad, or in the country of Gloucester, &c. at that time: but this man did go on according to the occasion in 1628. A woman, in 1628, acted a part of a Stage Play at Black Fryers; he spends many pages about this.

We all know what time the dearth was, three years ago: he taketh occasion not to pass it over. He maketh a long discourse of Plays, Masques, &c. in the late penurious times, how they were as expenceful as the wars were. This is to shew how by pieces it did grow bigger from time to time.

All Stage Players he terms them Rogues: In this he doth falsify the very act of parliament, for unless they go abroad, they are not rogues. The same term he giveth unto Scholars acting. Mr. Prynn had a purpose, not only in this to fall upon Stage Plays, but upon the body of the Commonwealth; and to infuse it into men's minds, that we are now running into Paganism and Gentilism. He falleth upon those things that have not relation to Stage Plays, Music, Music in the Church, Dancing, New-year's Gifts, whether Witchery, or not. Witchery, Church Ceremonies, &c. indistinctly he falleth upon them; then upon Altars, Images, Hair of Men and Women, Bishops and Bonfires, Cards and Tables do offend him, and Perukes do fall within the compass of his theme. St. George never offended him; but all this is to the end to bring a belief among the people, that we are returning back again to Paganism. His end is therefore to persuade men to go and serve God in another country, as many are gone already, and set up new laws and fancies among themselves. Consider what may come of it.

It may be fit enough and lawful to write against Plays, by men that have a mission; and they must do their errand in mannerly terms, and in the same terms as other men expect to bear with them. Mr. Prynn had no mission to meddle with these things, to see whether men should not return to Gentilism; the terms which he useth are such as he finds among the oyster women at Billingsgate, or at the common conduit. He hath raked up all the vile terms that could be found.

Now to prove that this is Mr. Prynn's Book, read Mr. Prynn's Examination, Inter. 5th, (which being read, was to this effect,) That Mr. Prynn, without the help of any other, did write, pen and compile the whole book, called *Histrio-mastix*, and the Epistle before the Book, and the Index and Table following.

Now for the publishing of this Book, it doth appear by the Deposition of Dr. Goade, that about 8 years since, Mr. Prynn did bring a Book to him in writing, of about a quire of paper, concerning Stage-Plays, to have the same licensed, but he held it unfit to be allowed; and doth well remember, that as to his argument of the unlawfulness for a man to put on woman's apparel, he put Mr. Prynn this question; Suppose, Mr. Prynn, yourself, as a Christian, were persecuted by Pagans, think you not, if you did disguise yourself in your maid's apparel, you did well? who answered, That he thought himself rather bound to yield to death than to do so.

Dr. *Harris* also deposed, That about 7 years ago, Mr. Prynn came to him to license a Treatise concerning Stage-Plays, but he would not allow of the same. So this man did deliver this Book when it was young and tender, and would have had it then printed; but it is since grown seven times bigger, and seven times worse.

Noy. We shall now prove when it went to the press. Read Austin the Stationer to Interrogatory the 28th, which being read, was to this effect; That the said book called *Histriomastix*, was given to this deponent, in or about the last parliament, at which time seven sheets thereof were printed at this deponent's house;

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which this deponent so printed, at the request of Mr. Prynn and Mr. Sparkes, upon Mr. Prynn's information, that it was licensed, and that he would bring the hand of the licenser unto it. But this deponent did refuse to print any more of the same.

Read Joseph H. to prove, that Sparkes would set upon it unlicensed in parliament-time, to Inter. 26, who saith, That the Defendant Sparkes did, in the time of the last parliament, print, or cause to be printed, divers books without licence; whereof some were Mr. Prynn's, some were Mr. Burton's works; and this deponent hath heard Sparkes say, he durst print any thing in parliament-time.

Another part of the Charge was managed by Mr. Mason of Lincoln's-Inn, reckoning up the number of Epithets wherewith Mr. Prynn had aspersed all sorts of people: and he said, that it was a Libel, not only against the state, but against every particular person; and proved the Charge by divers passages contained in the Book, fol. 201, &c.

Afterward Mr. Noy proceeded in the farther making good of his Charge against Mr. Prynn.

May it please your lordships; As he hath fallen foul upon all things, all persons, all sexes; upon the magistrates, upon the houshold of the king; so he hath not spared the king himself. I am sorry I shall have occasion to speak any thing of it; but there is a great deal too much in his Book. My lords, after he hath made all these complaints as intolerable, he falleth upon all indistinctly, and never taketh upon him to discern, to make a distinction, that there may be a toleration; but falleth foul upon every thing, that we are falling into Paganism; men and women are naught: he spareth not the king himself, but takes upon him to teach a remedy; the remedy is worse than the disease. What hateful comparisons he bringeth with other princes? as Nero: and speaketh of the consuming of the treasure of the realm with Masques, and of the late penurious times: a base word! A declaration of infamy upon princes, with such-like conclusions as these are. When all this is done, he teacheth the remedy not by way of precept, but by way of example; invites men to read John Mariana, and two grave authors more, he saith men not censured. I am very sorry I am to speak any thing wherein the king should be named, but he would not forbear it when the pen was in his hand; some of the words are so nasty that I will not speak them.

After Mr. Attorney General had spoken, he called for these Passages, amongst others, in *Histrio-mastix*, to be read, viz.

To his much-honoured Friends, the right worshipful Masters of the Bench of the honourable flourishing Law-Society of Lincoln's-Inn.

'Having, upon my first arrival here in London, heard and seen in four several Plays (to 'which the pressing importunity of some ill acquaintance drew me, while I was yet a novice) 'such wickedness, such lewdness as then made 'my penitent heart to loath, my conscience to 'abhor all Stage-Players ever since; and having then likewise observed some woful experiments of the lewd, mischievous fruits of Plays, 'of Play-houses, in some young gentlemen of my 'acquaintance, who though civil and chaste at 'first, became so vicious, prodigal, incontinent, 'debauched, yea so far past all hopes of amendment, in half a year's space or less, by their 'resort to Plays, where whores and lewd companions had inveigled them; that after many 'essays of their much desired reformation, two 'of them were cast off and utterly disinherited 'by their loving parents; whom I heard oft complaining, even with tears, that Plays and Play-houses had undone their children to their no 'small vexation, (a good Caveat for all young 'students to keep themselves from Play-houses, 'by these two youngsters harms:) Hereupon I 'resolved, out of a desire of the public good, to 'oppugn these common vice-fomenting evils: 'for which purpose about 7 years since, recollecting those play-condemning passages, which 'I had met with in the Fathers and other authors, I digested them into one entire written 'Discourse: which having since that time inlarged beyond its intended bulk, because I 'saw the number of players, play-books, play-haunters, and play-houses still increasing; 'there being above 40,000 Play-Books printed 'within these 2 years (as Stationers inform me) 'they being now more vendible than the 'choicest Sermons; two old Play-houses being 'also lately re-edified, enlarged, and one new 'theatre erected: the multitude of our London play-haunters being so augmented now, 'that all the ancient Devil's Chapels (for so the 'Fathers style all Play-houses) being five in 'number, are not sufficient to contain their 'troops; whence we see a sixth now added to 'them: whereas even in vicious Nero's reign, 'there were but three standing theatres in 'Pagan Rome, though far more spacious than 'our Christian London, and those three too 'many. Hereupon I first commended it, being 'thus augmented, to the Licenser, and from 'him unto the press, where it hath lingered 'longer than I did expect; which being now 'at last brought forth into the world, in such a 'play-adoring age, that is like to bid defiance 'to it; I here bequeath it to your worthy 'patronage, to whom it was first devoted, not 'caring how it fares abroad, so it may do good 'and please at home.'

In the next place, Mr. Attorney Noy caused to be read out of the book of *Histrio-mastix*, such passages, as were scandalous to the king and government, as fol. 312, &c.

Mr. *Atkins*, in defence of Mr. Prynn, said, That the eloquence of those gentlemen who argued against Mr. Prynn, made an exposition which was no part of his intention, in which point he would endeavour to clear him; and the way was by letting their lordships know, that many Passages in that Book are only re-

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(latively spoken, and not positive, and most of them are but the affirmations of other authors of several kinds and professions: as where it is said, that 'such incarnate devils as frequent 'plays,' &c. he speaketh by the way of common frequenting of Plays, lest they prove incarnate devils; and so of ladies that cast off their nature and modesty, that is relatively spoken by frequenting plays, lascivious dancing, &c. and when he speaketh of those in a continual proposition, his argument is thus:

'That which doth ordinarily (if not always) 'defile the eyes, the ears, and souls both of the 'actors and spectators, by ingendring, by exci-'ting meretricious, lustful, lewd, adulterous de-'sires and affections in their hearts, or by in-'stigating, by preparing, by inducting them to 'actual uncleanness, must needs be abominable 'and unlawful unto Christians; but these Stage-'Plays, &c. therefore they must needs be abo-'minable.' And there is none but Whores, Panders, or foul incarnate Devils, who dare controul that minor truth.

My lords; He doth not condemn New-year's Gifts, but acknowledges them to be as tokens and testimonies of favour and respect from superiors to their inferiors; and for Dancing (under favour) he doth not condemn it at all; he hath commended the same as single, and dancing the measures. And for dancing in great men and princes, he doth protest it was far from his thought to compare these times to Nero's, under so pious and religious a prince as we have, and by whom we receive so much happiness. That had been so impious and unworthy, that he could by no means make any apology; but as well his person as his pen should have been detestable, if he had made any such comparison.

And where he doth speak, that Dancing and Masquing have been near as expenceful as the wars, in that he means in Henry the 8th's time, and not in these days; as I take it, he speaks there of a History that doth express the great charge in that time.

I shall desire, as I did begin in the opening of his Answer, that he may lay fast hold upon the rock of the king's favour and mercy, and compassion of this court; and what his intentions are, they are best known to his own heart, his expressions known to your lordships. I cannot condemn his heart, I will not excuse his pen.

This if your lordships will give me leave, I shall say; I have long known him in a Society of Inns of Court, where he has lived: and for his ordinary discourses (except the matters in this Book) they have not been factious or seditious. But now he is before your lordships, truly for my part, I compare him to the condition of an Astronomer, who fixed his eyes so much upon the stars, that he did not look to his feet, and so fell into a ditch: for his eyes were so fixed upon this subject, upon the common resort to Stage-Plays, and the great abuse that comes by them, that he forgot to look down to his hand that guided his pen, which now bringeth him under your lordships censure. That I may not offend the patience of this court, (the court is full, and the expectation is great,) I will conclude with all humility, and wish and crave, that he who is the Supreme Judge, may be with your lordships in this matter, and may be over all your good thoughts, judgments and sentences this day, in this cause of this poor gentleman. And this is all I humbly offer in Defence.

The next day of hearing,

Mr. *Holbourn*, of counsel with Mr. Prynn, spake thus:

My lords; I am assigned counsellor with Mr. Prynn. The Information is for publishing in print a Libel or Volume of Libels against king, queen, state, &c. My lords, for Mr. Prynn, he doth humbly cast himself at your lordships feet. For the Book, I must say, he doth humbly submit himself to your lordships; yet, my lords, his heart will not give him leave to say, that he is guilty of those gross offences that are laid to his charge. He confesseth himself to be justly brought before your lordships for his ill expressions, which may prove an occasion of scandal by misconstruction, and so some dangerous principle may be infused into the subjects: And he beggeth your lordships to consider of them, according to the intentions of his heart, which were fair and honest, though harsh in expression, that he may receive a favourable construction, for that he citeth his Authors, and their words, and not his own. And for that he meddleth with matters not proper to Stage-Plays, as in mentioning the Sabbath, his meaning was, Stage-Plays upon the Sabbath-day: his mentioning Habits and Recreations, was in relation to men putting on womens habits, and unlawful recreation at plays, and so he conceives them not altogether impertinent.

For the Manner of his writing he is heartily sorry, that his style is so bitter, and his imputations so unlimited and general; yet in this he was led thereunto by Authors in the like case, which he offers for his excuse: he hopes his passion against these abuses by Plays may a little plead his excuse.

Now for the Manner and Matter alledged against him out of his own Book, in that he hopes your lordships favour: He saith, that those that are judges of the Books for licensing, they are guilty of the matter, and he hopeth that this Book doth differ from all the books brought into this court; for here are none brought but such as are unlicensed, and this is licensed: and he submitteth thus to that point.

My lords, as to the general end and intention of his Book, he sweareth, that the general resort unto plays was the first occasion; and his end was for the Reformation of the abuse of it, and no otherwise: and then, my lords, he hopeth he shall not incur your lordships severe censure. He did not send the Book beyond the seas to be printed, but printed it here;

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and it was three years in the press, and licensed and published.

And, my lords, the Declaration, to the Information of this court, speaketh something to his intentions, viz. to whom he dedicated this Book, and he dispersed it himself to men of known integrity; and certainly if his heart had been guilty of those foul crimes, he would not have presented one of these Books to Mr. Attorney Noy, himself. He did not absent himself, as one guilty of such offences would have done; he was so far from having disloyalty, that he doth commend the king and state, and that could not be with an intention against king and state. And all the Charges that lie upon him for his foul intentions are but inferences upon his Book, and consequences, and such of them only that be strained, and not of necessity.

The next thing charged upon him is Perjury, for that he said, he shewed no part of this Book to any before it was shewn to Sparkes; yet it was proved by Dr. Harris and Dr. Goade, that they saw it many years ago. As to this he saith, they speak only of his Book, concerning Plays, containing a quire of paper: and that it is true, he did shew them such a book: but that book was not this book; though they be of one subject and matter, yet they differ much in form and frame.

Then Mr. *Hern* spake on his behalf as follows:

My lords; We that are assigned counsel for Mr. Prynn, do come with great disadvantage, both in number and judgments, considering the great ability of the king's counsel, who have spoken against us. If the construction they have made be theirs, then clearly we are (as they would have us) to fall deep by your lordships Sentence.

The weight of this Cause, and the aggravations upon it by the king's Counsel, made me the last day (without desire of my client) to crave farther time, for we durst not then give any Answer. All that I can now say, is, That your lordships would look upon the intentions of his heart, in that he hath explained himself as fair as any man can do by his oath: how is it possible to make other proof of the clear intentions of his heart, than by his oath? His oath is admitted as proof against him, in the acknowledgment of his Book; and shall it not be admitted to him, to clear the integrity of his heart? We beseech your lordships to look upon him, as not writing these things out of perverseness of spirit, but out of the abundance of his heart transported with zeal against the growing evils, which have befallen many of this nation, and some of his own acquaintance, by their frequenting of Stage-Plays. We that know him must say, as far as our knowledge will give us leave, that in all passages that have fallen from him to us, he hath expressed himself full of devotion and duty to his majesty and the queen; and shall humbly take leave to offer some passages out of his Book, which do bear evidence, that he doth speak well of both their majesties, and of the state; and that by inferences and distinctions there made: and what is it but inferences made out of other passages of his Book, which doth reflect upon him?—Which Passages were opened by the Counsel, but not read.

The Sentence.

Three Star-Chamber days having been spent in the hearing of this Cause, the lords sat the fourth day to proceed to Sentence, which held till four of the clock in the afternoon; and they passed such Sentence, on Mr. Prynn, as is expressed in the ensuing speeches, which in effect comprehend all that was said by others.

The first was of *Francis* Lord *Cottington*, Chancellor of the Exchequer, whose turn was to begin first to speak, as being in the lowest degree of quality by his place. And commonly he that beginneth, as he openeth the matter at large, so he inclineth thereby many lords to forbear making of speeches, and only to declare themselves to concur in Sentence with him that began first, or with some other lord that spake before, as their judgments lead them.

My lords (said my lord *Cottington*), his majesty's Attorney-General hath brought Mr. Prynn before your lordships, with other Defendants, Thomas Buckner, Michael Sparkes, &c. It is for publishing a libellous Book, or Volume of Libels, to the scandal of his majesty and the state. To my understanding it may be more properly said, the great and high malice of Mr. Prynn, published and declared in that Libellous Book; a malice expressed in a manner against all mankind, and the best sort of mankind, against king, prince, peers, prelates, magistrates and governors, and truly in a manner against all things. But that which hath been more remarkable, is, his spleen against the Church and Government of it: therefore for that I will not sentence him, (because Mr. Attorney doth forbear to prosecute against him, for that which belongeth to the Church) yet it is an argument of his great and high malice: and when I consider of that, which hath been so often repeated, that he writ this Book alone, surely he was assisted immediately by the Devil himself, or rather he hath assisted the Devil. He hath written a book against the due reverence and honour, which all Christians owe to our Saviour Jesus, this doth convince my judgment against him; but the Book (as Mr. Attorney saith) declares the man, it is the witness: and if your lordships observe the particulars and style of it, you will say it is a strange thing; the very style doth declare the intent of the man, and that is (as Mr. Attorney said) to work a discontent and dislike in the king's people against the Church and Government and disobedience to our gracious sovereign the king. If Mr. Prynn should be demanded what he would have, he liketh nothing, no state or sex; music, dancing, &c. unlawful even in kings; no kind of recreation, no kind

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of entertainment, no, not so much as hawking, all are damned. The very truth, Mr. Prynn would have a new government, he would have a new church, he would have new laws, new entertainment, God knows what he would have; a new king he would have, and have all the people of his mind, to be discontented with their king and government.

Mr. Prynn confesseth he did write the Book, and it is true he did endeavour the printing of it, and the publishing of it, this is proved very well; yea, but Mr. Prynn had no other intention but a tenderness of conscience, he meant no hurt to the king or state (as his Counsel said): but Mr. Attorney answered them, that he is not the declarer of his intentions, he must be judged by the Book, by his words, more certainly by the effect; for all good men do receive scandal by this Book, and all of Mr. Prynn's humour were glad of this Book. When I consider what kind of Libel it is, it is not like other libels: other libels have been by persons discontented, some poor rogues scattered up and down; but here is a libel in folio, and in print, and justifieth itself by authors with an high hand, 'That is there,' and 'that is there.' And (my lord) when I consider those high Passages in his Book, I protest unto you, they are things to be abhorred; they are not spoken relatively (as his counsel would have it) but positively, 'That our English ladies, shorn and 'frizzled madams, have lost their modesty; 'that the Devil is only honoured in dancing; 'that Plays are the chief delight of the Devil; 'that they that frequent plays are damned, and 'so are all that do not concur with him in his 'opinion, Whores, Panders, foul incarnate 'Devils, Judas's to their Lord and Master, &c. 'princes dancing in their own persons,' his censure of them is infamous, &c. But the foulest of all is, 'That this was the cause of un-'timely ends in princes.'

My lords, shall not all that hear these things think, that it is the mercy of the king that Mr. Prynn is not destroyed? Have we not seen men lately condemned to be hanged and quartered for far less matters? One Peachum, I was myself employed with others in the examining of him; he confessed, that the Writing for which he was questioned, was a Sermon that he did intend to preach: the Words were against the person of the king, yet he never preached it; yet because he had written it with an intention to preach it, he was brought up on this point and condemned to die. But this Book is in print; it is against all magistrates, and particularly against the king our sovereign, and his blessed consort. And yet, my lords, it pleaseth his majesty to let Mr. Prynn have his trial here. I will not trouble your lordships with any more parts of the Book: Mr. Attorney noted unto your lordships, that you should see how necessary it was, that Mr. Prynn should be clean cut off, as one that hath a long time endeavoured to move the people to disobedience against the king, &c. So I say with Mr. Attorney, it is high time that Mr. Prynn may be cut off, so far as may go with the Censure of this Court. My lords, Mr. Prynn is better dealt withal, than he would have princes dealt with; he hath had very fair trials.

For his Defence, I took notice of it likewise: I do remember that all those gentlemen, that were employed and assigned as counsel for his Defence, every one of them began to crave mercy of the Court; yet they came with a Defence and Justification, so far as their cause would bear. Mr. Holbourn said, That for 'Players, they were rogues by the statute:' Yet Mr. Attorney said, 'They are not rogues 'by the statute, unless they wander, &c.' My lords, he said, his intention was against public and common Plays; yet seek all his book thorow, and you shall find it is against plays in princes palaces. His intention now must be understood by his Book, and by his words; and that which he doth apply of any author is his own. And I think his Defence did aggravate his offence. As to his Defence against the ladies, he saith, he speaketh it relatively and not positively; yet he saith, 'Our English 'ladies are so and so whorish, &c.' And for that part of his Book, wherein he condemns Murder, Mr. Prynn will have murder unlawful; but execution of princes is not murder, and therefore that is a lawful act. Mr. Attorney said well, the end of this man and John Mariana, (a Jesuit) &c. they are all one, they all cry malice against princes.

I shall humbly crave pardon, and discharge my conscience, and shall let your lordships see, how I understand the sense, and that so I am to judge; and I conceive it to be as your lordships see, that the malice of this Book is against king and state: and, my lords, with this I sentence Mr. Prynn.

I do in the first place begin Censure with his Book; I condemn it to be burnt, in the most public manner that can be. The manner in other countries is, (where such Books are) to be burnt by the hangman, though not used in England (yet I wish it may, in respect of the strangeness and heinousness of the matter contained in it) to have a strange manner of burning; therefore I shall desire it may be so burnt by the hand of the hangman. If it may agree with the court, I do adjudge Mr. Prynn to be put from the bar, and to be for ever uncapable of his profession. I do adjudge him, my lords, That the Society of Lincoln's-Inn do put him out of the society; and because he had his offspring from Oxford (now, with a low voice, said the bishop of Canterbury, 'I 'am sorry that ever Oxford bred such an evil 'member') there to be degraded. And I do condemn Mr. Prynn to stand in the pillory in two places, in Westminster and Cheapside; and that he shall lose both his ears, one in each place; and with a Paper on his head, declaring how foul an offence it is, viz. 'That it is for 'an infamous Libel against both their majesties, 'state and government.' And lastly, (nay not lastly) I do condemn him in 5,000*l.* Fine to the king. And lastly, perpetual Imprisonment.

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There are other Defendants, Thomas Buckner, whom I conceive to be the chaplain charged with the licensing of the Book. I observe, that Mr. Attorney hath little or nothing prosecuted against him. It is said, he did combine with the Writer and Stationer for this infamous Libel. It doth appear that he did license it, or at least 64 pages thereof; I think it be also true, that Mr. Buckner did see the Book after it was printed. It is said, for his excuse, That Mr. Buckner was cozened and surprized by Mr. Prynn and Sparkes; but it is plain he licensed it, or at least 64 pages; therefore I shall judge according to the proof, as it is the usual custom of this Court. I must judge Mr. Buckner to be worthy of a very sharp Sentence, for certainly there is a very great inconvenience fallen upon the state, for want of due examination: to what purpose is there an examination of Books, if there shall be a connivance and winking at the party that doth it? I shall think Mr. Buckner not only worthy of a severe reprehension, but I shall censure him first to have Imprisonment according to the course of the court, and 50*l.* Fine to the king.

Now, my lords, the next is Michael Sparkes, and he is the third; and he is the Printer of the Book; and binder, and publisher thereof. In his Defence he hath shewed your lordships a piece of the Book licensed by Mr. Buckner, and saith, it was all licensed, but that he proves not; but that it was entered in the Stationers-Hall, that he proves. But I do find, that he persuaded men to buy this Book after it was prohibited; and before it was prohibited he persuaded men to buy it, saying, 'It was an 'excellent Book, and it would be called in,' and then sell well. I do fine Sparkes 500*l.* to the king, and to stand in the pillory, without touching of his ears, with a Paper on his head to declare his offence, and it is most necessary in these times; and for the pillory to be in Paul's Church-yard. ('It is a consecrated place,' saith the Archbishop of Canterbury). I cry your grace's mercy (said my lord Cottington) then let it be in Cheapside. For the other three, I find that Mr. Attorney doth not prosecute them; therefore, my lords, I do not censure them.

The next in course that spoke after the lord Cottington, was the L. C. J. *Richardson*.—My Lords; Since I have had the honour to attend this Court, writing and printing of Books have been exceedingly found fault withal, and have received a sharp censure, and it doth grow every day worse and worse; every man taketh upon him to understand what he conceiveth, and thinks he is nobody except he be in print. We are troubled here with a Book, a monster, 'Monstrum horrendum, informe, ingens!' It hath been a question who is the Author of this Book? Surely I am satisfied in my conscience he is the author of it: but truly give me leave, I do not think Mr. Prynn is the only actor in this book, but that there were many heads and hands therein besides himself. I would to God in heaven, the devil and all else that had their heads and hands therein besides Mr. Prynn, were, &c. for I think they are all ill-willers to the state, and deserve severe punishment as well as Mr. Prynn doth. This Book is the subject of this day's work, and it is annexed, by Mr. Attorney, to the very information itself.

For the Book, I do hold it a most scandalous, infamous Libel to the king's majesty, a most pious and religious king; to the queen's majesty, a most excellent and gracious queen: such a one as this kingdom never enjoyed the like, and I think the earth never had a better. It is scandalous to all the honourable lords, and the kingdom itself, and to all sorts of people. I say, eye never saw, nor ear ever heard of such a scandalous and seditious thing as this mis-shapen monster is. How scandulous a thing it is, hath appeared already to your lordships, by the king and queen's counsel against Mr. Prynn; I will not for my part repeat.

Yet give me leave to read a word or two, where he cometh to tell your lordships of the Reasons why he writ this book: Because he saw the number of the plays, play-books, play-haunters, and play-houses so exceedingly increased, there being above 40,000 play-books, being now more vendible than the choicest Sermons. What saith he in the Epistle Dedicatory, speaking of play-books? 'They are so 'big a price, and are printed in far better pa-'per than most octavo and quarto bibles, which 'hardly find so good vent as they; and then 'come in such abundance, as they exceed all 'number, and it is a year's time to peruse 'them over, they are so multiplied:' and then he putteth in the margin, 'Ben Johnson, &c. 'printed in better paper than most bibles. 'Now if this be not a tax upon the kingdom, 'to print these books in better paper than the 'Bible itself, for my part I leave it to your 'lordships.' This monster, this huge, mis-shapen monster, I say, it is nothing but lies, and venom against all sorts of people. It is a strange thing what this man taketh upon him: He is not like those Powder-Traitors, they would have blown up all at once; this throweth all down at once to hell together, and delivereth them over to Satan. I beseech your lordships to give me leave: 'Stage-plays,' &c. saith he, 'none are gainers and honoured by 'them but the Devil and Hell; and when they 'have taken their wills in lust here, their souls 'go to eternal torment hereafter.' And this must be the end of this monster's horrible sentence. He saith, 'So many as are in play-'houses, are so many unclean spirits;' and that 'Play-haunters are little better than in-'carnate devils.' He doth not only condemn all Play-Writers, but all protectors of them, and all beholding of them; and dancing at plays, and singing at plays, they are all damned, and that no less than to hell. I beseech your lordships to give me leave but in a word to read unto you what he writes of dancing, &c. 'It is 'the Devil's profession; and he that entereth 'into a dance, entereth into a devilish profes-

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'sion; and so many paces in a dance, so many 'paces to hell:' This is that which he conceiveth of Dancing, 'The woman that singeth in 'the dance, is the prioress of the Devil, and 'those that answer are clerks, and the be-'holders are the parishioners, and the music 'are bells, and the fiddlers are the minstrels of 'the Devil.' I said it was a seditious Libel; this point of sedition is the only thing that troubles me, and it is that which I shall offer to your lordships: For I do know it, the good opinion, heart, will and affections of the king's people and subjects are the king's greatest treasure. Now if this be so, then for any man cunningly to undermine these things, to take away the hearts of the subjects from the king, and to bring the king into an ill opinion among his people, this is a most damned offence; and if I were in my proper place, and Mr. Prynn brought before me, I should go another way to work. I protest unto your lordships, it maketh my heart to swell, and my blood in my veins to boil, so cold as I am, to see this or any thing attempted which may endanger my gracious sovereign; it is to me the greatest comfort in this world to behold his prosperity.

Much hath been spoken concerning these things, and something by my lord Cottington before me; but good my lords, give me leave to remember you one or two Passages, not yet spoken of. He writeth thus: 'That Nero's 'acting and frequenting Plays was the chiefest 'cause that stirred up others to conspire his 'death.' Would any man think, that his acting and frequenting of plays was the chiefest occasion?

He writeth in another place worse than this, Fol. 464. 'Trebellius Pollio relates, That 'Martian, Heraclius, and Claudius, three wor-'thy Romans, conspired together to murder 'Gallienus the emperor (a man much besotted, 'and taken up with Plays, to which he likewise 'drew the magistrates and people by his lewd 'examples) as Flavius and others conspired 'Nero's murder for the self-same cause, &c.' Now, my lords, that they should be called three worthy persons that do conspire an emperor's death, (though a wicked emperor) it is no Christian expression.

If subjects have an ill prince, marry what is the remedy? They must pray to God to forgive him, and not say they are worthy subjects that do kill him: If they were worthy acts, Mr. Prynn, I can tell what you are (Mr. Prynn standing during the Censure behind the L. C. J. Richardson, and archbishop Neal). No man will conspire to murder a king that can be a worthy actor; for the very thought of it is high-treason, He speaketh of these three, that they were three worthy Romans that did conspire to murder Nero. This is most horrible, and here can be no manner of exposition, but in the worst sense: for his excuse, he hath made none at all, only it was not his intention.

Good Mr. Prynn, you are a lawyer. Intention! I know where the word standeth equal, as that you may take the intention this way, or that way, with the right-hand or left-hand, there in that case you may speak the intention; but where the words are plain and positive, as in your Books, here is no help of intention in the world: your Words are plain and clear, therefore you can never make any defence at all out of that. Not to hold your lordships any longer, my lords, it is a most wicked, infamous, scandalous, and seditious Libel. Mr. Prynn, I must now come to my Sentence, though I am very sorry, for I have known you long, yet now I must utterly forsake you; for I find that you have forsaken God, and his religion, and your allegiance, obedience, and honour, which you owe to both their excellent majesties, the rule of charity to all noble ladies, and persons in the kingdom, and forsaken all goodness. Therefore Mr. Prynn, I shall proceeed to my Censure, wherein I agree with my lord Cottington, as he began very well: First, for the burning of the Book in as disgraceful a manner as may be, whether in Cheapside or Paul's Church-yard; for though Paul's Church-yard be a consecrated place, yet Heretical Books have been burnt in that place. And because Mr. Prynn is of Lincoln's-Inn, and that his profession may not sustain disgrace by his punishment, I do think it fit, with my lord Cottington, that he be put from the bar, and degraded in the University; and I leave to my lords, the lord bishops, to see that done; and for the pillory, I hold it just and equal, though there were no statute for it. In the case of a high crime it may be done by the discretion of the court, so I do agree to that too. I fine him 5,000*l.* and I know he is as well able to pay 5,000*l.* as one half of 1,000*l.* and perpetual Imprisonment I do think fit for him, and to be restrained from writing, neither to have pen, ink, nor paper; yet let him have some pretty Prayer-Book, to pray to God to forgive him his sins; but to write, in good faith I would never have him: For, Mr. Prynn, I do judge you by your Book to be an insolent spirit, and one that did think by this Book to have got the name of a Reformer, to set up the Puritan or Separatist faction. I would not have Mr. Prynn go without a recognition of his offence to the king and queen's majesty. I agree to the Sentence on Buckner and Sparkes.

Secretary *Cook.* By this vast Book of Mr. Prynn's, it appeareth he hath read more than he hath studied, and studied more than he hath considered; whereas if he had read but one sentence of Solomon, it had saved him from the danger he is now like to fall into. The Preacher saith, 'Be not over-just, nor make 'thyself over-wise, for why wilt thou destroy 'thyself?' My lords, it is a Sentence requireth much study and consideration. It is most certain, that righteousness and wisdom are such virtues, as they help forward justice; but when wisdom is mixed with a man's own humours, as for the most part it is with flesh and blood, there is danger of straining it too far, and that will tend to the destruction of him and others.

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Examples are too pregnant of this, and he may take it from a good Author, even from Christ himself. When his Apostles, out of zeal to their master, would have called for fire from Heaven against the Samaritans that refused to entertain him, the answer was, 'You know not 'of what spirit you are.' I would Mr. Prynn would have considered this.

There is a good Spirit that is meek, tempered with modesty and humility, with mildness and with equity; and such a spirit is always tender, not to destroy, root up, overthrow, but to bind, repair and preserve. But there is another fiery spirit, which is always casting of fire, nothing but damnation and destruction; certainly such a spirit ever tends to his own confusion. And if this be well observed, every man shall find it true, that such a spirit ever cometh before destruction. I wish Mr. Prynn were not an ill example of this. Certainly, my lords, vice and corruption ought not only to be reprehended, but to be punished severely, and that sharply too where it is; but Mr. Prynn should have considered, every man is not a fit reprehender. He had no invitation, nor office, nor interest to employ a talent which doth not belong unto him. If magistrates and princes should inveigh against all things, and tolerate nothing, we must live no longer among men; and certainly, if we will be thought to live with them that are wholly virtuous, we must go out of the world; we have a good author for this. But, my lords, a toleration must be used, and that Mr. Prynn would have found, if he had considered his own body: shall a man upon every slight distemper and disorder in his body take physic? Or shall ill-humours be purged till he purge all out? Certainly he will purge spirit, life and all away with it. And as it is in the natural body, so it is in the politic, there must be a toleration and connivance; it cannot be governed without it, and we have a warrant for it. Did not Christ himself forbid the cutting out of the tares, lest they should pluck corn, and destroy that too? I think, if Mr. Prynn should have been asked the question that Naaman did to the prophet, he would not at all have bid 'go away in peace,' he would have threatened Hell and Destruction. There is a Christian wisdom, and there must be a toleration in all states. And certainly the faults that have been tolerated in all times were greater than modest Plays, or modest Dancing. It is not my intention, neither do I think it is the intention of any of your lordships, to apologize for Stage-Plays, much less for the abuse of them; I wish, and so I think doth every good man, that the abuse of them were restrained; but, my lords, not by railing, cursing, damning, inveighing, &c. not only against the faults and players themselves, but against all spectators, and those that come to them, and that of all degrees, and with such bitterness and acrimony, that in all the authors alleged, which are infinite, there is not to be found an example. My lords, I am very sorry he hath so carried himself, that a man may justly fear he is the Timon that hath a quarrel against mankind. But I love not much to aggravate offences, which of themselves are heavy enough.

He calleth his Book Histrio-mastix; but therein he sheweth himself like unto Ajax, 'Anthropomastix,' as the Grecians called him, the Scourge of all mankind, that is, the whipper and the whip. I cannot but concur with the Censure already begun by my lord Cottington, given against Mr. Prynn, Buckner and Sparkes.

Afterwards the Earl of *Dorset* spake to this effect:

Such swarms of murmurers as this day disclose themselves, are they not fearful symptoms of this sick and diseased time? Ought we not rather with more justice and fear apprehend those heavy judgments which this minor Prophet, prophet Prynn, hath denounced against this land, for tolerating indifferent things, to fall upon us for suffering them, like those Mutineers against Moses and Aaron, as not fit to breathe? My lords, it is high time to make a lustration to purge the air. And when will Justice ever bring a more fit oblation than this Achan? Adam, in the beginning, put names on creatures correspondent to their natures: the Title he hath given this Book is *Histrio-mastix*, or rather, as Mr. secretary Cook observed, *Anthropomastix*; but that comes not home, it deserves a far higher title; *Damnation*, in plain English, of prince, prelacy, peers and people. Never did Pope *in Cathedra*, assisted with the spirit of infallibility, more positively and more peremptorily condemn Hereticks and Heresy, than this doth mankind. Lest any partial Auditor may think me transported with passion, to judge of the base liveries he bestoweth upon court and courtiers, I shall do that which a Judge ought to do, viz. assist the Prisoner at the bar. Give me leave to remember what Mr. Attorney let fall the other day. I will take hold of it for the gentleman's advantage. That this gentleman had no mission; if he had had a mission, it would have qualified the offence. Our blessed Saviour, when he conversed in this world, chose Apostles, whom he sent after into the world, 'Ite, 'prædicate,' &c. to shew the way of Salvation to mankind. Faith, hope, and charity, were the steps of this Jacob's ladder to ascend Heaven by. The devil, who hates every man upon earth, played the divine, cited books, wrought miracles; and he will have his disciples too, as he had his confessors and martyrs. My lords, this contempt, disloyalty, and despair, are the ropes which this emissary lets down to his great master's kingdom for a general service. My lords, as the tenor of their commission was different, so are the ways: these holy men advanced their cause in former times by meekness, humility, patience to bear with the weakness and infirmities of their brethren; they taught obedience to magistracy, even for conscience-sake; they divided not their estates into factions; they detracted from none, they sought the salvation of men's souls, and guided their bodies and affections answerably; they

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gave to Cæsar the things that were Cæsar's; if princes were bad, they prayed for them, if good, they praised God for them; however, they bore with them: this was the doctrine of the Primitive Church, and this they did. I appeal to my lords that have read this Book, if Mr. Prynn has not with breach of faith, discharged his great Master's end. My lords, when God had made all his Works, he looked upon them and saw that they were good. This gentleman, the Devil having put spectacles on his nose, says, that all is bad: no recreation, vocation, no condition good; neither sex, magistrate, ordinance, custom, divine and human, things animate, inanimate, all, my lords, wrapt up *in massa damnata*, all in the Ditch of Destruction. Here, my lords, we may observe the great prudence of this Prince of Darkness, a soul so fraught of malice, so void of humanity, that it gorgeth out all the filth, impiety and iniquity that the discontent of this age doth contract against the church and state. But it may be some follower of his will say, It was the pride and wickedness of the times that prompted him to this work, and set his zeal, through tenderness of conscience, to write this Book. My lords, you may know an unclean bird by his feathers; let him be unplumed, unmasked, pull off the deceitful vizard, and see how he appeareth: this brittle Conscience Brother, that perhaps starts at the sight of the Corner-Cap, sweats at the Surplice, swoons at the sign of the Cross, and will rather die than put on Woman's apparel to save his life; yet he is so zealous for the advancement of his Babel, that he invents legions, coins new statutes, corrupts, misapplies texts with false interpretations, dishonours all men, defames all women, equivocates, lyes; and yet this man is a holy man, a pillar of the church. Do you, Mr. Prynn, find fault with the 'court 'and courtiers habit,' 'silk and sattin divines? I may say of you, you are all purple within, all pride, malice, and all disloyalty? you are like a tumbler, who is commonly squint-eyed, you look one way, and run another way: though you seemed by the title of your Book to scourge Stage-Plays, yet it was to make people believe, that there was an apostacy in the Magistrates. But, my lords, admit all this to be venial and pardonable, this pigmy groweth a giant, and invades the Gods themselves; where we enjoy this felicity under a gracious prince with so much advantage, as to have the light of the Gospel, whilst others are kept in darkness, the happiness of the recreations to the health of the body, the blessed government we now have: When did ever Church so flourish, and State better prosper? And since the Plagues happened, none have been sent among us such as this caterpillar is: What vein hath opened his anger? Or who hath let out his fury? When did ever man see such a *quietus est* as in these days? Yet in this golden age is there not a Shimei amongst us, that curseth the Anointed of the Lord? so puffed with pride, nor can the beams of the sun thaw his frozen heart, and this man appeareth yet. And now, my lords, pardon me, as he hath wounded his majesty in his head, power and government, and her majesty, his majesty's dear consort, our royal queen, and my gracious mistress; I can spare him no longer, I am at his heart. *Oh! quantum!* &c. If any cast infamous aspersions and censures on our queen and her innocency, silence would prove impiety rather than ingratitude in me, that do daily contemplate her virtues; I will praise her for that which is her own, she drinks at the spring-head, whilst others take up at the stream. I shall not alter the great truth that hath been said, with a heart as full of devotion, as a tongue of eloquence, the other day, as it came to his part, (meaning sir John Finch.) My lords, her own example to all virtues, the candor of her life, is a more powerful motive than all precepts, than the severest of laws: no hand of fortune nor of power can hurt her; her heart is full of honour, her soul of chastity; majesty, mildness and meekness are so married together, and so impaled in her, that where the one begetteth admiration, the other love; her soul of that excellent temper, so harmoniously composed, her zeal in the ways of God unparalleled; her affections to her lord so great, if she offend him, it is no sunset in her anger; in all her actions and affections so elective and judicious, and a woman so constant for the redemption of all her sex from all imputation, which men (I know not how justly) sometimes lay on them; a princess, for the sweetness of her disposition, and for compassion, always relieving some oppressed soul, or rewarding some deserving subject: were all such Saints as she, I think the Roman church were not to be condemned: on my conscience she troubleth the ghostly father with nothing, but that she hath nothing to trouble him withal. And so when I have said all in her praise, I can never say enough of her excellency; in the relation whereof an orator cannot flatter, nor poet lye: yet is there not Doeg among us, notwithstanding all the tergiversations his counsel hath used at the bar? I can better prove, that he meant the king and queen by that infamous Nero, &c. than he proves Players go to Hell: but Mr. Prynn, your iniquity is full, it runs over, and Judgment is come; it is not Mr. Attorney that calls for judgment against you, but it is all mankind, they are the parties grieved, and they call for judgment.

1. Mr. Pryan, I do declare you to be a Schism-Maker in the Church, a Sedition-Sower in the Common-wealth, a wolf in sheep's cloathing; in a word, 'omnium malorum no-'quissimus.' I shall fine him 10,000*l.* which is more than he is worth, yet less than he deserveth; I will not set him at liberty no more than a plagued man or a mad dog, who though he cannot bite, he will foam; he is so far from being a sociable soul, that he is not a rational soul; he is fit to live in dens with such beasts of prey, as wolves and tygers, like himself: Therefore I do condemn him to perpetual Im-

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prisonment, as those monsters, that are no longer fit to live among men, nor to see light. Now for Corporal Punishment, my lords, whether I should burn him in the forehead, or slit him in the nose; for I find that it is confessed of all, that Dr. Leighton's offence was less than Mr. Prynn's, then why should Mr. Prynn have a less punishment? He that was guilty of murder was marked in a place where he might be seen, as Cain was. I should be loth he should escape with his ears, for he may get a perriwig, which he now so much inveighs against, and so hide them, or force his conscience to make use of his unlovely love-locks on both sides: Therefore I would have him branded in the forehead, slit in the nose, and his ears cropt too. My lords, I now come to this Ordure, I can give no better term to it, to burn it, as it is common in other countries, or otherwise we shall bury Mr. Prynn, and suffer his ghost to walk: I shall therefore concur to the burning of the Book; but let there be a Proclamation made, That whosoever shall keep any of the Books in his hands, and not bring them to some public magistrate to be burnt in the fire, let them fall under the sentence of this Court: for if they fell into wise men's hands, or good men's hands, that were no fear; but if among the common sort, and into weak men's hands, then tenderness of conscience will work something. Let this Sentence be recorded, and let it be sent to the library of Sion, (meaning a college in London) whither a woman, by her will, will allow Mr. Prynn's Work to be sent.

2. For Mr. Buckner, I believe that he had no intention at all this Work should come abroad; he is said to be a conformable man to the church of England: I shall hardly censure him, he deserveth admonition.

3. For Sparkes, I concur in all things: The feodary had his office taken away from him by this Court; I see therefore no reason but that he may be barred from printing and selling of Books and kept wholly to binding of books.

The Sentence * against Mr. Prynn was executed the seventh and tenth days of May following.†

* 2 Rushw. Coll. p. 248.

† "It was a softer answer" says Kennett, "to Mr. Prynn's Book against Plays and Actings, that about the beginning of November, [1633] to congratulate the king's return, and divert his royal consort, the four Inns of Court, by some of their principal members, offered a splendid Masque to be performed by their Societies jointly, as an expression of their love and duty to their majesties. The offer was very graciously accepted; and upon consult and order of the Benchers, was very nobly performed at Whitehall on Shrove-Tuesday Feb. 18th, and again at Merchant-Tayler's-Hall, where the king, queen, and court, were magnificently entertained by the city."

143. Proceedings in the Star-Chamber against Sir DAVID FOWLIS, Sir THOMAS LAYTON, and HENRY FOWLIS, esq. on a Charge of opposing the King's Service, and traducing his Officers of State; Hilary: 9 CHARLES I. A. D. 1633. [2 Rushw. Coll. p. 215.]

["The prosecution was apparently promoted by lord Wentworth, afterwards the famous earl of Strafford. It produced disagreeable consequences to the earl; for on the Trial of his Impeachment for Treason, sir David Fowlis, and sir Thomas Layton, two of the Defendants in this case, were material witnesses against his lordship on the second Article of the Impeachment; both swearing to having heard him use those emphatically threatening words to some justices of the peace, 'that the king's little finger should 'be heavier than the loins of the law.' See 8 Rushworth, 149, 154." Hargrave.]

IN the month of February in Hilary Term, 1633, upon an Information in the Star Chamber against sir David Fowlis, sir Thomas Layton, and Henry Fowlis, esq. defendants, the cause came to a hearing.

The Information being opened to the court was to this effect:

That whereas several Commissions had issued lately out of his majesty's court of Exchequer in the 6th, 7th, and 8th years of his majesty's reign, directed to the lord viscount Wentworth, and to divers other lords, knights, and gentlemen of the best and principal rank and quality in those northern parts, who were thereby authorized for the more ease of the country, to treat, commune, and compound with all and singular his highness's subjects of the city and county of York, and other northern counties therein particularly expressed, as would make fine with his majesty for their contempts in not attending his majesty's coronation, to have taken the order of knighthood, as they ought to have done; and the said lord viscount Wentworth was by express letters from his majesty in that behalf specially appointed to be collector: and albeit the said sir David Fowlis had received many gracious favours both in honour and profit, as well from king James, as his now majesty, which might justly have incited and stirred him up to all dutiful and grateful thankfulness for the same; nevertheless the said sir David Fowlis most undutifully, and ingratefully, did not regard the same, but harboured some secret discontentment, and ill affection in his heart; for

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whereas the said lord viscount Wentworth, and other his majesty's commissioners, carefully and dutifully intended the due execution of his highness's said commissions, and had by virtue thereof summoned, and given notice to Ralph Ewre, James Penniman, esquires, and sundry others dwelling and inhabiting near unto the said sir David Fowlis, to attend the said commissioners at the said city of York, for their compounding for their said fines of knighthood; the said sir David Fowlis most undutifully endeavoured and practised what he possibly could to oppose his majesty's service therein, and to dissuade and divert persons from compounding with the said commissioners, and many times publicly declared his dislike and disaffection of, and to the said service, which was generally observed and noted throughout the country where he dwelt; which was by him so spoken of intent and purpose to cause men to forbear and refrain compounding, or resorting to the said commissioners, to make any composition for their aforesaid contempts; and thereby animated and encouraged sundry persons to stand out, and refuse to make any composition at all, who otherwise would have compounded with the said commissioners for their said fines of contempt, in not attending at his majesty's coronation to take the order of knighthood, as aforesaid. And in farther prosecution of his ill affection, and to shew his dislike of the said service, and the more fully to express and manifest himself, and his desire for the hindrance thereof, he the said sir David Fowlis, at a public meeting, at the house of the said sir Thomas Layton, in the beginning of the month of July, 1632, did, in divers of his conferences with gentlemen concerning the compounding with the said lord viscount, and the other commissioners for their fines and contempts of knighthood, publicly affirm and say, 'That Yorkshire gentlemen had been in time 'past accounted and held stout spirited men, 'and would have stood for their rights and li-'berties, and were wont to be the worthiest of 'all other shires in the kingdom. And that in 'former times all other shires did depend, and 'would direct all their great actions by that 'county. And that other counties, for the 'most part, followed and imitated Yorkshire: 'but now in these days Yorkshiremen were be-'come degenerate, more dastardly and more 'cowardly than the men of other counties, 'wanting their wonted courage and spirit, which 'they formerly used to have.' Which said words and speeches the said sir David Fowlis then used and uttered purposely to dissuade and discourage persons from compounding for the said contempts and fines for knighthood, as aforesaid. And the more to encourage those that stood out, and refused to compound, the said sir David Fowlis, at the same time and place, extolled and highly commended one James Maleverer, esq. for denying and refusing to compound with the said commissioners for his fines of knighthood, and said, 'that the said 'James Maleverer was the wisest and worthiest 'man in the country; and that he was a brave 'spirit, and a true Yorkshireman: and that 'none durst shew himself stoutly for the good 'of the country, but the said Mr. Maleverer, 'and was to be honoured therefore;' and did very much commend him, both there, and at other places and times, for not compounding. And the said sir David Fowlis being then told, it might perhaps prove more chargeable to the said Mr. Maleverer, for his wilful standing out in that manner; the said sir David replied, 'That the said Mr. Maleverer had put in his 'plea thereunto, and would easily procure his 'discharge, both of the fines and issues.' And in truth he had pleaded in his majesty's Exchequer an insufficient plea, and after such time as he had paid 156*l.* for issues, at last he compounded for his contempt. And farther to discourage and hinder men from compounding, the said sir David Fowlis then also alledged, that in other counties and shires they had not advanced their fines of knighthood so high, as was done by the commissioners in Yorkshire, saying, that there were many in Buckinghamshire and Oxfordshire, who did utterly refuse to compound: and thereupon shewed forth a list or paper of the names of sundry persons of those two counties, that so refused to compound. And the said sir David Fowlis taking notice of Mr. Ewre's, and Mr. Pennyman's compounding with the commissioners, blamed and reproved them for so doing, saying, 'That they had by com-'pounding done themselves some wrong, and 'that the country hereafter would be much 'troubled with such impositions.' And the said sir David Fowlis farther, to beget and draw a general disobedience in the hearts of his highness's people, and to cause them to deny and refuse to compound for their knighthood fines with the said commissioners, and to draw a scandal upon the said lord viscount Wentworth, and to bring him into disesteem in the hearts and minds of the gentlemen of that country, publicly said and pretended, 'That the people 'of Yorkshire did adore him the said lord vis-'count Wentworth, and were so timorous and 'fearful to offend his lordship, that they would 'undergo any charge, rather than displease him; 'and that his lordship was much respected in 'Yorkshire, but at court he was no more respect-'ed than an ordinary man; and that as soon as his 'back was turned for Ireland, his place of presi-'dentship of the council would be bestowed on 'another man.' And the said sir David Fowlis, and the defendant Henry Fowlis, did, about the beginning of July, 1632, and at other times publicly, in the hearing of sundry knights and gentlemen, to the end to hinder his majesty's service, and to render the said lord viscount Wentworth odious to the inhabitants of Yorkshire, and the places and countries where he was employed as a commissioner, most falsely and untruly scandalize and wrong the said lord viscount Wentworth, to have received much money of the country for knighthood fines, by virtue of the aforesaid commission; and that his lordship had not paid the same, either to his

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majesty, or the Exchequer. The contrary whereof did plainly, clearly, and evidently appear by the several tallies and constats, which were produced and shewed in open court, testifying that the lord viscount Wentworth had, a year before the speaking of those words by the said sir David, and his son, paid unto his majesty's receipts for knighthood fines the sum of 24,500*l.* besides other assignments by his lordship disbursed about the said service amounting to about 700*l.* of his own money, and more than he had at that time received for his majesty. And the said sir David Fowlis and Henry Fowlis most falsely and maliciously, not only to the scandal of his majesty and his justice, but chiefly to wrong and slander the said lord viscount Wentworth, reported, gave out and affirmed in the presence of divers knights, gentlemen and others, that when the said lord viscount Wentworth was gone into Ireland, all such as had paid their fines to his lordship, although they had his lordship's acquittance for the same, yet they would and should be forced to pay the same over again to his majesty's use. And the defendant, Thomas Layton, caused his officer and bailiff to levy about 39*l.* issues upon the goods of one Mr. Wivel, who formerly compounded and paid his fine for knighthood, and had his lordship's acquittance for the same; and that complaint had been made to the council at York, in the absence of the said lord president, that the said sir Thomas Layton's officers or bailiffs had by his privity exacted and taken 40*s.* worth of the said Wivel's tenants goods, by colour of the said levy, for so levying of the said issues, whereby the said council conceived, that the same would much cross and oppose his majesty's said service, and the exaction was meet to be punished: and therefore did award and send the king's letter to the said sir Thomas Layton (being then high-sheriff for the county of York) for to appear, and answer an information exhibited against him, and his servants, for such their supposed exactions in that behalf, as was lawful for the said council to do; and caused the said sir Thomas Layton to be served therewith, who immediately shewed it to the said sir David Fowlis: then the said sir David Fowlis thereon took upon him in a great presence and assembly of divers knights and gentlemen of the county (himself being then one of his majesty's sworn council in the said northern parts, one of the deputy lieutenants there, and a justice of peace in the North Riding where he then dwelt) to advise and dissuade sir Thomas Layton, to yield obedience to his majesty's letter, which this court held to be a great contempt, and offence; for that he said that he held it not fit, that the said sir Thomas Layton being high-sheriff, should appear, and answer the said letter, before he had acquainted his majesty first therewith, and known the king's pleasure. The said sir David saying further, (in scorn and contempt of the said court and council, whereof himself was a member, and by his oath bound to maintain and uphold the rights and liberties thereof to his uttermost) 'That the said court was a paper-court, and 'the said lord president, and council, had done 'more than they could justify, by sending for 'the said high-sheriff; and that, if he were in 'the sheriff's case, he would not care a dog's 'turd for them.' And the more to draw the council into disesteem and disrespect in those parts, he the said sir David then also said, that the said council had nothing to do with a justice of peace; speaking withal comparatively, that the office of a justice was above the council at York; the one (meaning a justice of peace) was by act of parliament, the other (meaning the court at York) was made but by commission. And also the said sir David being reproved by some gentlemen there present, who much disliked his discourse, yet he answered, 'he cared not who heard it, nor if it were pro-'claimed at the cross.'

To this Information sir *David Fowlis* made this Answer; "That he hath been so far from opposing the Commission concerning knighthood, as that he hath, according to his power, advanced the said service; and that he did perswade James Maleverer, and others, to submit to the commissioners, and compound for their fines. That he did perswade sir Thomas Layton to appear before the lord Wentworth, and the council, upon the king's letter, and denieth the words charged upon him. He confesseth he did say, That he knew not how his majesty would take it to have a high-sheriff committed, and disgraced for executing his majesty's writ: and confesseth, that it appears by the information, that Mr. Wivel had made his composition for knighthood, and that he received his acquittance; nevertheless process was awarded out of the Exchequer for levying issues, amounting to 30*l.* or thereabout: whereupon this defendant did say, that if the lord Wentworth had paid in all the monies he had received, he might have done well to have taken order, that those who had paid their money to him, should be free from any trouble, and not be compelled to make double payment."

Henry Fowlis pleaded not guilty.

Sir *Thomas Layton* for himself saith; "That a letter was served upon him from the lord president and council, he being then high-sheriff of the county, doing matters in the execution of his office; and that before he was in any contempt, he was within three days arrested by the pursivant attending the court, and by him carried prisoner from his own house to the said council, about thirty miles, and there remained in the custody of the said messenger, till he had answered an information there preferred against him, and interrogatories concerning the self- same matter now charged upon him; and before he was discharged, paid the said Wivel the money levyed by virtue of the process, and also paid 40*s.* more, which (as was pretended) Appleby, the bailiff, exacted from the said Wivel.—During all which time of this defendant's restraint, he was high-sheriff of the county of York, of all which he desireth

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a consideration might be had; albeit he might justly plead the dependance of the suit at York, yet he doth wave the same: and doth deny, that if the said 40*s.* were exacted by the said bailiff, over and above the 39*l.* levied upon Mr. Wivel, that the same, or any part thereof came to this defendant."

And it plainly appeared to this honourable court, by good and sufficient testimony then openly read; that all the particulars before mentioned, wherewith sir David Fowlis stood charged by the information, were fully proved against him: whereupon the court, upon grave and deliberate consideration of all the aforesaid premisses, declared; 'That the said sir 'David had many ways endeavoured and sought 'to oppose his majesty's service, and had with-'al greatly and highly thereby scandalized his 'majesty, who had done him so many gracious 'favours, and affronted his service, and had 'unjustly traduced his majesty's commis-'sioners, and great officers of state, and shew-'ed exceeding malice to the lord deputy: and 'the said sir David speaking these words 'charged upon him, to deter his majesty's sub-'jects from making payment of their fines to 'his majesty's receiver, for knighthood money: 'and that the court duly weighing and consi-'dering the heinousness of the said defendant's 'offence therein, and declaring the same wor-'thy of severe and extraordinary punishment, 'ordered:

'That the said sir David Fowlis, being a 'principal offender, shall stand, and be com-'mitted to the Fleet, there to remain during 'his majesty's pleasure; and that he shall pay 'a fine of 5,000*l.* to his majesty's use; and 'shall also publicly acknowledge his great and 'several offences, both to his majesty, and the 'said lord viscount Wentworth; not only in 'this court, but in the court of York, and like-'wise at the open assizes in the same county, 'where this decree shall be publicly read. 'And farther; that the said sir David Fowlis 'is a person altogether unworthy of the places 'he holds, as one of the council of York, de-'puty-lieutenant, and justice of peace, who 'hath breathed out so much faction and dis-'obedience. And for that he sought and en-'deavoured to draw disesteem and scandal 'upon that court, whereof he himself was a 'member, and upon the principal officer and 'member of the said court, the lord Went-'worth, a noble person of singular worth and 'merit, and worthily employed in a matter of 'greatest trust and importance: the court hath 'therefore ordered and adjudged, that the said 'sir David Fowlis shall, from henceforth, be 'held, and made incapable to have, or execute 'any of the said places, and that he shall pay 'good damage to the said lord Wentworth, re-'lator in this court, whom this court highly 'commended for vindicating his majesty's ho-'nour, in such a service of so undoubted right, 'justly appertaining to the crown, and which 'hath been heretofore taken by many kings, 'his majesty's predecessors, constantly and 'successively. Their lordships generally con-'demned the said sir David therefore, and for 'the base and scandalous report, that he so 'published against the said lord Wentworth, 'ordered and decreed, that the said sir David 'should pay 3,000*l.* to the said lord Went-'worth.'

And touching the Defendant Henry Fowlis, the court likewise thought him worthy of censure, and ordered and decreed, That he should stand committed to the Fleet, and pay 500*l.* fine to his majesty's use.

And forasmuch as the council urged no proof against sir Thomas Layton, they dismissed him from any farther attendance.

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144. The Trial of JOHN Lord BALMERINO, in Scotland, for a Libel: 10 CHARLES I.* A. D. 1634. [1 Burnet's History of his own Times, p. 32, &c. 2 Rushw. Coll. p. 283.]

Curia Justiciaria S. D. N. Regis, tenta in prætorio de Edinburgh tertio die mensis Decembris, 1634, per nobilem et præpotentem comitem, Willielmum comitem Erroliæ, dominum Hay, magnum constabularium Scotiæ, ac Justiciarium Generalem ejusdem, hac in parte ac in criminali processu subsequent. contra Joannem dominum de Balmerino, virtute commissionis S. D. N. Regis, sub testimonio sui magni sigilli specialiter constitut. Curia legitime affirmat.

ASSESSORS to my Lord Justice General, sir Robert Spotswood of Dunnypace knight, president of the College of Justice; sir John Hay of Barro, knight, clerk register; sir James Learmouth of Balcomy, knight baronet.

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* "Religious grievances are often ideal; but the Trial of lord Balmerino was an act of oppressive iniquity, conducted under the shade of the laws, and with all the forms of unsubstantial justice. In consequence of his father's disgrace and death, he had lived in retirement, and, till the arrival of Charles in Scotland, was unknown to the court. But his deportment in the late parliament was offensive; and his name was marked in the list of the dissenting nobility, from whom the rays of royal favour were now withdrawn. A temperate and submissive petition had been prepared by these peers, in order to exculpate themselves from the imputation of an opposition to prerogative, and to deprecate the operation of those articles from which they dissented; but when the design was intimated to

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Intran. John lord of Balmerino, delated of Airt and Part, (*i. e.* of his being Contriver and Partner) of the penning and setting down of a scandalous Libel, and divulging and dispersing it amongst his majesty's lieges; at the least of concealing and not revealing of Mr. William Haig, and not apprehending of him the said principal author of the said infamous Libel, as is at length contained in his Dittay (*i. e.* Indictment) following,

Pursuer, sir Thomas Hope of Craighall, knight, Advocate to our said lord, for his highness's interest.

Procurators in Defence, Mr. Roger Mowat, Mr. Alexander Pearson, Mr. Robert Macgill, Mr. John Nisbet, Advocates.

My lord Kildryame, master of Elphingstoune.

The master of Frazer.

Sir Thomas Ker of Cavers.

Michael Elphingstoune of Quarrel.

George Dundass, fiar of that ilk, (*i. e.* of Dundass).

Robert Drummond of Meidhope.

My Lord Advocate produced his majesty's Letter, commanding him to pursue the pannel, (*i. e.* the person indicted) for the crimes contained in his Dittay following; together with an Act of Session, nominating the assessors foresaids to be assessors to my Lord Justice General: And therewith produced the said Dittay or Indictment, with the executions thereof, of the whilk the tenour follows. And first the tenour of his majesty's Letter, directed to his majesty's Advocate.

To our right trusty and well-beloved counsellor, sir Thomas Hope of Craighall, knight and baronet, our Advocate for our kingdom of Scotland.

"C. *R.* Trusty and well-beloved counsellor, we greet you well. After due consideration having resolved to cause the lord Balmerino be put to the trial of ane assyse, (*i. e.* Jury) and to this purpose it being necessary that you in-

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Charles, as a necessary precaution before the petition was presented, or even subscribed, the royal displeasure was signified in such severe terms that it was instantly abandoned. A copy retained by Balmerino, and imparted to a confidential notary, was surreptitiously transcribed and communicated to Hay of Naughton, his private enemy. The latter betrayed the secret to the archbishop of St. Andrew's, who repaired to court, and, under the specious pretext of allegiance, revealed it to the king. He affirmed that the petition was circulated through Scotland to obtain subscriptions; declared that nothing but the opposition of the nobility had rendered the clergy hitherto so averse from the surplice; and assured the king that their refractory spirit would be soon subdued, if their patrons were selected for a severe example. A commission was issued to examine the supposed offence, and Balmerino was imprisoned on a warrant obtained by Spottiswood; but the real author of the petition, Haig, an advocate, escaped to the continent.—It would be difficult to conjecture, what was criminal in a petition neither presented to Charles, nor divulged except to a confidential friend. There were laws in Scotland against the utterance of leasings, or false reports tending to excite sedition, or to sow dissensions between the king and the people; and according to the usual extension of state offences, whosoever listened with an air of approbation, and neither revealed the report nor secured its author, was obnoxious to the same capital punishment, as if equally guilty of the same crime. As the author and abettor of a seditious petition, Balmerino was accordingly arraigned for leasing making; as the author, because the copy, found in his custody, was slightly interlined with his own hand: as the abettor, because he concealed the petition, and suffered the author to escape undiscovered. A Petition, couched in the most inoffensive terms, was converted in the indictment into a dangerous Libel, 'that depraved the laws, and mis-

'construed the proceedings of the king in the 'late parliament, so seditious that its thoughts 'infected the very air, a cockatrice which a 'good subject should have crushed in the egg.' Balmerino, who forbore to crush this unhatched sedition, was oppressed by the intrigues of the prelates, and the criminal connivance of the judges and officers of state. The court of session appointed three assessors to the justice general; Learmouth one of their number, Hay lord register, and Spottiswood their president, second son of the archbishop, whose influence had incited, and still continued to foment the prosecution. It was represented in vain that the interlineations, as they softened the terms of the petition, could never constitute that libel which they served to abate; that the petition was neither promulgated, nor disclosed, except to a confidential lawyer for his private opinion; that there was no precedent for the trial of those who had neglected to reveal a seditious performance, or to secure its author, and that a severe law never executed must be regarded as having passed into oblivion; that it might be illegal perhaps to conceal the petition when adjudged seditious; but as its purport was apparently respectful, and intended to conciliate the king's affection, that no prudence could discover a different construction which was necessarily latent till determined by the court. The question was already prejudged by the court: the assessors sustained and referred the indictment to a jury, which the earl of Traquair had undertaken to corrupt or intimidate.—As peremptory challenges are unknown in Scotland, the jurors are invariably selected by the judge from the return made by the clerk of court. Nine of the jury, with a single exception, were ineffectually challenged: but when Traquair, a minister of state, was admitted, it was no longer doubtful that the rest were industriously selected for their hostility to Balmerino, or their devotion to the crown. The experiment did not entirely succeed. In the former century, Gordon

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form yourself of such particulars, as concern your charge in the legal prosecution of that business; it is our pleasure, that with all convenient diligence you insist therein, by preparing of ane Indictment fit for that purpose, and that you carefully go on in every other thing, touching the prosecution thereof, as you will answer to us upon your trust: And that by the advice of the Chief Justice you prefix a day for the same, for which these presents shall be your warrant. Given at our mannor of Hampton-Court, the 14th of October, 1634."

Follows the Act of Session, nominating the saids Assessors, at Edinburgh, the 2d of Dec. the year of God 1634, the which day the lords of council and session nominate, appoint and elect sir Robert Spotswood of Dunnypace, knight, president of the College of Justice; sir John Hay of Barro, knight, clerk of our sovereign lord's register council and rolls; and sir James Learmouth of Balcomy, knight baronet, senator of the said College of Justice; to be Assessors to William earl of Errol, Great Constable of Scotland, and having commission from his majesty to be Justice-General in the criminal pursuit intentit and depending before the said Justice against John lord Balmerino.

Extractum de Libro Actorum per me magistrum Alexandrum Hay, scribam consilii ac deputatum honorabilis domini Johannis Hay de Barro militis, clerici registri ac Consilii S. D. N. Regis, sub meis signo et subscriptione manualibus, sic subscribitur A. Hay.

Follows the tenour of the Dittay:

"Charles by the grace of God king of Great Britain, France, and Ireland, defender of the faith; to our lovit (*i. e.* beloved) James Currie, Ormond pursevant, messenger, our sheriff in that part conjunctly and severally, specially constitute, greeting. Forsuameikle as it is complained and humbly meant to us by our trusty and well-beloved counsellor sir Thomas Hope of Craighall knight baronet, our advo-

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of Buckie had been engaged in the murder of the earl of Murray, and was appointed therefore as a sure man. When the jury had withdrawn, he addressed them unexpectedly in the most pathetic terms; and conjured them to reflect that the life of an innocent nobleman was at stake; whose blood would lie heavy on their souls to the last hour of their lives. While the tears streamed down his aged cheeks, he protested that his hands had once been imbrued in blood, for which he had procured a pardon from his sovereign; but that it had cost him many sorrowful days and nights, to obtain a remission to his conscience from heaven. The jury was moved with this impressive address: but Traquair, their foreman, resumed the argument, that it belonged to the court to determine whether the law was severe, or the petition seditious; whether the prisoner had concealed it was all that remained for them to decide. After a long altercation, the jury were equally divided; and in consequence of the final suffrage of Traquair their foreman, Balmerino was convicted of having heard and concealed a seditious petition, and of having forborne to reveal the author. Sentence of death was immediately pronounced; but his execution, to the great umbrage of the prelates, was suspended during the pleasure of the king.—During the whole trial the people discovered extreme agitation. They assembled daily, in opposition to the efforts of their magistrates, in tumultuous crowds; they prayed aloud, and in the streets, for the preservation of Balmerino; applauded the exertions of his friends, and showered imprecations on the heads of his adversaries. Their rage proceeded to the most desperate designs. Many consultations were secretly held; and it was determined to burst open the prison for his release; or, if that attempt should miscarry, to revenge his death on his judges and the eight jurors by whom he had been convicted. Some had undertaken to burn their houses; others to perpetrate the massacre; when Traquair, apprised of his own danger, repaired to court, and represented that the execution of the sentence was impolitic and unadvisable, however justly the prisoner had forfeited his life. After a long and severe imprisonment, a warrant was procured for his enlargement; but a pardon was dispensed with a slow and reluctant hand. The merit of the pardon was variously ascribed to the intercession of Laud, or to the humane and merciful disposition of Charles, who was averse from bloodshed rather than from revenge; and who hesitated to execute an innocent nobleman against whom he was incensed, though prevented by no scruple from acquiring an unjust and absolute dominion over his life.—This iniquitous prosecution was ruinous in its consequences to the king's interest in Scotland. The people had long felt that the administration of justice was partial and corrupt; but the nobility now discovered that there was no protection for themselves, from the resentment of the prelates and the power of the crown. Whatever secret cause of offence existed; a speech or a petition, an expression of discontent or grievance casually heard, and concealed from motives of compassion or honour, might furnish a pretext for their own destruction. The lenity of their sovereign was no protection; and Balmerino, whose real crime was his conduct in parliament, justly considered the remission of his sentence as no redress of the injury which he had sustained. His danger made a deep impression on the minds of his peers. Under an infatuated, or despotical monarch, whenever the laws were perverted for their ruin, their order had found no resource but in a confederacy against the crown; and to this measure their thoughts were already directed by the frequent example of their ancestors; by the sense of their danger individually, and of their strength when united; and above all, by the inordinate and daily usurpations of the aspiring prelates." 3 Laing's Scotland, 107.

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cate for our interest upon John lord of Balmerino, that where albeit by the common law, as also by the laws and acts of parliament of this kingdom, and specially by that act and statute of parliament made by our umqhile (*i. e.* late) dearest father king James 6, of happy and blessed memory, par. 10, chap. 10, it is statute and ordained, That all our subjects continue themselves in quietness, and dutiful obedience to us and our royal authority, and that none of them presume or take upon hand publicly to disclaim, or privately to speak or write any purpose of reproach or slander of our person, estate, or government; or to deprave our laws and acts of parliament, or misconstruct our proceedings, whereby any misliking may be moved betwixt us and our nobility and loving subjects in time coming, under the pain of death; certifying them that does in the contrair, they shall be repute as seditious and wicked instruments, enemies to us and the commonweal of this our realm: and the said pain of death shall be execute upon them with all rigour, in example of others. Like as by the 205th act of the 14th parliament of our said umqhile dearest father, in the month of June, 1594, the former act of parliament, with divers others, against leasing-makers, and authors of slanders and calumnies, is ratified and approven, and ordained to be published of new again, and to be put to execution in all time coming: with this addition, That whosoever hears the said leasing calumnies, or scandalous speeches, or writs to be made, and apprehends not the authors thereof, if it be in his power, or reveals not the same to us, or to any of our privy-council, or to our sheriff, steward, or bailie of our sheriffdom, stewartry or bailliary, stewards in regality or royalty, or to the provost, or ane of the baillies within our burrows, by whom the samen may come to our knowledge, or to the knowledge of our privy-council; whereby the saids leasing-makers and authors of scandalous speeches, may be called, tryed, and punished, according to the said acts: the hearer and not revealer, and not apprehender, (if it lie in his power) and concealer and not revealer of the saids leasing-makers, and authors of the saids scandalous speeches and writs, shall incur the like pain and punishment as the principal offender, as in our saids acts of parliament at length is conteined. Notwithstanding whereof, it having come lately to our knowledge, in the month of March last by-past, that there was a most scandalous, reproachful, odious and seditious Libel, found in the hands of one Mr. John Dunmure, notary in Dundee, and divulged and dispersed in the hands of several of our subjects: whilk scandalous, odious, infamous, and seditious Libel, did not only seditiously, reproachfully, and outrageously tax our sacred person in our behaviour at parliament; but also contains many points and purposes of false calumnies, public scandals and reproaches against us, our estate and government, depraving our laws and acts of parliament, and misconstruing our just and glorious proceedings in our first parliament, holden by us in person in the month of June of before, as doth manifestly appear in the hail tenour of the saids infamous Libel; and particularly in the particular passages hereof after following: insuafar as albeit by the law of God and laws of all nations, the person of the supreme and sovereign prince is and ought to be sacred and inviolable, and he ought to be reverenced, honoured, and feared, as God's lieutenant on earth; and that all subjects are bound and tyed in conscience to content themselves in humble submission to obey and reverence the person, laws, and authority of their supreme sovereign: yet the said unhappy and infamous libel, in the first entry thereof, begins with an outrageous upbraiding and taxing of our sovereign lord's majesty of a point of injustice or indiscretion in our behaviour at parliament, for putting of Notes (as the saids infamous libel alledges) upon the names of a number of our subjects, who did vote contrair to the acts of our church government, past in parliament. Whilk is ane fearful thing in ane subject to pry into the gesture of his sovereign in his supreme court: and upon a gesture, without speech, to infer a ground of exprobation and reproach to the sovereign prince. Next, the said infamous Libel reproaches us for refusing to receive from some of our subjects their reasons for dis-assenting from the said acts, before their public hearing in parliament: whilk is a point no ways compatible with the humble obedience of a good, quiet, and peaceable subject; but carries with it the signal and token of discontentment, and rubs upon our sacred person and proceedings matter of reproach and scandal, tending, if it were possible, to diminish the glorious opinion and estimation of our royal person, equity, and justice, in the hearts of our subjects. Thirdly, the malicious heart of the penner, not content with the first aspersion laid upon us for putting notes upon these who dis-assented, does ingeminat the samen in ane most bitter invective and viperous style, in affirming that such a thing was never of before censured by a prince of so much justice as our sacred majesty: whilk in effect is to reproach us of manifest injustice, for doing of that, the like whereof was never done by a just prince. And the libeller, not content with these reproaches, most villanously and despitefully belcht and vomited fourth against our sacred person, proceeds to a most fearful and dangerous undermining of our honour, credit, and greatest happiness, in affirming that there is now a general fear of some innovation intended in essential points of religion: albeit (blessed be God) it be certainly known to all our good subjects, that we are, and in all our actings have showen ourselves to be a most devote and religious prince, hating and abhorring in heart and affection all papistical superstition and idolatry. And the libeller, (out of a develish humour) not content to restrain his pen within the limits of this our kingdom of Scotland, as if it were too little for the compass of his cu-

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rious and furious brain, he enters to pry into our estate of England, and assures that there is reports of allowance of reprinting of books of Popery and Arminianism in England, and of the restraint of answers made to them: and then returning to Scotland, most falsly affirms, that Arminianism is preached there without censure. After that, he goes to the estates of the parliament, and affirms most falsly and calumniously, that divers papists were admitted to parliament, and upon the articles, who by the law of the realm can be no member of any judicatory. Albeit it be constant and nottour, that none of these who were admitted to parliament and upon the articles, was professed papists, as will appear by the roll of the names of these who were upon the articles. And farder, the unhappy penner of that cursed libel proceeding to ane higher point of taxing and misconstructing of our proceedings, he affirms that the grievances allowed to be proponed in Convention in anno 1625, were altogether slighted in this our first parliament: which is a manifest lye and untruth, there being nothing concerning the public moved at parliament, which was not either determined by our estates, or remitted to our council. And thereafter it is as falsly affirmed, that the meetings of the gentry, which were appointed for representing the grievances of the country in the matter of Coin and increase of theft, were interrupted in our name: which is a manifest lye and calumny. Like as thereafter it is most scandalously seditiously affirmed, that we denied liberty to our nobility to meet and conveen with the lords of the articles, against the constitution of a free parliament under such a just and lawful prince: albeit it be nottourly known, that our nobility did enjoy all the privileges of a free estate, which pertained to them and their predecessors. And sicklike thereafter it is affirmed ignorantly, foolishly, and falsely, That against the custom of this our kingdom, the bishops did chuse the articles of the nobility; albeit before the parliament in anno 1609, the nobility did ever chuse the articles themselves: which is notoriously false, and contrair to the fundamental laws and practices of all preceding parliaments, whereby it is constitute, that ever the clergy did chuse the articles of the nobility. And thereafter he affirms, That the bishops did chuse such of the nobility on the articles, as either were popishly affected, or had small knowledge of the estate and laws of this our country: which is an impudent malicious calumny and falshood; these who were chosen on the articles (as will appear by their names) being of the most antient of the nobility, and most expert in the laws and customs of this our kingdom. Thereafter the cursed and unhappy libeller returns to his nipping and checking style; and most presumptuously challenges our sacred self upon our speeches in parliament, and upon our proclamations made upon our revocations; which was intended for augmentation of our patrimony, and for disburdening of our subjects of taxation; and that yet nevertheless huge and great taxations were imposed, against the counsel given by our umquhile dearest father of blessed memory, in his Basilicon Doron, and against the practice of our dearest predecessor king James 1. who remitted to his subjects a great part of the taxation granted for his ransom: which is a peart and mischievous exprobation to our sacred person, who out of the love and tender affection which we bear to this our antient native kingdom and country, vouchsafed that grace and favour to visit it in our royal person, without sparing of cost and charges for our journey, and other necessaries belonging to our coronation; which is well known far to exceed the taxations voluntarily offered to us by our estates, in testimony of their humble and thankful gratitude for so great a blessing as the personal presence of us their sacred lord and sovereign, within this our native soil and antient kingdom. And as we did never enjoin nor urge any taxation, so the same being voluntarily and humbly offered to us by our loving and faithful subjects, as the mite of their humble affection, far within and beneath the respect of so glorious a benefit, yet we were pleased out of our love to accept it graciously. And yet this so gracious acceptance cannot pass the pen of this unhappy libeller, but must he casten up (*i. e.* reflected upon) with a false and despiteful exprobation, as done against promise, proclamation, and the practice of king James 1. which is falsely and villainously affirmed. And when the infamous libeller has spent his unhappy breath and pen in reviling and maledicting the glorious name of us, his gracious sovereign, in our person and proceedings, he thereafter challenges us for applying our former taxations to a wrong use, in bestowing the samen upon parties and persons, whose waistrie (*i. e.* extravagance) and wants, our subjects are not obliged to supply. And with this besides, by the way, he upbraids our servants and counsellors for malversation, in the guiding and imploying thereof: And is so peart and impudent in his devilish style, that he spares not the name of our ever-glorious dearest father king James of blessed memory; but most falsly casts up (*i. e.* mentions) a promise alledged to be made by his majesty or his commissioner, in the parliament holden in anno 1621, for discontinuing of the extraordinary taxation in all time to come. And then in the end, as a venomous wasp, he closes with an impudent reproach towards us, in that which is most commendable in a sovereign prince, by taxing us in our beneficence and liberality to the lords of our session, in providing honourable maintenance to them, and in bestowing pensions upon our officers; and leaves nothing within this our kingdom, which is not drawn in within the scourge of his devilish and malicious pen and tongue: So that it is not to be wondered and admired, that any person, living under such a gracious, pious, and just prince, could degenerate into so monstrous a contempt of our government, as to dare and presume upon to think, let be (*i. e.* much less) to speak and

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write such devilish, reproachful, scandalous, and seditious thoughts, which infest the very air, and can have no other end but the breeding in the hearts of our good and loving subjects, a fearful jealousy and dislike, and in the end contempt of our just government. And albeit all our good subjects be bound in conscience, as also by the laws of this our kingdom, to crush this Cockatrice in the egg, and to abhor it as a pestilentious clout; yet the said devilish libel was found in the hands of the said Mr. John Dunmure, notary in Dundee, and was divulged and dispersed amongst our subjects about the foresaid month of March last past: which coming to our notice and knowledge, we then gave power for examining of the said Mr. John Dunmure how the same came to his hands; who deponed, That he had the samen from the said John lord of Balmerino. Which John lord Balmerino being also examined, he granted the samen to be of verity, and therewith affirmed, that he had the said libel from one Mr. William Haig, whom he thought also to be the penner and author thereof. Of the which scandalous libel, the said John lord Balmerino himself was, and is, author, deviser, consulter, adviser, airt and part (*i. e.* contriver and partner) in the penning, writing, and drawing up thereof; at the least is guilty of the hearing thereof, and of the concealing and not revealing of the said Mr. William Haig, whom he affirms to have been author of the same; and also is most guilty of the not apprehending of the said Mr. William Haig, it being in the said John lord Balmerino his power to have taken and apprehended the said Mr. William; and, lastly, is guilty and culpable of the divulging and dispersing of the said scandalous and seditious libel amongst our subjects, in so far as the said John lord Balmerino knew of the penning of the said scandalous libel by the said Mr. William Haig, and advised and gave his opinion anent (*i. e.* about) the making of the samen; and in token thereof, interlined a part of the said infamous Libel in divers parts thereof with his own hand, which is yet extant to be seen by ocular inspection; and which interlining the said John lord Balmerino has confessed to be his own hand-writing. Likeas immediately after the forming of the said most infamous libel, the said John lord Balmerino received the same from the said Mr. William Haig, and delivered it to the earl of Rothes, of purpose to have the samen presented to us, and caused Mr. Robert Dalgleish his servant copy the said infamous libel; which copy he delivered to the said Mr. John Dunmure, in whose hands the samen was found, by occasion whereof the said infamous libel was divulged and dispersed amongst our subjects, and openly read and exposed to their view; to the prejudice and derogation of our sacred and glorious name, by the infamous, scandalous, and seditious passages and articles contained therein. Likeas the said lord of Balmerino kept and detained the said infamous libel in his hand continually, from the time of the closing of the parliament about the end of June, 1633, until the 9th of June 1634, last past, at which time he was challenged for the same, and did exhibit the said infamous libel, in presence of the lords appointed by us for his examination. Likeas the said John lord Balmerino having conferred with the said Mr. John Dunmure, after his first examination, which was in March 1634, and avowing that which he had done concerning the delivering of the said infamous libel to the said Mr. John Dunmure, and dispersing thereof, desired the said Mr. John Dunmure to go and tell the earl of Traquair, one of the examinators, that better men than the said John lord Balmerino himself would set their faces to (*i. e.* justify) the said libel, at the least knew of the samen. And albeit the said John lord Balmerino be a nobleman of good learning and understanding, and so presumed to have the knowledge of the laws and acts of parliament of this our kingdom, was bound in all duty, after receiving of the said infamous libel from the said Mr. William Haig, and reading thereof (which in the hail strain and tenour of the samen was of the nature of a scandalous and seditious libel, prohibited by our acts of parliament) as he would have eschewed the danger of our laws and punishment therein contained, as author thereof, to have revealed the same to us, or to some of our privy council: And also to have apprehended the said Mr. William Haig, whom he affirms himself to have been the author and penner thereof: yet the said lord Balmerino did no ways apprehend the said Mr. William Haig, nor yet reveal the said scandalous libel, it being in his power to have apprehended the said Mr. William Haig, who was but a single person, and the said lord Balmerino being a nobleman of power and credit: But the said lord, notwithstanding thereof, did still haunt and converse with the said Mr. William Haig, and did keep, detain and retain the said infamous libel in his hands. Likeas the said lord Balmerino, after he was cited to compear before the lords appointed for his examination, which was upon the 7th of June last; he compearing before the saids lords examinators upon the said 7th of June, being Saturday, he craved early of the saids lords to have his examination anent (*i. e.* about) his knowledge of the authors of the said infamous Libel, to be continued (*i. e.* delayed) till Monday next thereafter, which was the 9th of June; which being granted to him by the saids lords, and he thereupon being demitted from them upon the said 7th of June, being Saturday about 12 o'clock, he immediately thereafter met with the said Mr. William Haig, and shewed to him the warrant of the citation. At which time the said lord of Balmerino having the said Mr. William Haig in his own house, and so in his power, did not apprehend him, whom he knew and affirmed to be the author of the said scandalous libel: but by his shewing to him of his said warrant of citation, which bore the said lord Balmerino to have been conveened before the saids lords examinators, to make answer anent the said seditious libel, found

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in the hands of the said Mr. John Dunmure, he thereby gave occasion to the said Mr. William Haig to escape out of the country, and become fugitive. Likeas the said Mr. William Haig, immediately after the sight of the said warrant shewn to him upon the said 7th of June, being Saturday, escaped and fled out of the country, and became fugitive, and remains out of the country continually since syne, (*i. e.* since that time.) Likeas the said John lord Balmerino being incarcerat (*i. e.* imprisoned) within the castle of Edinburgh, after his first and second examination, as author, airt, part, or accessory of the said infamous libel, received several letters from the said Mr. William Haig furth (*i. e.* out) of the Low Countries, and other places to which he escaped; which letters the said John lord Balmerino kept by him, without acquainting the saids lords examinators, until the time he was challenged. In the which letters and in other letters sent by the said Mr. William, and intercepted by the lords, it is affirmed and avowed by the said Mr. William, that he had the approbation and allowance of the said John lord Balmerino to the making and penning thereof. By the which particular deeds, circumstances, and other vehement presumptions particularly above expressed, it is clearly evinced, that the said John lord Balmerino was author, deviser, outsetter (*i. e.* publisher) adviser, airt and part of the penning and forming of the said infamous libel, at the least concealer and not revealer thereof; and is also culpable of the not apprehending of the said Mr. William Haig, whom he affirmed to be the author of the said infamous libel. As also of the dispersing and divulging of the said infamous libel, in manner particularly above-declared; incurring thereby the pain and punishment of death, specified and contained in our saids acts of parliament, which ought and should be inflicted upon him with all rigour, in example to others to attempt the like. Our will is herefore, and we charge you straitly and command, that incontinent thir (these) our letters seen, ye pass, and in our name and authority, lawfully summon, warn, and charge the said John lord Balmerino presently in ward, within the castle of Edinburgh, to compear before our justice and his deputs within the Tolbooth of Edinburgh, the 3rd day of December next to come, in the hour of cause (*i. e.* when the court is met) and there to underly our laws for the crimes above-written: To the effect that upon his trial and conviction, as culpable thereof, justice may be ministered upon him conform to the laws of the realm; and that ye summon an assize, (jury) not exceeding the number of 45 persons, whose names ye shall receive in a roll subscribed by our advocate, ilk (each) person under the pain of 200 marks, according to justice. Given under our signet at Edinburgh the 11th day of November, and of our reign the 10th year, 1634."

Ex deliberatione dominorum concilii, sic subscribitur John Bannatine.

Follows the Execution of the said Summons.

"Upon the 14th day of November 1634, I James Currie, Ormond pursevant and one of the sheriffs of that part within constitute, past at command of thir (these) our sovereign lord's letters within written, and by virtue thereof charged the within written John lord Balmerino personally apprehended in the castle of Edinburgh, and delivered to him a just and authentic copy of these his majesty's said letters, to compear before his majesty's justice and his deputs in the Tolbooth of Edinburgh the 3rd day of Dec. next to come, in the hour of cause, and there to underlie his majesty's laws for the crimes within written; to the effect, that upon his trial and conviction as culpable thereof, justice may be administered upon him, conform to the laws of this realm: And this I did after the form and tenor of our sovereign lord's letters in all points, before these witnesses, Mr. Archibald Geddes, constable of the said castle of Edinburgh, and John Malcome, herald. And for the further verification of this my execution subscribed with my hand, my stamp is affixed. *Sic. sub.* Ja. Currie, Ormond pursevant."

Thereafter my Lord Advocate produced with the Summons above-written, the copy of the infamous Libel which was found in the hands of Mr. John Dunmure, notary in Dundee; bearing in the end thereof, that the said Mr. John being examined thereupon, he by his Deposition has granted it to be the samen Libel which was in his hands: Of the which copy the tenor follows:

To the King's most excellent majesty; the humble Supplication of a great number of the Nobility and other Commissioners in the late Parliament,

"Humbly sheweth; That the Notes which your majesty put upon the names of a number of your Supplicants in voting about these acts, which did imply a secret power to innovate the order and government long continued in the Reformed Church of Scotland; and your majesty's refusing to receive from some of your supplicants their reasons for dissenting from the said acts, before your majesty, and in your hearing in parliament, to breed a fear of our becoming obnoxious unto your majesty's dislike, if your highness should still remain unacquainted with the reasons of our Opinions delivered concerning the said acts: Seeing your supplicants are confident, that your majesty vouchsafing to take notice of the saids reasons, would be pleased to acknowledge, that no want of affection to your majesty's service, but a careful endeavour to conserve unto your majesty the hearty affections of a great many of your good subjects that are tender in these points of novation, covertly thrust upon this church, did induce our wishes and voices to appear in opposition to the said acts; and that a predominant desire in us to have all your royal designs here to prosper without interruption, did absolutely command us to forbear any reasons that

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could have been propounded against many of the conclusions in the late parliament.

"We do therefore humbly beseech your majesty graciously to ponder the considerations after-written, so shall we be encouraged (as in duty bound) to continue our humble prayers for your majesty's long and happy reign.

"First, we humbly beseech your majesty to consider, That though these acts as they are conceived, and may concern your majesty's prerogatives, and the liberties of the church, had never been moved or concluded (as they are), your majesty would have suffered no prejudice in your benefit, honour, nor power: That your supplicants are much more free from all suspicion of private ends in dis-assenting, than the contrivers of the said acts, in offering them to the hazard of contradiction, or soliciting an assent thereto: That in deliberation about matters of importance, either in councils or parliaments, opinions do often differ; and they that have been of contrary mind to a resolution carried by the plurality of votes, have never hitherto been censured by a prince of so much justice and goodness as your majesty.

"We do also most humbly beseech your majesty to believe, that all your Supplicants do, in most submissive manner, acknowledge your royal prerogative in as ample manner as is contained in the Article 1606, made thereanent (thereabout); and withal do consider, that the long experience and incomparable knowledge your royal father had in matters of government, as well in church as in commonwealth, is the very cause expressed in the act 1609, for giving power to his majesty to prescribe apparel to kirk-men, with their own consent. And since in all the time of his life and government for the space of 16 years thereafter, he did forbear to make any change upon their former habits; we are bold to presume, that in his great wisdom he thought fit, that the apparel used in time of divine service ever since the reformation of religion till his death, and to this day, should be continued, as decent in the church, and most agreeable to the minds of his good subjects in this nation. We do also beseech your majesty to consider, That under the act intitled, 'A Ratification of the Liberty of the 'Church,' the acts ratifying the assembly of Perth in parliament 1621, were declared to be comprehended: That most part of us being then in parliament, did oppose the same; that experience hath shewed how much these articles of Perth have troubled the peace of this church, and occasioned innumerable evils and distractions in it: That there is now a general fear of some novations intended in essential points of religion; and that this apprehension is much increased by the reports of allowance given in England for printing books of Popery and Arminianism, and the restraint of answers made to them; and by preaching Arminianism in this country without censure: by the admission made of divers papists to the parliament and upon the articles, who by the laws of this realm can be no members of any judicatory in it: That the minds of most of your good people being in this perplexity, your supplicants have great reason to suspect a snare in the subtle junction of the act 1609, concerning apparel, with that of 1606, anent your Royal Prerogative; which by a sophistical artifice should oblige us either to vote undutifully in the sacred point of Prerogative, or unconscionably in church novations, [A*.] which blessed king James would never have confounded, as appeared evidently in the parliament 1617, honoured with his gracious presence; where his majesty, by the bishops instigation, tried, urged, and past in Articles a ratification of his royal prerogative enacted in the parliament 1606, with Addition of an Article authorizing all things that thereafter should be determined in ecclesiastic affairs by his sacred majesty, with the consent of a competent number of the clergy, to have the strength and power of law. When this Act came to be heard in open parliament, his majesty gave order to read only the Rubrick of the Act; which being done, he was then pleased in his fatherly compassion over the tender affections of his loyal subjects (well known to his majesty, as fluctuating betwixt love and fear) publicly from his own mouth to declare his princely love and pleasure, for reasons known to himself, to have that Act suppressed, though passed in the Articles: because his Royal Prerogative being of itself inviolable, was already established sufficiently; and in the depth of his wisdom, he would absolutely prefer the peace of the Church to the appetite of church-men. And since we are fully persuaded of your majesty's unfeigned affection to the true religion, and so do presume that none of these things lawfully rejected at the Reformation [†B— C——] thereof in this kingdom should be introduced again without consent of our clergy lawfully assembled; and fearing that a forcible and colourable intruding thereof, would diminish in the hearts of many of your loyal subjects, that affection which is founded on their opinion of your majesty's goodness and wisdom.

"We do therefore dis-assent from the foresaid Acts, as importing a servitude upon this church unpractised before, and giving ground for introduction of other new indefinite devices.

"We do further offer unto your majesty's consideration, that albeit our just and heavy Grievances allowed of in the late Convention of Estates 1625, and 1630, to have been represented to your majesty, in hopes of refreshment to the country's sufferings, have been altogether slighted in this your first parliament; albeit your majesty denying your nobility their freedom by authority to meet with the Lords of the Articles, may seem against the constitution of a free parliament (under such a just and lawful prince, and contrair to the custom of your ancestors), which before the parliament

* The Pannel's interlinings you will find in the other copy hereof.

† Interlined [B of Religion C] in the other copy by the Pannel.

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held in anno 1609, did always elect and chuse the Lords of the Articles from among them of their own rank and quality; there having been no parliamentary bishops from the reformation of religion till then, nor were they such as now do cull and single out such noblemen either popishly affected in religion, or of little experience in our laws, as having had their breeding abroad, and so none of the ablest to be upon our Articles, but fittest only for the clergy's mystical ends. Whereas the former practice was such, as seemeth most agreeable to reason, and what every estate should do, that so they may communicate their minds with the rest of their body; since none but men very presumptuous of their own knowledge, or senseless in themselves, will adventure to trust their first conceptions in matters of so great importance as are the conclusions of parliament. Albeit the humble supplications of the ministry to your majesty and estates of parliament, delivered to the Clerk Register, (and that your majesty was in all due humility petitioned by the ministers of this kingdom, both Conformists, and Non-conformists, to give them a hearing) have been suppressed: albeit the meeting of the gentry, and happily of the burrows too, in a joint purpose to have represented to your majesty our unspeakable sufferings by the Abuses of the Coin (the Mastery of the Mint being a thing merely regal) and increase of Theft and Oppression of divers parties, and other things worthy your majesty's consideration, were in your majesty's name interrupted: And finally, albeit your majesty was graciously pleased by your former and later Speeches in the Parliament House to declare (answerable to your several Proclamations, bearing that the course taken by your revocation for settling the patrimony of your imperial crown, was, that ye should not be burdensome to your people), that your majesty had no purpose at this time to lay any burden upon this nation, according to the wise counsel of king James in his *Basilicon Doron*, treating of the right Use of Subsidies: albeit that the present condition of your subjects is worse, and the patrimony of the crown greater, than when king James 1. remitted to his people a great part of his Taxations, granted even for that good king's ransom; yet have we all as one man consented to all your majesty's demands, and more, even to have taxations multiplyed, without representing how the former have been, or these may fall to be, bestowed upon divers parties, whose wastes and wants your good subjects are not obliged to supply; without objecting that some of them have been granted extraordinarily for Supplies of the Palatinate, which being now by the mercy of God in a better condition, they might have pleaded in reason to be thenceforth discontinued; without foretelling that some of the subsidies are like to be means of more processes, (or suits) betwixt your majesty's subjects and the Treasurer, than matter of profit to your Treasury; without putting your majesty in remembrance of the impertinencies you have suffered by men's ambition after the public places of judicatories, which none have heretofore refused by reason of the small fees due to them; without contradicting the exceptions of your officers pensions, or alledging their Fees to be as sufficient for maintaining the dignity of their places now, as they were before your majesty's father succeeded to the crown of England. And all this have we done implicitly, only to testify our ingenuous affection to your majesty, and our obsequious resolutions to give you full content in every thing, that makes not a breach in our Religion and Laws, or occasioneth not offence to the weaker sort in the way of God's Worship here established; and albeit we were not acquainted with any of the statutes before the public voting of them in parliament. Therefore we are confident that your majesty finding such a harmony in our affections to your service in preserving our Religion and Liberties, will be unwilling, upon any suggestion of such as are (or hope to be) sharers of our voluntary contributions, to introduce upon the doctrine or discipline of this your Mother-Church, any thing not compatible with your majesty's honour, your good people's consciences, or that hath been rejected by acts and public practice of this Reformed Church.

Follows the said Mr. John Dunmure's Deposition, written upon the end of the said Copy.

Apud Edinburgh xiv Martii 1634. conveened St. Andrews, Traquair, Bishops of Edinburgh, Ross, Clerk of Register.

"I Mr. John Dunmure, notary in Dundee, being examined in presence of the lords of his majesty's secret council above-written, depone and confess, that this supplication within written, is all written with my own hand, and is that which I delivered to Mr. Peter Hay of Naughtoune about Lambas last. And farder I depone and confess, that this is the just and true copy of the paper delivered to me by John lord Balmerino, shortly after the end of the late parliament, within Edinburgh; and that then my lord of Balmerino (I being with him) said to me, Because ye have given me many papers, I will let you see this and have your judgment of it; but let it be *tibi soli*, as ye respect my credit. And that I keeped it four or five days, and copied it, and then delivered the same back again. I further depone, That the paper contained the supplication within written, in the same words and sense: and it is not by my lord Balmerino's hand, but by some other hand.

Sic Subscribitur, JOAN. DUNMURE."

Written on the back of the said Copy, "For the Kirk and Country in the Parliament, 1633."

My lord Balmerino produces two Warrands of the Lords of Session, by their lordships deliverance of the several dates under-written, ordaining the procurators therein contained, to compear and defend my lord in the criminal process above; and the said lords by their deliverance, of the date the 19th of Nov. 1634.

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The lords having considered the desire of the Supplication, &c. and appointed the persons therein condescended on by my lord to be his advocats for his Defence, viz. Sir Lewis Stewart, Mr. Thomas Nicholson, Walter Hay, and Mr. John Nisbet. And by the deliverance on the end of another Supplication given in by my lord to the said lords, craving (upon some of the former advocats refusal) more advocats, they by their deliverance thereon, of the date the 25th Nov. 1634, appoint and ordain Mr. Roger Mowat, Mr. Alexander Pearson, and Mr. Robert Macgill, Advocats; and ordains, &c. Upon the production and reading of the which Warrands, the said lord Balmerino took Instruments.

Thereafter it was objected by my Lord's Advocats, that my Lord Register could not sit as ane assessor to my Lord Justice-General in this process, because not only my Lord Register has been one of the Judges of the particular committee appointed for Trial and Examination of the Pannel, before whom he has oftentimes compeared and been examined; but also my Lord Register has given partial counsel, and has been upon the counsel of the advising and libelling of the Dittay now produced and read, and has assisted in the same at several occasions: and so by giving information and advice in that kind, has behaved himself as party in effect, and therefore cannot be Judge nor Assessor to the Justice-General. And after Answers and Replies, the lords by their Interloquitor repelled the first part of the alleadgance, bearing that my Lord Register cannot be Assessor, because he was a member upon the committee: and as to the second member thereof, declares that they will have my Lord Register to make his judicial Declaration, and that judicially thereupon, in presence of the Pannel, before any Answer be given thereto; which accordingly my Lord Register does.

The Pannel, in respect of my Lord Register's Declaration Judicial, is content that my Lord Register remain Assessor to the justice-general: whereupon my Lord Advocat asked instruments.

Thereafter the Pannel produced a Supplication to the Lords of privy council, with Deliverance thereupon, craving the Depositions made by the earl of Rothes, Mr. John Dunmure, and Mr. Robert Dalgleish, from the clerk, to be seen by his procurators; and their lordships, by their Deliverance thereon, dated at Edinburgh, 28 Nov. 1634, the lords remit to the justice the answering of the desire of this supplication. *Sic subscribitur* St. Andrews.

Accordingly my Lord Advocat, at the Justice Ordinance, (*i. e.* by order of court) gave up to Mr. Roger Mowat, one of the Pannel's procurators, two Depositions of Mr. John Dunmure, one of Mr. Robert Dalgleish, one of the earl of Rothes, one of Mr. Peter Hay; together with four missive Letters, sent by Mr. William Haig to the Pannel, to be reproduced Friday next, at which time they were accordingly reproduced.

Thereafter upon the said Decemb. 5, the Dittay and infamous Libel was read, as specified in the Dittay.

It is first alledged by Mr. Robert Macgill, as the Pannel's procurator, under protestation for himself and the rest of his brethren, with an apology that he nor they allows not the least sort of inordinate speech against his majesty, but only to free the innocent, as they who are commanded by the Lords of Session, and take instruments upon the first Article of the Acts imprinted in our sovereign's first parliament, anent the surveying of the laws; does alledge the Dittay cannot be inferred against the Pannel, upon the first act specially and at length set down (therein:) because it has not been the mind of the legislator there to inflict the pain of death upon such reproaches as are contained in the Dittay, and alledged to be contained in the Supplication or Petition styled by the Dittay 'Calumnious.' For the main cause of making that 20th act, parl. 10, holden in December 1585, (our dread sovereign, and his honour, being ever proposed) was not only to ratify the grace given and extended to these noblemen, who a little before became in at Stirling, as may be seen by the particular acts of parliament unprinted anent the restoring of those noblemen, with their followers; but much more to strengthen the nobility (as reason was, and the time required) against captain James Stewart, who then had fled, and was the cause of their former banishment; and feared by them, that he might wrong them again, if he had regained his majesty's ear, because that they came in such a manner. And to strengthen also the nobility against any other, who should take in hand the like, as to come in betwixt the tree and the rind; I mean, betwixt his most sacred majesty and his favour *et suos commitates*, for his nobles are so called, and has their names as they who should be ever accompanying his most sacred person. For the Deeds done 'contra aliquem et comi-'tatu vindicantur ut crimen læsæ majestatis, 'Leg. quisquis, Cod. ad legem Juliam majestatis,' by the time.

The strain of the Act carries also this, to wit, Reproaches of his majesty's Estate or Government, or depraving his laws and acts of parliament, or misconstruing his proceedings: but answering to the question, *In quem finem* should these Reproaches have been written, whereby any misliking may be moved betwixt his majesty and his nobility and loving subjects? Where the word 'his nobility' is very emphatick, and the two last words expounds the samen, being exegetick of the former by a gracious praise, testifying by the word 'loving' the forgetting of the former slip, which had been more by misreport than in verity. Compare also this Act with that which was made during the said captain James his grandeur, a little more than a year preceding, parl. 8, cap. 134, Jac. 6, in the which, as it were *consulto consilio*, the noblemen are omitted *ibi*; to the reproach of his majesty's council and

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proceedings, to their great prejudice who were then put away by his (*i. e.* captain James's, counsel, and holden away by his detractions, until they peartly enough (yet encouraged by their own innocency) came in at Stirling: and incontinent did procure that tenth parliament to be holden, in which was made the said tenth act, no more days intervening betwixt their return and its sitting but the days of citation. And is yet more clear by the words, 'deprave 'his laws and Acts of Parliament: meaning act 25 Jac. 2, parl. 6, against the Apprehenders of his majesty's person, as the act bears; the literal sense whereof might infer a Dittay against the committers, if it were not to deprave the laws, if the mind of the legislator were not looked unto. So that this tenth act cannot well be understood as convenient to infer the Dittay, especially seeing he was not the author or penner of that alledged infamous Libel; but Mr. William Haig, who has clearly taken it upon him by his own letter, as was constant (*i. e.* evident) to the Lords of the Committee, and is acknowledged in the Dittay by these words, 'At the least guilty of the 'hearing:' wherein the Pannel's part was not much worse than others who heard it, and yet not revealed the same. As also although that Remonstrance by way of supplication be now alledged to be scandalous, but then to be preferred to his sacred majesty, and was offered to be given; *ergo* the Dittay cannot be inferred in this act.

And as to the second Act libelled expressly, Jac. 6, parl. 14, cap. 209, containing divers Acts anent Leasing-makers; we repeat the forsaid Protestation, and say, If all sorts of inordinat Speeches (whilk let it be spoken with all humility and dutiful reverence, as not allowing any, but to shew the Pannel's innocency) against his majesty our dread sovereign and his government, even those which by interpretation or misconstruction may be inferred upon a man's speech (*i. e.* contrary to) his mind; and not only the author of the same, but also the hearers, not revealers, and not apprehenders, are understood to be punished with death in our law, in the addition of that act, and so are all to be comprehended therein: then we should make our law to commit an absurdity, which no municipal law ought to do; but rather an interpretation should be taken out of the common law and reason. Gailus ad Longum, lib. 2. 'Observatione trigesima tertia, quo modo statu-'torum interpretatio facienda sit.' The absurdity is, that there should be equality of pains, and so equality of crimes, committed in Speeches, in most submissive manner be it said, against his most sacred majesty, not only by the authors, but also by the concealers and not apprehenders, whatever the scandalous speech be. But he that hears and not reveals a higher speech, shall be punished as he who hears treason. The connection is cleared by this, 'Quod delictum majus et parvo dignosci-'tur ex pœna qualificata.' Tractatu incerti Authoris de Læsæ Majestatis Crimine, quæst. 11 num. 5. Et passim in Jure, ut comprobat Baldus in Capitulo primo, prima Nota ad Titulum 38 lib. 2. Feudorum de Vassallo qui contra constitutionem Lotharii. And the opinion of the civilians is exploded long since, 'ut sontica dignum horribili flagello.' For there are sundry sorts of inordinat Speeches and Contumelies against the prince and the estate; as these that are spoken against his majesty's person and blood outrageously, or in a conspiracy against the country, understood in some manner by Clarus, paragrapho Læsæ Majestatis, num. 1, in fine. And here it is only that the lawyers find the hearers and not revealers, and not apprehenders, to be punished by death: Clarus, paragrapho ultimo, quæst. 87 num. 2, Punctus in fine. And yet he requires 'ut adsit Tractatus.' Such were the Speeches uttered betwixt Catiline and his complices; 'Et non nuda verba ab authoris 'animo detorta.' In which case it is well said, 'Quod crimen majestatis a judicibus non 'in occasionem, ab principalis majestatis vene-'rationem habendum sit,' Leg. 7, § 2, F. ad Legem Juliam Majestatis. The second sort are where 'directis verbis animo injuriandi 'viciis improperat,' to a prince for lack of virtue. Where the lawyers remit the author, 'Lege unica cod. si quis imperatori maledixe-'rit; (it not being yet condescended fully amongst them, what is meaned by the word *Remittendum*). But anent the hearers, nor revealers, and not apprehenders, not a mum, but on the contrary, 'quod nulla pœna teneantur.' As 'in omni delicto nisi casibus dictis,' Clarus says, num. 3. 'Versiculo quod tamen, dicta 'quæstione 87.' Far less can the hearers, not revealers, and not apprehenders of the authors of the third sort of speeches be concluded under death with the first; and that third sort, in all humility I say, where vice and lack of virtue is not 'improperat directis verbis, (tantum abest 'ut sit animus injuriandi).' But as a flower or flourishing weed may afford both honey and venom, so Speeches written to ane good end, by ane misconstructing illation may be interpret in ane evil sense; as the informer of the Dittay makes the alledged Supplication to be a contumelious and infamous Libel: which cannot be done, in all humility and submission I say it, to infer the Dittay against this Pannel, upon the said addition in the act 205, as hearer, not revealer, not apprehender, without a manifest absurdity against the law and reason, as said is. For even in speech, 'quamvis dixit 'dominum suum esse dominum hominum et 'bestiarum, quod non debet author puniri;' concluded remissive. 'Cæsar Orcellus in ad-'vocatione ad decisionem Mathei de afflictis '265, num. 68, 69, et idem advocatione in de-'cisionem 307, num. 15. Quod verba sunt 'civiliter capienda et ad bonum moderanda; 'itidem in dicto tractatu incerti authoris dici-'tur distinguendum inter verba narrativa et 'simpliciter enunciata quasi prætereundo, ac 'alia verba dispositiva seu positiones affirma-

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'tas, ut ex iliis non liceat argumentum sumere, 'ex his vero liceat.' Quæst. 6, num. 13, ibi nunc videndum. But of the Particulars, and even of this General, more falls to be said hereafter.

Only against Delators of Speeches, called, 'Frumentarii et Otacustai,' let it be remembered to the justice, that some good emperor 'quos infinitis illustrissimus et sacratissimus 'imperator noster præcurrit parasangis,' used these folks to know what the people thought of them, and how to amend any slips, if any were. Capitolinus in Antonino Philosopho says, 'Erat famæ suæ curiosissimus, requirens 'ut verum quisque de se diceret, emendans 'quæ bene reprehensa viderentur, et passus se 'impune cavillando perstringi, dicitur civiliter 'se egisse.' Xiphilin reports the same of Titus; 'Imo Tiberius deprecatus est apud sena-'tum nimis præcipites verborum pœnas.' Yea, to this tendit king James 5, of worthy memory, his disguising himself for such another inquiry; as also Goran, one of our dread sovereign's most worthy progenitors, is commended for the same by Hector Boyes. In respect whereof, the Dittay is not relevantly inferred upon the two acts of parliament libelled.

It is farder alledged by Mr. *Roger Mowat* for the Pannel, That the saids two acts of parliament mentioned in the Dittay, and whereupon the samen is founded, can be no ground in law for this criminal pursuit; in respect the saids two acts, and many others of that kind, but especially the last of the saids two acts, and the additions subjoined thereto, have never been in observance, custom, or practice heretofore, against any alledged contraveeners thereof: and therefore cannot now receive a beginning against this pannel, being a nobleman known by the hail course of his bygone life to have been ane strict obsequious keeper and observer of his sacred majesty and his most noble progenitors their acts and statutes; in such sort, that it can never be verified that ever the pannel has been so much as once denounced rebel, and put to his majesty's horn, (outlawry) for any action or cause, civil or criminal, whatsomever; and so is not presumed to have contravened any of the said two acts, albeit the same had been in custom and practice, as they have not. And that the said two acts, specially the said addition of the last act, are fallen in desuetude, and never heretofore practised, is clear and evident, because the contrary cannot be showen: And it has been received as a most laudable and warrantable custom amongst wise and judicious politiques, that laws in desuetude and out of custom are not to be introduced at an instant, without some new intimation thereof, when necessity is found for re-establishing of the said laws; but specially such laws and acts, as carry with them the pain of death, forfaulture, or such-like: Likeas some strict acts of parliament of this kind, containing the like or more grievous pains, being ratified by subsequent and posterior acts, the said posterior acts have ordained intimation to be made to the leidges of the said former acts, pains, and severity thereof, before the said pains should be inflicted upon the contraveener. And it is clear, that not only the said two acts mentioned in the Dittay are not of custom, and have not been practised, but many more, containing some less and some greater pains, in the most part of all preceding parliaments: For which I will only adduce some few, to verify and instance this part of my alleadgance, (allegation). And first I alledge the 105th Act of the 7th parliament of king James 5, of worthy memory, intituled, 'Pains of them committing Fraud in Aliena-'tion;' which bears, about the end of the said act, That the person, seller or giver shall be declared infamous, and shall be punished in his person and goods at the king's will. And it cannot be denied, but that this act hath been many times contravened, by many of good sort, in points of double Alienations, and yet was never heretofore practised against the saids contraveeners.

There is another act of queen Mary's, of happy memory, par. 5, c. 16, made against them that swears abominable Oaths; whilk act is ratified by king James 6, of ever blessed memory, par. 7, c. 103, both the said acts bearing in express words, 'That for the fourth fault, 'prelats, earls, or lords contraveening, shall be 'banished or put in ward year and day, at the 'will of the prince.' These acts have been contraveened, yet no pursuit for the saids Pains has followed thereupon.

The 2nd act of the 16th parliament of most blessed king James, bears, 'That the slaying of 'salmond, smolts, kipper, or black fish, shall 'be a crime of theft in time coming, and to be 'punished as theft in every quality.' Which act, if it shall receive force, and be put in practice upon a landed man, (as questionless it may) it shall import him, or any landed man contraveener thereof, no less than tinsel (loss) and forfaultry of life and goods; because by the 50th act of the said 11th parliament, landed men convict of theft or receipt thereof, commits treason: *ergo*, landed men, slayers of salmond, smolts, &c. in forbidden time, commits theft, and consequently treason; which (as the act bears) is declared to be tinsel and forfaulture of life, lands, and goods.

These and many other of this kind, every where to be found amongst the said acts, does evince, that with reason the said acts libelled in the Dittay, and others of that kind, which never have been practised of before, cannot be received against the leidges (subjects) without a preceding intimation; whereby good and loyal subjects may be *in mala fide*, in case they be found after the said intimation to have contravened. And so the said two acts, specially the said addition mentioned in the last act, cannot be found nor sustained as warrantable grounds in law against this Pannel; being a nobleman, not only known to be ane observer and not breaker of his sacred majesty his noble progenitors their laws, acts, and statutes, to draw

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upon him for alledged hearing, concealing, and not revealing and not apprehending of the authors of the alledged infamous supplication, the pains contained in the said acts and in the said Dittay, which is the tinsel and loss of his life.

It is alledged farther by Mr. *Alexander Pearson* for the pannel, in fortification of the Exception propounded, 'Quod leges per desuetudinem tacito consensu censentur abrogatæ, expressa lege 32. § 1. F. de. Ita ut secundum ipsas non firmatas judicare non liceat, firmantur, autem leges cum moribus utentium approbantur, canone in istis tertio distinctione 4ta. Et si hoc obtinet in civilibus, quanto magis in criminalibus, ubi tanto cautius agendum est, quanto magis periculum vertitur? Unde illud papæ qui decrevit ut generaliter clerici in quinquagesim. a carnibus et deliciis jejunent, quia moribus utentium approbatum non est, aliter agentes transgressionis reos, non arguit canone supra citato.' And therefore the acts of parliament whereupon the propositions of the Dittay are founded, none of them, at the least the last thereof, never having been in observance at no time since the making thereof, now by the space of forty years, even since the last act; the acts foresaid, specially the last, cannot sustain the Dittay, nor infer the pains therein mentioned.

It's answered by my *Lord Advocat*, That all the Alledgances ought to be repelled, in respect of the acts of parliament, whereupon the Dittay is founded; and that there runs no prescription against laws, and specially against laws prohibitive of crimes, which are also prohibit and punished by the common law; of the nature whereof are these two acts whereupon the Dittay is founded. And the Alledgance, 'Quod leges 'tacito consensu abrogantur,' is only 'per contrariam consuetudinem idque in contradicto 'judicio,' which is that which the law calls 'tacito consensu;' and all the arguments adduced in the contrary, are 'ab incommodo quod non 'solvit.' And the indulgence of the prince in the overseeing the punishment of crimes in bygone time, cannot be adduced to warrant a crime when it is pursued; and specially when the crime is of the nature of rebellion against the prince, in his person, estate and government. And albeit this be a clear and sound answer, and that no more is necessar; yet it is constant and notourly known, that these laws has been put in execution this 34 years bygone; as namely, against Francis Tennant, in the year of God 1600, and against Mr. Thomas Rosse *in anno* 1618, and lately against Mr. George Nicol his infamous Libel.

It is duplyed (said again) for the Pannel by Mr. *Alexander Pearson*, That where it is alledged by my Lord Advocat, that Desuetude cannot be obtruded against acts of parliament, which has warrant from the common law; it is answered, that the acts anent crimes by Desuetude rather loses their vigour than acts of civil business, because in acts criminal there is greater hazard, as loss of men's honour and life. As to any precedent in civil law giving warrant to the addition of the last act of parliament, it cannot be alledged, 'Quia non est lex statuens pœnam 'mortis,' contra hearers, concealers, and not revealers, which is the addition of the act. And where it is alledged by my Lord Advocat, that Desuetude of laws is only 'per contrariam consuetudinem in judicio contradicto;' it is answered, That Desuetude of laws is clearly expounded otherwise by the citations above rehearsed: so that 'leges quæ nunquam in usum 'forensium productæ sunt et quæ moribus utentium approbantur,' are become in Desuetude, 'licet non sit consuetudo in foro contradicto in 'contrarium.'

It is further duplyed by Mr. *Robert Macgill:* Not to dive any further into the acts of parliament, but respecting the distinction already said, I alledge, that the addition of the act 205, cannot be thought to be 'in viridi observantia' in this our case; because if so ought to be, it should much more have been practised against the havers, hearers, readers and seers of any using Mr. George Buchanan's Books: But this hath never been used yet, act 134, parliament 8th, albeit there has been many. But so it is, that this has not been used in its own case; *ergo* it ought not to be begun to be put in use against this pannel, who let be his other virtues, has been ever a patron of dutiful obedience to his and our most gracious and sacred sovereign. The connection is clear, because that Book, as sundry reports it who has read it out of the country, 'ipsum regiminis cardinem nititur con-'vellere, et impingit in regiam prerogativam.' Further, if all sort of speeches (let me say it in all due reverence) against his majesty and government, come under the acts ratified here, with the addition against havers, hearers, revealers, and not apprehenders, and were 'in 'viridi observantia,' who should not be brought before this judicatory, and under the compass of the said act? for as we live all in one family, every man in his own, and talk thereof, so live we also in a commonwealth, whereof to talk sometimes bitterly (which is not to be allowed) though foolish: And so the most part thinks that they have their own interest, and will force as it were the wiser, nill they will they, to hear them. And anent that which my lord advocat says, 'quod non valeat argumentum ab in-'commodo,' it ought to be repelled in respect of the place alledged out of Gailus, Libro secundo, Observatione 33. where he concludes, that the argument is good against the municipal law to make it to be ruled according to the civil law, and to common reason. And farther, that our own municipal laws ought to receive limitation according to reason. I repeat the foresaid 25 Act Jac. 2. Item by the said Act 134. Par. 8. Jac. 6. it is made capital to meddle in his highness's affairs and estate, either present, bygone, or to come; saying further, That none of his subjects of whatsoever function, degree, or quality, presume in time coming to meddle as said is, without any exception: then shall a nobleman, who is born as it were by our laws to meddle in such affairs

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as concern the commonwealth and country, not have so much liberty as to petition his majesty most humbly in matters of government, for the weal of all, as may seem to him, while his reasonings be discussed, no not in parliament; yea, even *extra parliamentum*, his sacred majesty was petitioned after his majesty's revocation, howsoever it was conceived, and in whatsoever terms: So that punishment of Speeches anent Government, and the Laws, must receive their right sense. Wherefore 'till they be surveyed (which has been most royally begun long since by his most sacred majesty, and now enacted in his first parliament) the rigour of the said addition ought not to be practised upon this pannel; 'Pars enim præcipua legis est voluntas, et 'verborum dicitur prærogativa, lege non du-'bium.' Codice de Legibus. And Menochius passim de arbitrariis Judiciis, gives exception from municipal laws, according to equity and reason.

It is farther duplyed by Mr. *Roger Mowat*, to that part of my Lord Advocat's Answer anent the instances and practices alledged for proving of the Custom and Consuetude of the said two acts of parliament, to wit, Francis Tennant, Mr. Thomas Ross, and Mr. George Nicols; That the said practices or instances cannot be respected, because they are not produced: and if they were produced (as they are not) it should be clearly shown, that they met not in (did not suit) this case, either because they are not founded upon the said acts of parliament, and specially upon the said addition contained in the said last act, or else because the crimes are not alike: for the first crime of Tennant's was ane Cokiland (Libel) bearing and proporting express positive scandals and reproaches, whereof he was condemned to have been the actor and author. And so whether he was pursued and convict upon the acts or upon the common law, his Dittay was most relevant. As for Mr. Thomas Ross, his crime was also a most abominable speech written by himself against the hail nation *directis verbis*, whereof he confessed himself (being upon pannel) to be the penner, former, deviser, and divulger; and copies of his most infamous libel affixed upon public places with his own land: and so cannot be obtruded as a practick or precedent in this case. As for Mr. George Nicol his crime, it needs not to be answered, because he was not pannelled nor convict; and so his process intented against him cannot be adduced as ane practick to rule the like cases thereafter: and the pain inflicted upon him was by warrand of council, and so none of the saids practicks can be respected. In respect whereof, the argument founded upon the desuetude of the said two acts, and the danger that may follow hereafter upon other acts of that kind, &c. which have not heretofore been practised, stands relevant. And it is craved, that the dangers which may ensue to good subjects upon the practice of the acts before alledged, may be adverted unto, and the dangerous sequels prevented.

Secundo, It is alledged for the Pannel by Mr. *Alexander Pearson*, under Protestation forsaid, That the Writing whereupon the subsumption of the Dittay is foundit, is not an infamous libel *quoad accusatum*; neither in the pannel's part in the particulars libelled against him seditious and calumnious; neither can he be presumed to have had any such intention. First, not ane infamous Libel *quoad accusatum*, but an humble supplication of some lords and commissioners of the late parliament, offered to his majesty himself; whereunto the Supplicants were induced in love and tendering of his majesty's honour, and in fear of their offence to his majesty by their voting anent some acts of the late parliament. For removing whereof, and for satisfaction to his majesty, they did humbly beseech his majesty to be graciously pleased to ponder their reasons for dis-assenting from the saids acts; and to consider the Supplicants hearty obsequiousness to his majesty in other matters of the said parliament, wherein they did forbear to represent any thing to the contrary thereof, for testification of their ingenuous affection to his majesty; This doing of the Supplicants is no crime, *sed de natura boni*; and far from any culpable commission, in meddling with things not belonging to them. And it is hard that any supplicants deprecating humbly his majesty's offence, should by so doing incur his majesty's offence, and the crime of capital punishment: specially the supplicants having no private respects, but for the publick, wherein they had interest and special charge; and for conservation of themselves in his majesty's good favour, the loss whereof, or the fear of loss, should be most grievous to any loyal subjects; 'Cujus reipublicæ tantus ubi-'que favor ut proclamant leges quod reipublicæ 'venerandæ causa secundum bonos mores sit, 'etiamsi ad contumeliam alicujus privati perti-'net, quia tamen non ex mente magistratus facit 'ut injuriam faciat, sed ad vindictam majestatis 'publicæ respiciat, actione injuriarum non te-'netur. Leg. 13, F. de injuriis et famosis libellis. '—Est ergo quod accusatum Libellus supplex 'et si libellus supplex postulat juri contraria, 'hujusmodi postulata ab omnibus judicibus re-'futari præcipiunt leges et supplicantem iterum 'super eadem causa non audiendum, L. 3, 5, et '7. Codice de precibus imperatori offerendis. 'Sed non ideo supplicans reus est sceleris, quia 'libellus continet refutanda; nec libellus sup-'plex ideo famosus, cum hæc fuit *ἰσηγορία*.— 'Non Libellus famosus quoad accusatum, quia 'non ad infamiam, sed favoris conciliationem, 'ut supra: Item non clanculum et secreto, 'sed professo et reapse domino regi oblatus. 'Atque ideo nullo modo quoad accusatum de-'tractatorius aut calumniosus, cum detractio 'sit seminatio mali occulte, et calumnia sit ad-'versus absentem; neutram autem committi-'tur cum is cujus interest proponat querelam 'coram eo cujus parte sunt de ea cognoscere; 'de eo cujus interest reipublicæ ejusque salutis 'causa duntaxat.—Nam Libellus famosus quoad 'accusatum, quia non constat directis asser-

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'tionibus in quibus venit verum aut falsum, 'quod omnino requirit libellus famosus.' Leg. unica, Codice de famosis Libellus. 'Sed post-'tulatis in quibus considerandum venit bonum, 'justum, et qui verum et falsum non agnoscunt 'cum non fuit enunciatio.'

Farder, the Pannel cannot be presumed to have had any other intention than the strain and tenor of it, as a supplication does imply, and which is most beseeming thereto; to wit, to the voice of ane humble supplicant. 'Ea sen-'tentia accipienda est semper, quæ rei gerendæ 'aptior est, et in ambiguis orationibus maxime 'sententia spectanda est ejus, qui eas protulit.' De Regulis Juris. And it is always disagreeing to a humble Supplicant to tax or calumniate, and therefore it cannot be so expounded, but should be interpreted the best way the words may admit; 'Quia de jure in dubiis et obscuris, quod minimum et benignius est sequimur.' Leg. 9. F. ibidem.

Item. The Writing aforesaid, as in form of Supplication, was used also as a Supplication, and so delivered by the Pannel to the earl of Rothes, to be presented to his majesty, as affirmed by the Dittay itself, and indeed offered to his majesty: which, howsoever his majesty did not accept of then, and take the samen to his consideration; yet the supplicants did think that the very presentation thereof did seem to assure the nature of the writing to be a Supplication: and scarcely even could the wisest conceive so of the pannel's having the writing, as it is now interpret against his majesty; but think that his majesty had past all offence thereof, as the law speaks of action of injury, whereof the present accusation is a kind. Leg. 2. §. 1. F. de injuria, 'Verba legis injuria-'rum, actio ex bono et æquo est et dissimula-'tione abolitur, si quis enim injuriam dereli-'querit, hoc est statim passus ad animum suum 'non revocaverit, postea ex pœnitentia remis-'sam injuriam non potuit recolere.' By the which it appears, that the Pannel had no such mind or intention as the Dittay would rub (fix) upon him in all the progress of the matter libelled against him. And I suppose that none will think, that by the presentation of the Supplication at the first to his majesty by the Supplicants, that they then by so doing were culpable of a capital crime, if the same had been immediately thereafter destroyed, and never more seen nor heard. And if they then were not culpable, shall any supervenient act make them culpable, or more culpable? 'minimè 'nunquam enim crescit ex post facto præteriti 'delicti estimatio,' Leg. 130, § 1. de Regulus Jur. 'Multo minus ex post facto oritur no-'vum delictum, quod ab initio non fuit quoad 'accusatum, aut ubi offensa si qua fuit dissi-'mulatione abolita sit.'

It is eiked (added) by Mr. *Robert Macgill,* If it had been leisome (lawful) to this Pannel, as a born counsellor, in that great council and parliament, and other noblemen, to propound to his most sacred majesty the things contained in that supplication alledged to be scandalous; which are not affirmations, but as it may seem, grievances, remonstrances, and expedients; then it was also leisome to the Pannel, and others, to represent even out of parliament to his most sacred majesty, our dread sovereign, what they could have propounded then, but did abstain (therefrom) for the reverence they carried to his majesty: specially when they did it in most submissive manner, as the hail strain thereof beats, and out of a most loyal affection. 'Et prius est verum ergo et posterius.' The verity of the minor is plainly embraced by Bodin, 'qui est acerrimus Regiæ majestatis 'propugnator,' cap. 1, lib. 3, 'ubi de senatu 'et quod senatori de republica loquendum sit, 'præsertim de omnibus fere capitibus in sup-'plicatione hac contentis.' As to the connection, it depends first on the duty of a good counsellor here, to whom, as God has given to be endowed with reason, so our most sacred sovereign and his progenitors have given to be a wise man and counsellor even from his birth. That he may learn to exercise his reason from his birth, for the benefit of the commonweal; which is the first place of honour, as Cicero says, and is that which we call nobility; shall he not have as it were a magazine of reasons, as may seem to him good, and even communicate them with others, for trying of the same? specially at this time of surveying of the laws, that according to the time, and other circumstances, he may furnish to his majesty his best counsel in every thing that he thinks may concern the weal of the country wherein he lives, as by duty even from his birth he is bound: like to the labourer, to whom in a rainy day, 'quæ 'mox cœlo properanda sereno maturare datur.'

Next, it depends upon the good mind to the Commonweal, whereof his most sacred majesty is the head, 'ut non teneatur injuriarum qui 'quicquam reipub. causa faciat.' Neither is that thought to be an injury, Lege Injuriarum, 13. §. 1. Lege quod Reip. F. de Injuriis juncti Leg. neminem 9 Cod. ex quibus causis irrogetur infamia, et Lege ex varia quarta de Delatoribus, lib. 2. Cod.

Thirdly, It does depend upon the conception of the words, which is by way of most humble Supplication. 'Et verba propter adjunctam 'mutant naturam suam, Carvetta ad decisiones: 'afflicti neque tam refert qualia sunt quæ intra 'nosmet composuimus quam quomodo efferan-'tur.' Ac Quintilianus, lib. 2. 'Et ut in aliis 'rebus ita in sermone, forma dat essentiam ser-'moni;' for even good words may be used in an evil sense, *ut heus bone vir!* But this is worthy of all praise: 'Et si non dederis Cæsar, 'permitte rogari, offenduut nunquam thura 'precesque Deum,' kings are gods on earth; and albeit by Bodin *extrema provocatio* be counted inter *jura majestatis,* that from a king himself there is no appellation (appeal); yet he commends the sort of appellation *a Philippo ad Philippum,* and alledges it to be the opinion of Baldus, ad Legem primam et ultimam Cod. de Relationibus, et Leg. 1. §. 1. F. de Appellationibus, viz. to his majesty.

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For seeing the alledged scandalous Petition was offered to his most sacred majesty to be read, but not received nor read, nor after due consideration condemned by his majesty; it was not thought so dangerous (let me speak it with reverence) as to come under the compass of the acts of parliament, and so as it ought not to have been divulged: I mean, in that quiet manner, as it might not be imparted to Mr. John Dunmure, 'sub sigillo taciturnitatis,' and not to have been copied. And farder, the Pannel ought to be excused and assoilzied (absolved) from the Dittay, 'si delictum dici de-'beat, quod cum loquimur in delictis in quibus 'dolus est de substantia delicti, tum credulitas 'et sive justa sive injusta sit causa, excuset, nam 'videtur cessare animus delinquendi.' Clarus, § final. Quæst. 60, num. 22. 'Et in delictis vo-'luntas non finis attenditur.' Gailus lib. 2. Obser. 99. num. 6. 'At hic nullus exitus nisi 'bonus, idem observatione undecima, quod in 'delictis principium non finis attenditur,' num. 18. 'Ubi de homicidio perpetratur et consi-'lium convitia tenditur.' Lege sinon, quinta Cod. de Injuriis, 'et causatur hæc actio ex af-'fectu inferentis,' Pharm. Quæst. 105. Inspect. 3. num. 3. ex Lege illud tertia, §. 2. Leg. non solum 2, in princip. si quis servum 26, de Injuriis ubi Pharmacius, 'Quod lata culpa his dolo 'æquiparetur et locutis multa de præsumptione 'doli in utramque partem, et de juramento pur-'gationis subdit.' Num. 118, 'dicta inspec-'tione quod verba debent impropriari ad fu-'giendum delictum et malum animum, præser-'tim cum in publico dicta sunt.' Which we say, when it was not concealed, but offered to be given to his most sacred majesty; neither is it presumed that any man has a mind to defame his neighbour. Pharm. dicta Inspect. 2. num. 118, et sequent. And were he not to be thought more than mad, who would draw up, instead of a Supplication, a Libel full of detractions against his sacred sovereign lord; or who would keep the same beside him, let be to offer to give it to his dread sovereign? And in the crime of Lese Majesty, 'Dolus malus est de 'substantia criminis;' it being ever said in the 'Digestis, Cujus opera dolo malo quid factum 'sit id rempublicam.' What shall it not be *de substantia delicti*, in this alledged crime of detracting, not so evil as is alledged in the Dittay? But as the same agrees with a remonstrative supplication (let me say it with reverence) wrong glossed, as it may concern the Pannel, (where he had so many probable causes inducing him thereto) 'Quæ qualitates et circum-'stantiæ conjecturæ, cum nulla delinquendi 'consuetudine probatæ, relevant contra dolum 'præsumptum etiam propter prohibitionem.' Carerius, fol. 104, 105. viz. That these things might have been propounded in parliament; That he was a counsellor of estate; That other noblemen thought then also (as) well of it as he; That it was for the weal (at least so apprehended by them) of the country, in this time of surveying the laws; That it was offered to be given to his majesty, and that under the form of a most humble supplication: That other hard supplications concerning the estate had been received graciously by his majesty; That it was not then taken notice of, nor upon consideration condemned. And it might have been, that if any here had perchance lighted on it, they would have done worse with it than the Pannel. For, as Quintilian says, 'Consilium 'et ratio quædam acti, petita et plura perpen-'dens, ac comparens latentibus rebus et dubeis 'adhibenda.' Now no right nor virtue in itself can be seen but *quasi facies;* as Plato says: yea, verity, equity, and utility, are lain hid in the draw-well of Democritus: 'Et ut quisque 'altissima mente est, ita ex altissimo Democri-'ti puteo quasi submersas veritatem, æquita-'tem, et utilitatem, nititur haurire.' Yet so is the reason of man obfuscat (darkened) since his Fall, that he cannot penetrate to that deep, for the darkness; which by disceptation of contrary reasons, like two flint-stones stricken upon other, some sparkles of light flee out, for letting see to draw forth these virtues. Wherein consider also the Pannel's carriage and his life by-past; and if any thing tending to sedition was ever heard of him, or even what effect has followed. 'Qualitas enim facti ex persona fa-'cientis præsumitur,' Glossa finali Canone non omnis.' 5. quest. 5, et dicta Lege septima, § 1. F. Ad Legem Julii Majestatis. 'Ubi ait mo-'destinus, nam et persona spectanda est, an 'facere potuerit, an ante quid fecerit, et an co-'gitaverit justa, et jam causa excusat a sedi-'tione quæ jam orupit.' Boerius Tractatu de seditiosis præmisso 4, num. 2. Ubi utitur exemplo Moisis et Israelitarum ad Aquos Meriba. And shall the Pannel, who had so many reasons for him, be thought punishable as one seditious in that mean matter of divulging as said is, of a remonstrative supplication? whereof but by illation and misconstructing *(salva pace dixerim)* it is gathered, far from the Pannel's mind, that sedition might have been moved. No, no, that man is only styled seditious, who, by direct speeches, draws the people in factions, and going madly before one of them, cries out the word *(vivat)* 'scilicet hæc aut illa factio.' Borrjus dicto Tractatu Præmisso 2. num. 2. Et Carerius fol. 10, 31. pag. 2. num. 3, in fin. ubi etiam dicunt, 'Quod in iis quoque qui jam se-'ditionem excitarunt puniendis requiritur, et 'studiose rumorem et tumultum conciliarent 'vociferatione.' Which things, seeing they are so far from the nature of the Pannel, and from his doings, his intention and mind ought to be justified, and consequently he ought to be assoilzied from the Dittay produced.

December 6, 1634.

It is alledged by Mr. *John Nisbet* for the Pannel, That the dittay is no ways relevant, because nothing is libelled to infer a seditious and sinistrous intention of the pannel, in contriving, concealing, or imparting of the piece challenged; neither is it libelled, that the pannel knowing the alledged Libel to be seditious and infamous, concealed or divulged the

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same; but to the contrair, it is libelled, That the Pannel, immediately after the receipt thereof, delivered it to my lord Rothes to be presented to his majesty, which clears the candour of his intention, and the opinion he had of the nature of the piece, and of the use he thought might be made of it to propitiat his majesty, and not to traduce his sacred person or government to his subjects. And therefore, albeit he had concealed it, and divulged it, he cannot be obnoxious in the pains of the acts of parliament, which are only against seditious Contrivers of slanderous Writings, and malicious Concealers of Writings, nottourly and to their knowledge seditious, expressly compiled by incentives and firebrands of sedition, and exposed to the view of the subjects for that effect. For the words of the acts of parliament (To the 'reproach of his majesty's person, estate, and 'government, steering up Sedition, tending to 'steer up the hearts of the subjects to hatred)' implieth intention. And the civil and canon law requireth 'dolum generale in omni actione 'injuriarum tanquam substantiale requisitum.' Gailus lib. 2. Observatione 99. And expressly both in the compiling and divulging of seditious and infamous libels, Leg. Lex Cornelia, § 1. F. de Iujuriis, 'Cum dolus non adest, nisi dolo 'malo quis fecerit (viz.) Librum ad infamiam 'alicujus pertinentem scripserit, composuerit, 'vel ediderit.' Leg. illud § sane eodem titulo, 'Impubes et furiosus non possunt facere injuriam, quia neuter est doli capax; nam hi solent pati injuriam, non facere: cum enim injuria ex effectu facientis non consistit, consequens erit dicere, hos sive pulsant, sive convitium dicunt injuriam fecisse non videri.' Leg. 34. F. de Obligationibus et Actionibus, injuria ex effectu sit, Institutionibus de Injuriis, §. 1. Leg. 5. §. ultima, F. ad Legem Aquilian; Ubi dicit Julianus, 'Actionem injuriarum non 'competere, quia non faciendæ injuriæ causam 'fecerit, sed monendæ, et injuriæ non factum 'queritur, sed causa faciendæ expressa.' Leg. 39; de Furtis decreti secunda parte, Causa 5. Quest. 1. Canone 4. 'Verba sunt (si vim 'chartarum quæ famosæ sunt) scilicet dolose 'manifestaverit, si ad se quasi authorem hujus-'modi delicti capitali sententia subjugandum.' Turre-Cremata et alii doctores in verbo Dolose. Baldus Consil. 230. in fin. lib. 3. Consil. 443. in fin. lib. 5. 'Dolum in injuria re-'quirit, sine quo illata dici non potest.' Idem consil. 277. Num. 2. volumine 5. 'Respondet 'totam culpam quæ alicui dolo æqui paratur 'non sufficere continet.' Cravetta, consil. 419. num. 1. Idem concilio, num. 36. 'Ait agens 'actione injuriarum debet allegari dolum et 'omnia jura clamitant, injuriam non fieri sine 'animo injuriandi.' Leg. si non convitii, Codice de Injuriis, verba sunt, 'si non convitii 'concilio probare potes, te aliquid injuriosum 'dixisse, fides veri a calumnia defenderit.' Leg. 5. § 1. F. de Furtis; 'Maleficia voluntas et 'propositam delinquentis distinguit.' Leg. 14. F. ad Legem. Corneliam de Sicariis;' in male-'ficiis voluntas spectatur non exi us.' Leg. unica Codicis, 'si quis imperatori maledixerit, 'ubi petulans et improbum mendacium, quo 'imperialia nomina lacessuntur, non statim injuria censetur, et eo nomine punitur; sed 'distinguitur an ex levitate processerit et sic 'contemnitur, an ex insania, et miseratione 'digna censetur, an ex injuria et sic remittenda 'declaretur. Sic injuria confunditur et reci-'procatur cum animo injuriante.' Omnes Doctores, Menochius consil. 197. lib. 12. per totum. The cause debated by the doctor is coincident with the present, but not so pregnant in favour. 'Arguebatur senator scripsisse injuriose de principe in hunc sensum, quod cum 'senatorum numerus utili sanctione coarctatus 'fuisset, postea esset ampliatus importunitate 'et ambitione postulantium, mentem principis, 'impellente; et cum rursus nova Constitutione 'consultum fuisset, et numerus senatorum imminutus, denique, aut demum auctus fuit, et 'in immensum crevit magna cum supremi or-'dinis jactura et inutili intensa, totiusque status 'incommodo addiderat, hospitationibus tota 'die patriam maxime gravari et forenses nimis 'remanere gravatos.'

Menochius consultus num injuriose scripserit, respondet, 'Qui injuriarum et male dicentiæ accusationem instituit; duo debet probari, alterum verba esse injuriosa, alterum 'prolate esse animo injuriandi. Et hæc methodo ostendit verba non esse injuriosa, quia 'laudem ducis continent cum ejus constitutio 'dicatur optima, et potius bono zelo et pro 'celsitudinis utilitate prolata videntur. Deinde 'arguit senatorem pœnam non incidisse, quia 'verba injuriosa etiam de sua natura puniuntur, 'tantum cum animo injuriandi proferuntur, et 'præsumptio juris stat. pro eo qui protulerit 'aliqua verba quæ videntur injuriosa, ut dicatur ea dixisse absque animo injuriandi. Ergo, 'satis superque fundato est intentio senatoris 'quod scripserit prædicto, non modo non animo 'officiendi injuria serenissimum principem, sed 'potius laudandi et similia verba a subdito bene 'merito de principe præsumitur prolata potius 'bono zelo. Secundo, quia quando verba sunt 'dubia, standum est declarationi ejus qui ea 'dixit: et quando sunt dubio, similiter declaratio ab aliis verbis præcedentibus vel subsequentibus, vel ab utrisque. Et in casu dicit 'senatorem principem laudasse, cum dixerit 'fuisse in arbitrio suæ celsitudinis, num senatorum numerum augeret. Addit, quod injuria 'requirit dolum, sine quo illata dici nequit, et 'in casu constat omnem dolum abfuisse, quia 'dolus non præsumitur commissus contra personam benemeritam; non præsumitur in homine probo, non præsumitur in eo qui pro 'beneficio patriæ aliqua verba protulit, que 'principis personam videntur afficere; non 'præsumitur in subdito, quia nihil nunquam 'contra principem molitus est. Quæ præsumptio multo magis comprobatur, quando 'verba voce vel scriptis directa sunt ad principem; et si hæc in homine privato vera sunt, 'quanto magis in senatore gravi et illustri, qui 'alioqui ex his verbis consciisset sibi contingere

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'grave detrimentum? Cravetta in simili casu 'dicit Judæos Christi inimicos, in dubio non 'præsumitur, aliquid dixisse ad injuriam Christi, quanto minus debet presumi crimen injuriæ in subdito, contra suum dominum?' Idem ibid, num. 26. 'Conjunctus non presumitur injuria, conjunctum animo injuriandi intra septimum gradum.' Glossa in Leg. vestes, F. de Injuriis. 'Multo minus præsumendum est 'subditum velle injuriare dominum suum:' et Consil. 6. 'Non est simile quod vir facultatibus plenus adeo stultus fuerit, ut prodigus 'esset personæ et æris, et quod dolus non solet 'committi contra tantum principem, sine causa.' Idecius, Consil. 256. 'Absolvit quendam Paridem seditionis insimulatum, quum nullo 'animo injuriandi dixerit alto voce quod princeps quidam male faciebat, et facere non poterat, quia edita dicendum poterit bono zelo 'moveri, et in dubio præsumendum est ut delictum excludatur, et quia præsumptio delicti removetur propter bonam famam et opinionem Paridis.' By all which presumptions, more pregnantly concurring than in any case extant in law, the pannel's innocency is cleared abundantly. And nothing farder can be exacted but his declaration by oath, which he offers most willingly; and by the universal and uncontroverted practic of all nations, seconded with like presumptions, importeth absolution: 'Quia probatur animus non injuriandi, juramento ejus qui injuriam intulit.' Guido. Consil. 223. num. 2. in fine. Menoch. de presumptionibus, lib. 5. Presump. 40. num. 32. Idecius, Consil. 256. 'Qua intentione reus verba dixerit ab ejus animo pendet, et ideo ejus declaratione cum juramento standum est, quia dependentibus ab animo status juramento ejus 'de cujus animo dubitatur.' Leg. 1. Codic. de Sicariis et aliis Legibus ab eo citatis. Godophredus ad Legem si non convitii, Codice de Injuriis, 'Reo purgationis juramentum causa 'cognita defertur habita ratione persone, qui 'injuriosus natura sua verbis usa est,' Gailus, lib. 2. Observ. 106. 'Notum est injuriam absque animo non committi, et innocentiam cum 'animo constat juramento probari posse, et 'ita in camera judicatum refert.' And therefore in respect of the premisses, the Dittay is no ways relevant, both because Dolus is not libelled, and because the Dittay bears that the pannel gave the piece challenged to my lord of Rothes of intention to be presented to his majesty: whereby the innocency of his intention is evidenced, and of his accession in having or divulging the piece aforesaid, since he was so far from thinking the piece injurious to his majesty, in that he had ventured by my lord Rothes's means, not only to acquaint his majesty therewith, but to present it as a fit apology to his majesty; as is acknowledged by the dittay, which we accept in that part.

It is farder alledged for the Pannel, That the hearing, having, and not reporting, is not relevant to infer a concealing after the pannel's knowledge that the king was acquainted therewith, because 'celamus eum qui ignorat,' leg. 1, F. de Actionibus empti et venditi. And the reason expressed in the act of parliament why the reporting is injoined, is, that seditious pieces of that nature may come to his majesty's knowledge. After which time, the pannel was not obliged to importune his majesty with superfluous reports, seeing it is acknowledged by the Dittay, that immediately it was delivered by him to my lord Rothes; and so acquitted himself of all that was incumbent to him in duty anent the point of revealing.

It is likewise alledged for the Pannel, That the points of the alledged Libel quarrelled as outrageous to churchmen, or to noblemen, is not relevant to infer the crime and pain of infamous libelling, because they are not challenged by the parties interested, and of the law: 'Volenti non fit injuria, et injuria dissimulatione aboletur si quis deliquerit, et ad 'animum non revocaverit.' Secondly, There is no act of parliament irrogating capital punishment upon the authors of infamous Writings, reflecting against subjects, but only against his majesty's sacred person, estate and government.

It was thereafter alledged, under Protestation *ut supra*, by Mr. *Roger Mowat* for the Pannel, That the Dittay is not relevant to infer the pain libelled upon, because ane humble supplication in name of a number of his majesty's loyal subjects, for removing of the prejudices which his majesty had or might conceive against them as supplicants, and for conciliating his majesty's gracious favour towards them, is not such ane infamous libel as falls under the compass of the acts of parliament upon which the said Dittay is founded: but the supplication quarrelled, whereupon the pannel is accused *quoad eam*, and the rest of the said noblemen, is an humble supplication in their names, as a number of his majesty's most loyal subjects, to remove his majesty's prejudices, and to conciliat his highness's favour; *ergo* no infamous libel falling within the compass of these acts, *quoad eos*, and the pannel. The major is clear by the definition, nature, and qualities of ane infamous and scandalous libel, (where there must be maligning, detraction, and calumny), and by the definition of an humble and submissive petition and supplication, which differs far from an infamous libel, and altogether heterogeneous. The assumption, viz. that the quarrelled supplication, whereupon the pannel is accused, is an humble petition to remove prejudice, and to conciliat his majesty's gracious favour, is evinced in the said quarrelled supplication itself, in the inscription, in the intention of the supplicant; and lastly, in the humble desire of the supplication, which is the substance, life, and quintessence of all petitions: the intention and end of the supplicants being the essence of the petition, and the harsh or hard expressions of the said quarrelled supplication (being submissive and modest in the inscription and desire thereof, as said is) cannot infer guiltiness against the Pannel, who is not Author nor

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Writer thereof. And also any Petition, formal by a secretary, a lawyer, or a writer, to be given and presented to his sacred majesty, (even though the desire thereof might seem just) being hard and difficile, or containing hask (harsh) expressions not easy to be understood by every reader, shall infer guiltiness and punishment of death upon the supplicants mention therein, who perchance may be absent out of that part of the kingdom where the petition was founded. And if the harshness of some expressions, contained in the said quarrelled supplication, can infer the guiltiness libelled, and punishment of death, upon this pannel, the supplication and remonstrance made and presented to his most sacred majesty by a great many of the nobility, who then were afraid at the large extent of his majesty's late revocation and reduction, would likewise fall under the compass of these acts of parliament. But that supplication and remonstrance was accepted by his royal majesty, and his majesty was pleased with it. And since the same has tended to his majesty's honour and benefit, in the matters of surrender annuity, and plantation of the Kirks, with competent stipends, the connexion is proven, because the humble supplication and remonstrance was no less expostulative nor this, which may be easily cleared by perusing the said remonstrance itself; *ergo*, &c.

It is answered by my *Lord Advocate*, That the second alleadgance, and all the members thereof, and Additions made to it by the Pannel's procurators, ought to be repelled, in respect of the Dittay, which subsumes relevantly upon the two acts of parliament, word by word, as the same are conceived. And where it is alledged that the infamous libel cannot be esteemed infamous or reproachful, *quoad accusatum*: because it is conceived under the form of a supplication, and contains not *infamiam* or *injuriam*, but tends to pacify his majesty, whom the supplicants supposed to be offended; and that it contains nothing 'positivè vel enunciativè circa verum vel falsum, 'sed via postulati circa bonum vel malum.' And likewise where it is alledged that the Dittay is not relevant, there being nothing libelled to infer the libel quarrelled to be seditious, and that the pannel knew the same to be seditious; and that there is no Dolus libelled: it is answered, That all these alleadgances ought to be repelled in respect of the Dittay, which is qualified according to the qualification of the acts of parliament. And the designation of a supplication alters not the nature of the libel in the points where it is challenged as reproychful and scandalous; but these points being of their own nature scandalous and seditious, cannot be excused under the veil and pretence of a supplication, especially where the reproaches are emitted against his majesty's sacred person: 'Quia in minima pulsatione 'sacre et supremæ majestatis nulla admittitur 'excusatio, ut ait Horoudus,' lib. 8, de Libellis 'defamatoriis: tanta est atrocitas libellorum 'famosorum; et imperator Augustus libellos 'famosos in principem tractaverit sub specie 'læsæ majestatis.' Et citat. Ciceronem. lib. 4, de Republica, 'ubi ait nostræ duodecim tabulæ 'cum per paucas res capite sancivissent in his, 'hanc præcipue sanciendam putaverunt, si quis 'hoc tentavisset sive carmen condidisset quod 'infamiam facere flagitiumve alteri; et multo 'magis ubi quis modestiæ nescius, et pudoris 'ignarus, improbo petulantique stylo sacræ 'majestatis numen crediderit lacessendum.' And this crime is so odious and heinous that there needs no dolus to be libelled, *quia dolus præsumitur*. And for the colouring of the supplication, it is altogether impertinent; because that would elude the law, seeing every man who resolves to abuse the sacred person of the sovereign prince, has it in his power to give what name he pleases to his scandalous and odious conceptions, whether to design them by ane epistle, by ane history, by a petition, by an admonition, and lastly, if he pleases, by a vow, to cover his crime under the mask of piety. And for supplications, the law is clear, that albeit they be offered to the supreme prince, yet if they contain a reproach and scandal to a subject, they are punished, Lege apud Labionem, F. de Injuriis et famosis Libellis, §. 29, cujus hæc sunt verba; 'Si quis 'libello dicto principi famam alienam fuerit 'insectatus, tenetur injuriarum.' And therefore much more, where a subject dares presume to make offer to his sovereign lord of a supplication; and in it presume to tax or reproach his majesty's person, his gestures, his speeches, his promises in his supreme parliament, and to lay aspersions upon his glorious honour, majesty, and dignity; which, with the rest of the points of the libel, there repeated, are as many aggravant qualities to infer the atrocity of this infamous and seditious libel. And Pharma, in his 30 Concil. num. 34, 35, 37, and 62, disputes at length this question, 'An sub specie 'voti libellus famosus excusetur?' And concludes, 'Quod quæsitus color infamiæ sub 'velamine petitionis magis aggravat et injuriam et animum injuriandi.' And no man can be able to deny but the definition of ane famous libel is most competent to this particular case, which is 'ubi vel delictum, vel vitium, vel de-'fectus improperatur alieni personæ.' And not only one, but all these concur in the particular qualifications contained in the dittay; and of the law, 'Actus sumunt denominationem 'a potentiori, præcipuè in actu mixto.' And read this infamous libel, it shall be found in the strain of it, and the most powerful positions, to aim still at his majesty's person, estate, and government; which are so much more inexcusable, that they were needless; and not only needless, but contrary and destructive of the narration and conclusion, which seems to tend for pacifying his sacred majesty. For if the purpose of the supplicants had been to propitiat his majesty, their sorrow and grief for his majesty's supposed offence, and an humble deprecation of his majesty's wrath, had been fit

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and useful means to procure their wished desire: but in place of these, to enter irreverently and outrageously upon the gesture of the prince, upon his acts and gestures in parliament, upon the censuring and misconstruing of his proceedings, and drawing the hail body of the estate under the asperity and atrocity of their seditious speeches; it is a thing without example. And where it is alledged, That this petition was presented to his majesty by the earl of Rothes; and if any injury was therein, it was removed by dissimulation: it is answered, That dissimulation never removes injury, but upon preceding knowledge. But there is no notice thereof to his majesty, because refused: and, as I am credibly informed by these who have heard it out of his sacred majesty's most gracious mouth, his majesty has declared that his majesty remembers well the time that the earl of Rothes made offer of that supplication to his majesty; and that his majesty's Answer to him was, 'My lord, ye know what is fit to 'you to represent, and I know what is fit to me 'to hear and consider; and therefore do, or 'do not upon your peril.' And the circumstance of presenting to his majesty can have no place to extenuat, but rather to aggravat the crime; because the pannel in his own depositions has declared, that after reading thereof by the earl of Rothes and him, it was thought of such a strain as was not to be represented to his majesty; and therefore the representing, after it was disallowed, increases the offence. And where it is alledged, if his majesty had received it, that no crime nor punishment might have been inferred against the presenter; it is formally contrair, in respect of the odious and seditious conception thereof, which would have deserved the punishment of law in greater measure: in respect whereof, the said hail alleadgances ought to be repelled.

It is duplyed by Mr. *Alexander Pearson* for the Pannel, That where it is replyed by my Lord Advocate, that the alledged and infamous Libel, though under the title and form of Supplication, yet the same being indeed scandalous and reproachful, that it cannot escape under that cover: it is answered, That the alledged libel cannot be thought scandalous, *quoad supplicantes*, neither doth it affirm the particulars libelled by the Dittay *cum hoc in se non habent*; being a supplication which of its own nature speaks not but as it seeks, and no more than it seeks: and whatever reasons or motives it proports to persuade, it ends in a humble request for a gracious answer from his majesty: that it cannot be said to affirm directly, which one infamous libel of its own nature requires, *dicta lege unica codice de famosis libellis.* The words of the law is, 'si ejusmodi assertionibus 'sides veri opitulata non sit:' Therefore requires assertions direct, which is not in the alledged libel: but proports reasons and motives, laying out the same to the view and consideration of his majesty, if thereby graciously and favourably it may obtain its desire. Where it is replied by my Lord Advocat, That *dolus* needs not be libelled, 'Quia delictum et injuria præsumitur facta animo injuriandi et sic 'dolose;' it is answered, That giving and not granting the same, 'Injuria præsumitur animo 'injuriandi in dubio tantum, et nisi probetur 'contrarium.' Clar. § Injuria, num. 17. But to the present case it is by the most evident presumptions, above rehearsed in the defences made for the pannel clearly manifested, that there was no mind in the Supplicants and pannel of injury or wrong; therefore cannot be presumed to have offered any injurious and scandalous Libel to his majesty, or done any thing thereanent with that mind.

And where it is replied by my Lord Advocat, That if the supplicants had a purpose of deprecating his majesty's offence, and intreating his majesty's gracious favour, they had made choice and use of fit means to come to that end, and not by scandalous speaking or reproaching:

It is answered, What fitter means can a supplicant use for intreating of favour, than by humble supplication? And that which my Lord Advocat calls scandalous reproaches in the alledged Libel, is grievances and remonstrances thereof, humbly presented to his majesty, and not assertive reproaches, *ut supra.* And where it is alledged, That dissimulation removes not injury, but upon preceding knowledge; and that his majesty did not read nor take to consideration the supplication foresaid presented: it is answered, That the supplication offered to his majesty, although his majesty took not the same to consideration, seems to assever the nature of the writing to be a Supplication, and was a great inducement to the supplicants to think that his majesty had passed all offence thereof conceived. And where it is alledged by my Lord Advocat upon the pannel's deposition, wherein it is alledged that the Pannel and the earl of Rothes together, after the reading the supplication; thought it not fit that it should be presented to his majesty; it is answered, That the Pannel's alledged deposition proports not the earl of Rothes and his together reading of the supplication; like as it is of truth, that the said supplication was offered to his majesty by the earl of Rothes, before the Pannel and the earl of Rothes had any thoughts or purpose of suppressing of it: and howsoever the pannel had had once a mind of suppressing the same, yet he thereafter knowing that it was indeed offered to his majesty, was a great inducement to the Pannel to esteem and think of it as ane supplication.

It is further duplyed by Mr. *John Nisbet*, for the Pannel; Where it is replyed by my Lord Advocat, That it is subsumed relevantly, and the Dittay is qualified according to the qualifications in the acts of parliament; That dole being essentially required in all actions of injury, albeit acts of parliament, by reason of their shortness, are not specifick in the expression thereof; they must be interpret conform to the common strain of law, 'Quia in statutis pœna-'libus aliquid delictum capitaliter, etiamsi quod 'de dolo non fiat mentio, dolus requiritur, et

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'non sufficit lata culpa.' Phar. Quest. 86. Num. 15, 25. 'pro qua opinione citat et quam 'plures doctores, qui aiunt se liberasse aliquos 'a pœna mortis, et esse mente tenendum ad 'confusionem judicum imperatorum, qui cre- 'dunt non esse recedendum a verbis statuti: et 'subjungit,' num. 27. Ibid. 'Multo magis cum 'statutum imponit pœnam pro eo quod de jure 'communi non punitur.' As the present case, the points of not reporting, and not apprehending, are punishable by no other law in the world; and that the sinistrousness of the intention is necessary to be libelled, it is consistent with reason, because the crime consists thereof; 'Et 'ideo oportet ponere in libello, quia non proba- 'hoc esse quod aliquando contingit abesse.' Codice de Probationibus Leg. Neq; as the present case. A seditious concealing or having, is not relevantly libelled by the having of a piece alledged seditious, because a man may have a seditious piece, and yet not be a seditious concealer, because he may be of opinion that it is not seditious. And it were hard in law or reason, upon the errors of opinion, to infer the guilt of so atrocious a crime, which, as all crimes, requires ane express consent. And by the law, 'Nihil est tam contrarium consensui, 'quam error,' F. de Jurisdictione omnium judicium Leg. 'si per errorem et errantis nulla 'est voluntas,' Codice de Juris, et Facti Ignorantia.

And where it is replyed by my Lord Advocat, That the designation alters not the nature of the alledged Libel, it is duplyed, that the designation of the foresaid libel, joined with the strain and fashion of it, vindicates the Pannel's innocency in the conceiving and using of it; because it would appear to any man to be a supplication, and not an infamous libel, seeing it is addressed to his majesty, whose royal and excessive goodness excludes all presumption of injury, and of the law. 'Subditi contra princi- 'pem suum fraudem committi voluisse non præ- 'sumitur.' Menoch. concil. 404. num. 27. Cravetta concil. 309. num. 6. It beginneth at ane humble supplication of his majesty, and concludeth with a hopeful assurance, that his majesty will listen thereto: And therefore, 'cum 'exordine principii interpretemur fidem.' Baldus in Leg. quinta Codice de Commissis. 'Mul- 'to magis ex principio et fine reliqua interpre- 'tanda sunt; et ex extremis media præsumun- 'tur.' Menoch. de Præsumptionibus, lib. 6. It contains ample elogies of his majesty's royal goodness, and justice of his blessed father and their predecessors. 'Et ideo verba debent in- 'telligi de actu uniformi, non difformi; id est, 'uniformitur in laudem, et decus, et non par- 'tim in laudem, partim in vituperium.' Cravetta concil. 9. num. 27. 'et verba debent potius 'impropriari et intelligi secundum fictionem 'Juris, delictum fugiatur.' Ibid. et Pharm. Quest. 105. So that it is clear, that the supplication proves not a naked and transparent veil of designation, but probable grounds resulting upon the strain of the piece itself. Whereas my lord Advocat aggravates the circumstance of the person injured, being his sacred majesty, the laws adduced convinces the odiousness of the crime, when it is notour; but extenuats the presumption, that the Pannel should have been tainted therewith, because so sacrilegious a crime is not presumed: 'et maxime petulans 'et improbum mendacium,' convinces not ane injurious intention against a prince. And the emperors have left place to prove the candor of intention, notwithstanding the most express and formal injuries of words. Leg. unica Codice, 'Si quis imperatori maledixerit.' And where it is replyed by my Lord Advocat, that *dole* is presumed; it is duplyed, 'Quod animus inju- 'riandi non præsumitur; et incumbit injuriato 'eum probare,' Jacobus de Bello Viso, lib. 1. cap. 3. 'Actor habet necessarium ponere in 'libello quod animus injuriandi intercesseret.' And all the Pretorian edicts require formally *dolum malum*, F. de servo corrupto, lib. 3. et edictum contra corrumpentem album, F. de Jurisdictione omnium Judicum. Leg. 7. § Doli Mali. Edictum de vi publica, qui Dolo Malo, F. ad Legem Juliam de vi publica, Leg. 10. Et in Crimine Majestatis ad Leg. Juliam Majestatis. 'Et cessat Dolus quia non præsumitur,' Leg. Dolum, Codice de Dolo Pharm. Quest. 105. Inspectione 3. et 121. In Libello debet exprimi, 'Quod Injurians animo injuriandi fecerit, quan- 'do sumus in personis in quibus malus injuri- 'andi animus non præsumitur.' Salicelus in Leg. si non convitii Codice de Injuriis, num 4. 'distinguit utrum is qui injuriam fecisse dicatur, 'talis sit persona qui præsumptionem injuriæ 'faciat cessare, an vero talis qui non facit.' And far more when the person that is injured concurs to exclude the presumption of injury. 'Princeps qui transcendit omnem injuriæ effec- 'tum et affectum.' Cravet. concil. 9. 'Etiam 'Judæus non præsumitur aliquid dixisse ad in- 'juriam Christi.'

Whereas it is replyed by my Lord Advocat, That if the designation of a supplication should be admitted to palliate ane injurious intention, the law would be eluded, 'Quæstio colore inju- 'miæ sub velamine petitionis;' it is duplyed, That the inconveniency cannot be obtruded in this case, because the like presumptions of innocency will not be concurrent.

Where it is replyed by my Lord Advocat, That the impudent presumption in presenting a piece of that strain to his sacred majesty, aggravates the crime; it is duplyed, That the citation adduced by my Lord Advocat, aggravates only the intention, 'et animum injuriandi,' when it is constant; but infeebles the presumption, That noblemen of their quality and wisdom should have adventured to present a piece that they thought of that nature; seeing it cannot be presumed, that they should have thought that the name of a supplication would have satisfied or eluded the king's sagacity, and make them to eschew due punishment.

The lord Justice-General continued the court till Tuesday next the 9th. At which time, when it was replyed by my Lord Advocat the last day of the process upon the law, 'Item

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'apud Labionem,' that the nature of a seditious or infamous libel is not compatible with the presenting to his majesty, 'Quia libellus 'potest dare principi, et nihilominus in eo fama 'aliena lacessit:'

It is as yet duplyed thereto by the said Mr. *John Nisbet* for the Pannel, That the Case meets not, because the law adduced is of a libel presented to the prince, and reflecting upon ane other person than the prince himself: And it has never been heard that any has been so inconsiderate as to present his own Dittay to a prince.

Whereas it is replyed by my Lord Advocat, That the most of the alledged libel adduced by the supplicants, to enforce their intention in propitiating his majesty, is impertinent and destructive of the conclusion itself; and therefore, 'Denominatio sumenda est a potentiore, 'præcipue in actu mixto:'

It is duplyed, That in law words destructive of a Protestation, 'Relevantur per protesta-'tionem (verbi gratia.') The word 'Mentiris, 'salvo honore, si subsessent conjecturæ per 'quas talis protestatio adjuvaretur, quod scilicet 'protestans non haberet animum injuriandi.' Clarus, §. Injuria, num. 13, And albeit in matter of notion and form, 'Conclusio sequitur 'deteriorem partem syllogismi,' yet *in practico syllogismo*, the conclusion being 'the To *æquum*-'*rium*, transmittit ab intellectu practico,' to be espoused and embraced by the will, is most considerable; and the impertinence of Midses used to enforce the same, is acknowledged by all moralists to be an escape of imprudency in the pre-election, and not of guilt in the intention. And whereas my lord advocat contends, 'Quod denominatio sumenda est a potentiori;' it is answered, *quod expressa elogia* are more powerful than strained consequences. And an express supplication contained in the hail strain of the piece, should preponderate some incident glance: 'Et quando verba injuriosa non 'principaliter, sed in consequentiam prolata 'sunt, etiam quando sunt de sua natura injuriosa' (as is not in this present case) 'præsumuntur dicta vel scripta sine animo injuriandi.' Mur. Conc. 107. num. 10.

Whereas it is replyed by my Lord Advocat, That the definition of the infamous Libel, is quadrant against the piece quarrelled:

It is duplyed, That albeit a peace, 'ubi de-'lictum vel vitium vel defectus improperatur 'alicui,' be materially infamous; yet formally and in relation to a guilt and a crime, *dolus malus* is necessarily required, as an essential ingredient in the definition of an infamous libel. Damhauderius in practica, cap. 138. num. 1. 'Scriptis fit injuria cum dolosè et maliciosè 'componuntur et scribuntur cantilenæ, rythmi, 'libelli, comœdiolæ aut cantiunculæ, quibus al-'terius laceratur nomen et fama; et libellus 'famosus, et compositio facta in scriptis in in-'famiam alicujus, ejus quod quis probare non 'vult, et in publico jactat. vel in loco ubi inve-'niatur.' Phar. Quæst. 105. Inspect. 2. num. 1. 'Et ad essentiam libelli famosi videtur requiri, 'quod fuerit positus in publico, vel loco ubi in-'veniatur.' Ibid. num. 485, et Canone, Caus. 5. Qnæst. 1. 'Qui in alterius famam publicè 'scripturam aut verba contumeliosa confinxerit, 'flagelletur.' And albeit in law 'calumniari' materially 'est falsa crimina intendere,' ad Senatus Consultum, Turpilianum, Leg. 1. §. 1. nevertheless 'non utique qui non probat quod 'intendit protinus videtur calumniari, nam ejus 'rei inquisitio arbitrio cognoscentis committitur, 'qui reo absoluto de accusatoris conciliis incipit 'quærere qua mente ductus ad accusationem 'processerit,' F. ad Senatus Consultum, Turpilianum, Leg. 1.

Where it is replyed, That the presenting of such a piece aggravates the crime, and the odious conception thereof is punishable notwithstanding the presentation; it is duplyed for the Pannel, That the presenting of it by so worthy a nobleman put the pannel, *in bona fide*, to think it not a piece of that nature whereof it is alledged to be, and to overpass, at the least to mistake the odiousness of the conception of it, if there be any.

It is eiked (added) by Mr. *Robert Macgill* for the Pannel, with Protestation, as set down from the beginning, not repeating that which I have said; but remitting the most honourable and wise Judges *(quia via jam est præmunita)* to these things set down before by me, touching every particular, as they have been worthily replyed by my Lord Advocat.

And first, anent the Qualification contained in the acts of parliament.

It is answered first, That the first act libelled is only against delators, as said is, and expounds the act 83 Jac. 5. Parl. 6. as might be cleared by the time wherein that act was also made: But he remits it to the consideration of the Judges. Secondly, It is answered, That there being no Qualification set down in this first act of parliament, but a general law, that general law ought to receive the qualification according to the distinction propounded by me, in all humility, of inordinat speeches against a prince, in the last part of my first exception, in respect of the absurdity of the parity of crimes, and pains which would follow, if it were not so limited: And remits, as before, to Galius, anent the interpretation of municipal laws. And what shall the general rules of the law (miscalled by some Regulæ Leshiæ) receive their own exceptions according to reason; and the municipal laws, which even in the most substantial points of the commonweal, will alter three or four times in an age, according to the circumstances *(nam ex moribus legis)*; shall they, say I, stand good in a general sense contrary to reason? which I count to be the judgment of the lawyers. See in the last part of my Duply, strengthening my first exception; where it is shewn that the word 'government,' in the 134th act, and so in this act, ought not to be understood against counsellors and lords of parliament: Which is followed out largely in my second exception, and so ought not to be understood in any other act, to make them

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contraveeners, where they had *optimum animum*, and according to their opinion only might be thought to have erred, *quod humanum est*, as was alledged by Mr. John Nisbet; 'Neque id 'prius quam rationis ad veritatem eliciendam 'inter se confligant.'

The Second is anent the colour or mask of Supplication; remits that to the practics alledged by Mr. John Nisbet out of the Consultus of Menochius touching government, set down so rudely, *ut sit addita supplicatio*, and as it were, dropped out of the gall of bitterness. And yet notwithstanding the lawyers verdict was to absolve the nobleman. Remits also to the last part of my first exception in the end, anent the exposition of words and sentences, taught likewise in the second exception, and anent the form of speaking and prayer, especially where 'contra præsumptionem doli.' It is clearly evinced that the pannel had not 'animum dolosum,' but rather a very good will and intention, which he, as we say in a proverb, wishes most humbly might be taken in part of payment. And remits that anent presumption of Dole, which my Lord Advocat said in the fourth place to my second exception, *parte secunda*, That whether it be necessar to libel, or not, yet seeing it is, 'de substantia delicti, et credulitas a causa sive in-'justa excuset a delicto, quia abest animus de-'linquendi,' as Clarus has there alledged, *ergo*, to be assoilzied as author, &c.

And to the Third, adduced by my Lord Advocat, anent the definition of an infamous Libel, and the punishment of injuries against private persons, and far more against princes; we disallow altogether such inordinate speeches, and say, That they ought to be punished as the lawyers have defined according to the mind of the speaker or penner. But that the definition of an infamous libel cannot agree herein, so far as concerns the pannel, it is not to be thought; 'quia directis et conceptis verbis, maliciose et 'perditissimo animo,' mast injuries be impropriat: Which, in all humility, the pannel thinks not to be here; and remits to my second exception. And that a capital pain ought to be inflicted upon all sort of inordinate speeches or writings, and all sorts of speakers and writers, and upon the havers, hearers, and not revealers, indistinctly, even against princes; let me say it, with all reverence, as my Lord Advocat would insinuate by the places adduced, it is not the lawyers mind.

The Fifth, alledged by my Lord Advocat, goes back again upon an alledged disguising. But we deny that any thing adduced either anent supplication or vow agrees with our case, where nothing can be said to be *improperat directis verbis* (else the pannel had been a mad man): But by a wresting way, *salva pace dixerim*, may be thought by some to infer injury. And here again remits to these parts of my exceptions, *ut supra*, anent the exposition of words.

The Sixth is anent our most sacred sovereign his refusal; wherein remits to that part of my exception anent the appealing from a prince to himself, especially by a counsellor; 'Donec intelligatur quid velit supplicatio, et 'rationes hinc inde adductæ, quasi ex adverso 'acies manum inter se conferant.' As to his majesty's own declaration, the pannel seals his mouth with the finger of Harpocrates, and reverences his majesty's sayings as oracles, and in all humility, accepts them as an acknowledgment of the offer made.

The last, I think, are the Pannel's own Depositions; wherein distinguish the disallowing and the times and all shall agree. He disallowed of it first, as that of the general; it was rejected by his most sacred majesty: But the pannel thought that it might have been keeped till a more convenient time, according to the appellation also mentioned, and till *causa audita* it had been condemned. And the pannel depones, That before ever the principal came back, the copy was surreptitiously purchased by Mr. John Dunmure, in falsifying his promise.

It is triplyed (replyed the third time) by my Lord Advocat, that the duplies in the whole parts and members thereof are impertinent; because the exception was founded upon the form and designation of the infamous libel. That being designed a supplication, it could not contain matter of ane infamous libel; which exception was answered with this reply, That the Dittay is directly subsumed upon the acts of parliament, viz. That this, which they call a supplication, is a writing containing reproaches and scandals against the person, state, and government of our gracious sovereign, as the Dittay bears; and no more was necessarily to be replyed but upon the acts of parliament. And yet, for informing the mind of the judge, it was cleared both by the express text of the civil law, and by the judgment of the best jurists, and versed in criminals, That the designation purges not the infamous speeches conceived in a supplication to the prince, being to the infamy of ane subject, much less to the dishonour of the supreme and sovereign prince. And this is not pertinently answered by no part of the duply; but both the acts of parliament and civil law concurring, stand in full force to elide the exception. And the points urged by the duply, has nothing to do with the exception, but are points extraneous, founded upon intention, libelling of Dole, presumption in favours of the pannel, and others, in whose name it was alledged the said supplication was drawn up; which I may justly term presumption: For whatsoever distinction they have in their quality from others, it is from the bounty and favour of their supreme prince and sovereign, who is the fountain and source of all honour and dignity. And good reason that they bruik (enjoy) all their privileges, in all causes with all persons, except where they come in contestation with their supreme sovereign: and there, as Godofhred writes, 'ad legem Juliam majestatis, 'ubi majestas pulsata, defenditur nulla digni-

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'tas; nullum culmen, nulla fortuna est immu-'nis.' And in this case, where reproaches, scandals, and aspersions are laid upon our gracious sovereign, the excuse of nobility, that it may be presumed that they did it not *malo animo*, is rather an accusation than an excuse; because no subject is so bound to know the true respects of humility, and reverence, and obedience due to the sovereign prince, as those to whom his majesty hath communicated a shadow of his glorious honour. And as to the instance adduced out of Menochius, we have nothing to do with it; for it is likely, he that answered so, had not such a law as we have. And as to the instance adduced out of Lex Unica, 'si quis imperatori maledixerit,' that by that law there is no place left to the accused to purge himself of his evil intention, that is true in the case of the law, but has nothing ado with us, 'ubi non est lubricum linguæ quod 'facile ad pœnam non est trahendum;' but a malicious and seditious writing, compiled of purpose to the reproach of their gracious sovereign. And in writings of this kind, as Harondus expresses in his 18th title, fol. 208, there are no worse reproaches and *convitia* (says he) than those which are done by writing, than those which are done upon manifest deliberation; because the same proceeds upon ane evil and seditious purpose, and pierces deeply, and abides longer than the injury by words. And for all the rest of the instances and authorities of the civil law, I oppone the two acts of parliament, which are the only grounds of this libel; in so far as it concerns the authors of the infamous libel, the not apprehending the authors thereof, the concealing and not revealing of the same. And as to the mention made in the entry of the Dittay of the common and civil law, the same is wholly in respect of the divulging and dispersing of the said infamous libel, whereof our said acts of parliament make no express mention. And where we have our own laws, and acts of parliament, as we have in this case, these must be the only rule of judging. And the exception and duply, albeit they have many quotations of the common law, yet all needless and impertinent; since they are not adduced to purge that part of the Dittay which is founded upon the common law. But in the points disputed, we have good warrand to adhere to our own acts of parliament, (except in so far as we are forced by the objections made by the pannel's procurators to clear the doubtful and ambiguous terms of their exception and duply) because by act of parliament, made by king James 1, par. 3, cap. 48, and by king James 4, par. 6, cap. 79, it is statute and ordained, That all the leidges be governed by the king's laws, and no others. And his majesty's Advocat offers, whenever it shall please my Lord Justice General to command him to clear any speech that is founded upon the common law, that he shall do the same by word.

It is quadruplyed (pleaded the fourth time) by Mr. Alexander Pearson, for the Pannel, That where my Lord Advocat triplyes a part of his lordships reply to have received no answer by the duplies made for the pannel; to wit, that part thereof, which bears, that the writing quarrelled, although in form and title a supplication, yet does contain reproachful speeches, &c. it is answered, That the alledged infamous libel, in so far as it concerns the pannel, cannot be esteemed but as a supplication, in respect of the duply and the reasons contained therein, which I need not repeat here.

Where it is triplyed by my Lord Advocat, That our Duply is impertinent; it is quadruplyed, That if there be any impertinency, his lordship is to be blamed therewith, for having occasioned it by ane unnecessary reply. And for the points urged by us for the pannel, to clear his intention, and to vindicate him from the presumption of injury, in compiling or being accessory to the piece quarrelled, not extraneous, both because the acts of parliament require intention, by the intentional words 'to 'the reproach, steering of sedition, &c.' And albeit they should contain nothing thereof, a sinistrous intention being required in the essence of the crime, it must necessarily have been libelled conform to the passages already cited in our duply.

Whereas my Lord Advocat triplyed, That the character of nobility accused *non excusat* in this case; it is quadruplyed, That that is only where the crime is constant, (i. e. evident:) And that eminent quality ever wants the presumption, than any invested therein should injure their sacred prince; whereof they are not only a shadow, but noble and mystical members, as is cited already.

Where it is triplyed by my Lord Advocat, that the case adduced out of Menochius, is not pertinently adduced here, because there was no law; it is quadruplyed, That the question resulted upon the common law, which ordains due punishment upon the authors of infamous libels, and chiefly against princes. And the case was not so pregnant in favour of the party whom he absolves, because he was the author, and had exposed to the view of all the world the piece there challenged. And we adhere to the author's opinion; and instances, how it has never been found to be an undutiful part in jurisconsults and advocats, to vindicate pieces quarrelled to be injurious.

And where it is triplyed by my Lord Advocat, that the instance Lex Unica quadrats not; it is quadruplyed, That the instance of the present case is more pregnant, because the case of the law adduced, 'improba et petulantia mendacia,' are challenged; And in the present case the piece challenged is not expressly injurious; and all that can be inferred upon the pannel, is an indirect and imprudent accession thereto.

And where it is triplyed by my Lord Advocat, that the allegations of the duply are impertinent, because not alledged for the points of the common law not expressed in the acts of parliament; 'tis quadruplyed, That there are

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alledged in our duplies for all, and refers ourself to our duplies.

To the whilk it is quintuplyed (answered the fifth time) by my Lord Advocat, That the words of the act of parliament has no respect to the intention of the person, but only express the effect of the reproaches which tend to move dislike betwixt his majesty and his good subjects. And it is granted in the quadruply by Mr. John Nisbet, That they are materially reproachful, and not formally.

It is sextuplyed by Mr. John Nisbet for the Pannel, that the words 'to the reproach,' imply dole and intention; because the crime prohibited by the act of parliament consists essentially thereof, and is cleared by all the allegations adduced, and more expressly by other acts of parliament of that nature, as the 60th act of queen Mary, 6 Parl. whereof the words are, 'Tending to stir the hearts of the subjects to hatred,' which are emphatically words of intention. And whereas my Lord Advocat would inforce an acknowledgment of material injury in our quadruply, we disclaim it, and maintain that it cannot be evinced therewith; and albeit it were, there rests a relevant defence in law upon the innocency and candour of intention.

Thirdly, It is alledged by Roger Mowat for the pannel, for a third principal Defence to that part of the subsumption of the Dittay, qualifications, and condescendings thereof, bearing that the pannel himself was and is author, deviser, consulter, adviser of the infamous Libel, and airt and part of the penning, writing, and updrawing thereof; at least is guilty of the hearing, and of the concealing, and not revealing the author thereof; and most guilty of the not apprehending of Mr. William Haig, whom the pannel affirmed to be the author of the said libel, it being in his power to have apprehended him; and also is guilty of the divulging and dispersing thereof, in so far as the said pannel knew of the penning of the said libel, gave his opinion to the making thereof, and in token thereof interlined a part of the same in divers parts with his own hand, which by ocular inspection is to be seen, and which the pannel has also confessed by his deposition under his hand, as the said Dittay in that part bears, &c.

That the Pannel ought and should be *simpliciter* assoilzed (absolved) therefrom; And 1st, That the said Pannel cannot be criminally pursued as author and deviser of the said Libel; because by the pannel's own deposition, taken by the lords of the committee on the 9th of June 1634, the pannel has deponed, that the said Mr. William Haig was the author of the said libel. Likeas the said Mr. William his missive letter, all written and subscribed with his own hand, dated at Camphire the 27th day of the said month of June, which letter was directed to the pannel, and exhibited by him before the said committee, bears the said Mr. William his grant that he was the penner of the said supplication or libel; and takes the crime upon him in soliciting his friends by his other letters and missives, likewise produced to the said lords of committee, to deal for purchasing and obtaining to him a remission for the said alledged crime. And so the said Mr. William having not only confessed himself to be the author, but having dealt with and solicited his said friends for a remission, as said is, the said dittay can never be sustained against the pannel as author and deviser thereof; which missive letters are in the pursuer's own hand. Item, the said pannel ought likewise to be absolved from that part of the said dittay, bearing to be consulter, adviser, and airt and part of the penning, writing, and drawing up of the said quarrelled libel; because the said two acts of parliament, whereupon the said dittay is founded, make no mention of consulters or advisers. And acts of parliament, specially in this kind, are strictly to be taken, and suffer no extension beside that which is expressly set down therein. 2dly, Giving, (granting) the said acts might be extended to consulters and advisers, (as they cannot) yet *absolvitur* ought likewise to be granted from the alledged consulting and advising by the pannel, and his being airt and part of the penning, writing, and drawing up of the said supplication now quarrelled; because the said pannel being examined by the said committee upon the said 9th of June last, and being then interrogat who was author and penner of the said libel, not only has deponed, *ut supra*, that it was the said Mr. William Haig, who gave the said libel to him, and who (as he thought) was the author thereof: but being thereafter interrogat upon another interrogator the same day, if the said Mr. William had any command to draw up the said quarrelled supplication or libel, or if the pannel or any of his knowledge, was at the forming thereof, the pannel has also deponed upon his said great oath to the said interrogators, that the said Mr. William Haig had no warrant from him, nor knew he of any warrant given to the said Mr. William, or that any was present at the forming thereof. Which clearly evinces and manifests that the pannel was neither author, deviser, consulter, adviser, nor airt and part of the penning and writing of the said libel; seeing the said pannel being brought before the said committee, and urged by them to give his oath upon the said points, he has given the same, he has deponed, *ut supra*, denying all the said several points. After the giving of the which oath of verity, and subscribing the same, as the same produced by my Lord Advocat bears, no dittay or pursuit, criminal or civil, can now or hereafter be sustained against the pannel upon these points, whereupon already he has given his said oath; because no other manner of probation can be received against him, to prove contrair to his said oath, given before the said committee in manner aforesaid. And where it is libelled in the said dittay, and qualifications thereof, that the pannel is author, consulter, adviser, airt and

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part of the penning and writing, at the least guilty of the hearing, concealing, &c. not revealing, not apprehending, &c. in so far as the pannel knew of the penning thereof by the said Mr. Wm. Haig, advised and gave his opinion anent the making of the said libel, and in token thereof interlined it in divers parts with his own hand, &c.

It is alledged, That the pannel ought to be *simpliciter* absolved from the said qualification libelled in these words, in so far as the pannel knew of the penning of it, advised and gave his opinion anent the making of the same; because that is likewise directly contrair to the pannel's deposition foresaid, proceeding upon the said interrogator, moved by the said committee wherewith he was interrogat, if Mr. William Haig had any warrant or command from him to draw up the said libel, and if the pannel, or any of his knowledge, was at the forming thereof. Whereunto the pannel has made answer, and upon his said great oath deponed, That Mr. W. Haig had no warrant from him, nor knew he of any given to him, or that any was present at the forming thereof. And so the pannel by his deposition, upon his said oath, having deponed, that Mr. Wm. Haig had no warrant from him, nor knew he of any warrant given to him, or that any was present at the forming thereof; the said criminal pursuit can never be sustained to infer thereby that the pannel is author, consulter, deviser, adviser, airt and part of the penning, writing and drawing up; because that is altogether denied by the said pannel, as his said deposition clearly bears. And being denied upon his great oath, as said is, that part cannot be sustained upon the said qualification and inference libelled; it being impossible, *per rerum naturam*, that the said dittay in these points can any way be proven by any other probation whatsoever, after giving his said oath.

Court adjourned till to-morrow the 10th instant.

Intrant. the said 10th day.

The pannel and procurators (as before) compeared the said day.

Quarto, It was alledged by Mr. *Roger Mowat* for the Pannel, As for his fourth principal Defence against that part of the Dittay, bearing, that the pannel knew of the said alledged infamous libel, advised and gave his opinion to the making of the same, and in token thereof interlined a part thereof in divers parts with his own hand, as may be seen by ocular inspection, and as his Confession in the deposition bears; that *absolvitur* should be granted from that part, bearing that the pannel knew of the penning thereof, because that is directly contrair to the pannel's deposition, before repeated, which does contain an express denial of his knowledge of the forming of the said libel, or that any was present at the forming thereof. And to that part of the qualification libelled, bearing, that in token that the pannel knew of the penning thereof, he interlined a part with his own hand; it is alledged, *nullo modo relevat*, unless it had been relevantly libelled in the dittay, that the pannel interlined the said lines the time of the forming of the said libel, or shortly thereafter, which is not said: for mending and interlining to be a token against the mender or interliner of a writing, that he knew of the penning thereof, and gave opinion to the making of the same, must necessarily be libelled to have been at or immediately after the writing of the same. Which cannot be urged upon the pannel in this particular, because by his deposition, given upon the 16th of June 1634, upon an interrogator wherewith he was interrogat, whether he had interlined some lines in the said quarrelled supplication, which was exhibited by him before the lords of the committee, and whether he did the same before he shewed it to Mr. John Dunmure, or to the earl of Rothes, has deponed, that the said Mr. John Dunmure never saw the said interlined libel, but only the copy, which was cast in the fire after the redelivery thereof; and deponed, that the said interlined copy lying then before the said lords, and now in my Lord Advocat his pursuer's hands, was that copy which was delivered by the pannel to the earl of Rothes, but was not interlined until long after the earl of Rothes redelivered the same; and deponed, that never one saw it since the said interlining. And so it being that copy which should have been presented to his majesty, and which was offered to be presented, it is not likely nor probable, and with reason cannot be affirmed to have been interlined before the time of the said offer of presenting. And so the said interlined libel cannot be counted a token (as the dittay bears) of the pannel's knowledge of the penning of the said libel, and of his advising and giving his opinion to the making thereof. Likeas, *in rei veritate*, the said interlining was after the said Mr. John Dunmure was first questioned in March last, by the space of nine months, or thereby, after that the said supplication was offered to have been presented to his majesty. And so a private interlining of the said copy by the pannel, by adding or mending some few words, which neither in matter nor form can be quarrelled, being so long after the intended offer thereof made to his highness, cannot be a token against the pannel, as is libelled, to make him to have been upon the knowledge of the penning, and to have given his advice and opinion to the making thereof; *Hoc attento*, That the said interlined copy was never seen by any, but by himself, after the said interlining, which simply he produced the same to the said committee, which in law he could never have been compelled to do, if he had expected that any such advantage had been taken thereupon to his heavy prejudice. For the pannel did never fear nor suspect that the said committee would have desired or induced him to have exhibit and produced before them a paper, the production whereof might have imported no less to him than the probation of the

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alledged crime, committed in the dittay, to make him thereby guilty and punishable by death. And it is nottour that the pannel did, at the saids lords desire, produce the same to them, upon their promise that it should not ensnare the pannel, seeing in law he was neither obliged to produce any writing, nor to declare, nor to give his oath upon any interrogators demanded of him; neither would he have done it, if he had known (as now in experience he finds) that it might and would have brought upon him the said alledged crime and punishment of death.

It is added by Mr. *Alexander Pearson* for the Pannel, in fortification of the said fourth exception propounded for the Pannel: First, for that part thereof, bearing, That the pannel the 9th of June last deponed, upon his great oath, that Mr. William Haig had no warrant of him for drawing up of the said supplication, and that he knew nothing of the forming thereof; that the pursuer cannot be heard now upon that part of the Dittay, to pursue the pannel, because of the pannel's oath and declaration foresaid, which cannot in Law and reason be called again in question; 'Propter jurisjurandi religionem, quod 'speciem transactionis continet majoremque 'habet authoritatem quam res judicata, et dato 'jurejurando, non aliud quæritur quam juratum 'sit.' Leg. 1, 2, et 5. § 2. F. de Jurejurando. Where it is alledged by the Dittay, That by the letters sent by Mr. Haig to the pannel, it is affirmed by Mr. Haig that he had the allowance of the pannel to the making and penning thereof, *non relevat*, because Mr. Haig being author and penner of the alledged infamous libel, by his own grant in his missive letter, dated 27 June, and also acknowledged so by the Dittay, Mr. William Haig's declaration foresaid (no ways granting the same), can no ways be respected, or have force against the pannel, 'Quia 'de jure socius aut particeps criminis adversus 'socium fidem non facit,' Leg. Quoniam, Cod. de Testibus. Leg. Si Filium, Cod. de Liberati Causa.

It is alledged by Mr. *John Nisbet*, that the Dittay is not relevant, in so far as it qualifies the pannel to be author of the piece challenged by the interlining thereof; because the interlining in one point only, convinceth that he hath not been author of the rest. Secundo, The interlining has no contingency with the point challenged, but is a smoothing of some apparent shrewdness in conception. And in a word, the Dittay is no ways relevant in so far as it qualifies any accession by the pannel's depositions; because it is affirmed by the pannel, that he was induced to depone, upon assurance that he should not be ensnared. And of the law, 'Con-'fessio emanata sub spe impunitatis non impor-'tat condemnationem;' Clarus, § final. Quæst. 55. num. 8. et 9. 'Ubi affert opinionem Imo-'læ id asserentis esse æquiorem;' Pharm. Quæst. 81. num. 280. 'Confessio emanata sub 'promissione impunitatis non sufficit ad con-'demnandum, nec in foro conscientiæ nec con-'tentioso; et confitentem non afficit:' Eadem Quæstione, num. 42. Hipolitus in § postquam num. 15.

It is answered by my *Lord Advocat*, That the exceptions proponed against that part of the Dittay, bearing the pannel to be author, adviser, consulter, deviser, and airt and part of the penning, writing, and drawing up of the infamous libel, ought to be repelled in the hail members thereof.

And first, where it is alledged, that my lord is not author, because that he has deponed that Haig is author, and Haig by his letter has granted himself to be author; because that is not a defence, but a denial: for both Haig and the pannel might be authors and contrivers of an infamous libel. And therefore the Dittay in this point is relevant, and consequently must be put to the knowledge of ane assize, (jury) before whom the probation and verification of the Dittay is to be used; and before whom it is easy to shew and clear, that neither the pannel's deposition can liberat him, nor yet Haig's letter, who in the defence is granted by the procurators to be *socius criminis*. And giving (granting) the justice would take the dispute of this to himself, which is proper to the assize; yet if any moment stood in Haig's letter, it must be taken *complex*; for by the same letter he affirms, that the pannel was adviser of the said seditious libel.

And where it is alledged, that Deviser, Consulter, and Adviser, are not contained in the acts of parliament whereupon the Dittay is founded, ought to be repelled in respect of the act of parliament of king James 6, his majesty's gracious father of eternal memory, parl. 12. c. 151. wherein it is declared, That all criminal libels shall contain the parties complained upon to be airt and part of the crimes libelled: which is in this case *per expressum* libelled; and the words of adviser, consulter, deviser, *sunt synonima et ἐφολογα*.

And where it is alledged, that the pannel in his deposition has denied that he was either author or adviser, that is a denial *ut supra*, and not a defence against the relevancy. And where it is alledged, that the pannel having deponed by oath, that no other probation can be used *contra jusjurandum*; it is answered, That it is against all law, reason, and custom, to oppone *jusjurandum in criminalibus*. For then after examination by the judge, which is ever taken upon oath, no criminal should pass the knowledge of ane assize; and it were a proclamation of universal impunity, if oath should determine the trial.

But that which is alledged by the pannel and his procurators *super jurejurando*, has only place 'in civilibus et in jurejorando delato per 'actorem,' which cannot have any respect in this case. And it is nottourly known, that Anchindrine and Garrarie not only denyid upon oath, but abode by the denial in the torture and question; and yet notwithstanding their oath, and denial by oath, were put to the knowledge of ane assize, and convicted. And where it is

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alledged, against the specification in the libel of this first point of author, that knowledge, advising, and interlining, are not relevant; I declare that I adhere in the first place to the general subsumption of the Dittay upon the act of parliament, whereby it is subsumed that the pannel is author, adviser, consulter, deviser, and airt and part of the seditious libel: and protest, that notwithstanding of whatsoever defence is or shall be propounded against the qualifications, (albeit the same might be found relevant, which cannot be in reason and justice) That the said general shall pass to the knowledge of ane assize, as relevant *per se*. Under which protestation, I proceed to make answer to the defences against the qualifications.

And first, where it is alledged that this clausule, bearing the pannel knew of the penning of the said scandalous libel by Haig, and advised and gave his opinion anent the making thereof; that the samen is contrair to the pannel's depositions, given by him upon oath, (as said is;) I answer, That this impugns not the relevancy of the Dittay concerning the qualification, and therefore must pass to the knowledge of an assize. And as to the pannel's depositions, whether they be conform or disconform to the libel, *non est hujus loci;* because neither is the Dittay founded upon them, nor are they used by me as pursuer, neither as a part of the libel or proof of the libel.

And where it is alledged, that that part of the qualification anent the pannel's interlining is not relevant, except it be condescended *quo tempore* interlined, if 'in ipso actu vel statim 'post actum;' it is answered, That this part of the qualification is used jointly with the rest. And there is no necessity of condescending, because *quocunque tempore* interlined, it is a sufficient evidence of the concourse, consent, and advising to Haig, maker thereof; especially in respect it was drawn up by him, viz. Haig, in name of the pannel, and others having interest in that writing, which is truly an infamous libel, and termed in a sinistrous notion by name of a supplication: Likeas the pannel his procurators has in their second defence maintained this action of law, That 'principium et finis tanquam 'duo extrema includunt medium.' And therefore the pannel's knowledge, as the first imitation of that infamous libel, and his receiving the same from Haig immediately after the penning thereof, and receiving to be presented to be his majesty to their use who were alledged supplicants, and the interlining thereof *ex post facto*, (albeit not interlined before the delivery thereof to the pannel) is relevant in law with the rest of the members of the qualification *per se*, by and attour (over and above) the general, to sustain this Dittay, to make the pannel author, adviser, deviser, consulter, and airt and part of the penning and drawing up of the said infamous libel: specially seeing it will be constant (i. e. evident) by the depositions, when the same shall be used before the assize, that the same was not interlined *longo intervallo* after delivery thereof by Haig to the pannel, but very shortly after *in tempore quasi continuo*. And where it is alledged, That this interlining was not till after nine months after the receipt thereof from Haig, that is not, or cannot be verified, nor has no warrant in the depositions. And where it is alledged, That this interlined libel cannot be used against the pannel, because it was never delivered to Dunmure, nor never shewn to any, till the pannel produced it before the committee, and it was produced under promises that it should not be used to the pannel's prejudice; and that the pannel was not obliged to answer, neither to have produced the same before the committee: it is certain the committee urged nothing from the pannel but by good warrant and to which the pannel was obliged to answer upon his allegiance; and the denial to give ane answer to his majesty's commissioners, who had warrant under his sacred hand and seal, which was exhibited to the pannel, would have inferred against the pannel a more dangerous crime than that he is now accused upon, by declining of his majesty's judgment, and of his majesty's commissioners. And for the committee, they urged nothing from the pannel but a plain, true, sincere, and speedy declaration of his knowledge of the author and contriver of the said scandalous libel, which, as it was incumbent for the committee in obedience to his majesty's warrant to them, so it could breed no snare nor prejudice farder, nor he did burden himself by his own confession; in respect whereof, the exceptions ought to be repelled.

It is duplyed by Mr. *Roger Mowat* to my Lord Advocat his Reply, made to the defences proponed against that part of the dittay whereby it is alledged, That the pannel cannot be convened as author, consulter, adviser, &c. but that the said Defence ought to be repelled, and the hail members thereof. And first, That the said first part of the defence is not a defence, but a denial of that part of the dittay; and that the denial must be referred to an assize, and disputed there, and not here; and that the same is not relevant, because albeit the pannel has alledged another author, yet they might be both authors of the said libel. It is answered, That the said alleadgance stands relevant, notwithstanding the reply, because the said defence in that part is not simply a denial, but is a denial very pregnant, instantly verifying that the pannel cannot be said to be the author, and so criminally to be pursued; because by his deposition before the said committee, he has not only denied upon oath that he is the said author, but has likewise instantly verified the same, condescended upon the true author; and not only has simply condescended upon the said author, but has likewise instantly verified the same: which verification being proponed with the said defence, is both relevant and competent now only to be decided before my Lord Justice, and not before the Assize, seeing it is a peremptor exception instantly verified. And whereas the said Reply bears, That the said Author Mr. William Haig's letter, bearing that the pannel was adviser, is to be taken complex,

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there is no such speeches nor words mentioned or contained in the said letter, which must now be produced, because it has been seen by the pannel, that it may say for itself. And whereas my Lord Advocat alledges, That the assize is only judges to the probation, and that he prove before them that the pannel was author, adviser, &c. of the said alledged infamous libel; that ought to be repelled in respect of the alleadgance propounded for the pannel, founded upon his depositions and Haig's letter: which depositions and letter being already produced, and delivered to the pannel, and used, and liberty granted to propound his defences thereupon, the defence is so proponed, that it may be either found relevant or repelled. And it cannot but be found relevant, because a pannel being pursued for a crime, as author thereof, this is a most usual and relevant defence, that he cannot be convened as author. But he must be absolved from that point, because he offers him instantly to prove ane other author: upon whom he likewise instantly condescends; and not only condescends, but instantly verifies and proves. And so the exception being relevantly propounded, and instantly verified, as said is, it must be here found relevant, and likewise proven, and cannot be referred to the inquest. And where it is replied by my Lord Advocat, That that part of the defence founded upon the pannel's depositions, bearing that he has confessed ane other author, and giving his oath thereupon cannot be respected, being but his own depositions and declarations, and cannot work in his own favours; it is duplyed, That that part of the said Answer and Reply ought to be repelled, in respect of the said defence founded thereupon; especially seeing the said depositions were given before the said committee, who were appointed by his majesty for trial of the said author. And the said depositions being a part of the said trial, the pursuer cannot be heard to quarrel them, especially seeing they are used by the pursuer against the pannel, and are now as his evidence. And if the pursuer use them against the pannel, it is lawful for the pannel to make his use thereof, so far as makes for him, in respect whereof the alleadgance stands relevant in that part founded upon the said depositions. Which, together with the said missive letter written by Mr. Haig, and which the pannel propounds *conjunctim*, to prove his alleadgance, verifies clearly that part thereof: and so being both relevant and proven, is sufficient to elide (quash) that part of the dittay, That the pannel should not be found convenable as author. And whereas my Lord Advocat in his reply answers, That the said first defence, or first part thereof, is not relevant, bearing that it is alledged for the pannel, That he cannot be convened as author, seeing there is another author condescended upon, and proven; because it is replied that they might both be authors of the said alledged libel: it is duplyed, That that part of the said Reply ought to be repelled, in respect of the dittay itself, wherein it is not libelled that they are both authors, but only that the pannel is author; and when it shall be so libelled, it shall have an answer. And where it is replied by my Lord Advocat, That that part of the defence, bearing that consulters and advisers are not contained in the acts of parliament, upon which the dittay is founded, ought to be repelled in respect of the 151st act of the 12th parl. of king James 1. of happy memory, wherein it is declared, that all criminal libels contains airt and part. To that it is duplyed, That the defence stands relevant notwithstanding of the said answer; and that the pannel can no ways be drawn within the compass of the said two acts, except upon that which is especially contained therein; and consulters and advisers are not contained therein. And as to that contained in the other act of parliament, cited anent airt and part, it is answered, That they are different: and if they be alike, airt and part should only be mentioned in the dittay, and not in the other with consulting and advising, which are clearly several points, and must be severally elided; in respect whereof, that part of the said alleadgance stands relevant. And where it is replied, That the pannel's depositions, alledged in the exception, to verify that he was not consulter, adviser, &c. because that the said depositions bears that he knew not of the penning, and gave no advice thereto, that that part of the said alleadgance is likewise denied *ut supra*, and not a defence. It is replied, That as my Lord Advocat repeats his reply against the denial, so for the pannel the said defence and duply, made in fortification thereof, are here repeated; especially that part of the duply founded upon the said depositions, bearing that the said depositions are used by my Lord Advocat against the pannel, and therefore must work in his favour also. Where it is replied to that part of the alleadgance, bearing that the pannel cannot be convened as author and deviser, because he has given advice, and in token thereof has mended and reformed a part of the said libel; that that cannot be respected, because of the reason contained in the said exception, bearing that it is contrary to the depositions, and that it impugns not the relevancy. It is answered and duplyed to the said Reply, That the same ought to be repelled, in respect of that part of the alleadgance which is founded upon the pannel's deposition, and needs not impugn the relevancy, because it is peremptor for that part, and as it is relevant, so it is instantly proven by the said depositions, and elides that member of the Dittay, being peremptorily proponed, and instantly verified and proven by the said depositions. And albeit it be replied by my Lord Advocat, That the said depositions are not used by him neither as part nor proof of the libel, yet it is contrair, because they are mentioned in some part of the libel, and so used. And as for proof, they cannot be yet used as such, till the relevancy be discussed. But albeit my Lord Advocat should not use them, yet the pannel uses the same; and the said depo-

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nitions may be found a lawful probation to him of any thing that he shall found thereupon.

And where it is alledged by my Lord Advocat in his reply, That that part of the Defence used by the Pannel against the interlining libelled, that the same is not relevant, because not libelled when interlined, as that part of the said alleadgance bears; and it is answered by my Lord Advocat, That that part of his lordship's qualification is used jointly with the rest; and that *quocunque tempore* interlined is an evidence of the Pannel's concurse with Haig, in respect it was done by Haig in name of the Pannel and the rest of the supplicants; To that it is duplyed, That that part of the alleadgance proponed for the Pannel stands relevant, notwithstanding of that part of the reply made thereto; and that it is yet contended for the Pannel, that it is no ways relevant to alledge *quocunque tempore* interlined thereupon, to infer against the Pannel that he was author, deviser, and airt and part of the penning: for common sense evinces, that to be airt and part of the penning or devising of a writing, must be done either the time of the forming of the said writ, or very shortly after, otherwise interlining can never infer author, deviser, or airt and part of the penning. And it is clearly set down in the said alleadgance, that great time intervened betwixt the author's penning and devising of the said libel, and the Pannel's interlining of it; for it is clear and notour to my Lord Advocat and the lords of the Committee, by clear depositions before them, that the said interlined libel was that same which was intended to have been presented to his majesty by the earl of Rothes, and that it was not interlined during the hail time the said earl had the same, and for a long time after. And so that part of the said Dittay is no ways relevant to infer the said Pannel to be author for the said interlining, because the time of the said interlining is not libelled *quando*, and that it was at the time of the penning, or immediately after.

And where it is answered, That the said libel was done by Haig in name of the Pannel and the rest, that part of the answer ought to be repelled, as altogether irrelevant, not bearing that it was done at their command; for to do any deed in name of another person, cannot be counted that person's deed in whose name it was done. And where it is replied, that the general is relevant, without that part of the qualification anent the interlining after that the Pannel received it from Haig, especially seeing it will be constant by the depositions, when they will be produced before the assize, that there was no interlining *longo intervallo*, but shortly: To that it is duplyed, It ought to be repelled in respect of the alleadgance, and the qualifications therein contained, bearing clear and undeniable circumstances of the time of the interlining; and likewise in respect of the said depositions, whereupon that part of the said alleadgance is founded, and which now the pursuer uses by propounding his reply thereupon. And seeing both the pursuer and the Pannel condescends upon the said depositions as a probation of that part, that part of the Dittay cannot be referred to the assize, to be proven before them, anent the time of the said interlining; but as the defence is relevant, as it is proponed, and ought and should be so found, so the depositions may be presently received as the probation thereof, being instantly verified and proven, as said is. And where it is answered, That the nine months, contained in the alleadgance, alledged to have intervened betwixt the penning and interlining, is not verified; it is duplyed, That, first, relevancy must precede probation: *Secundo*, That the said space and time may be gathered out of the circumstances contained in the said alleadgance and depositions: and lastly, The Pannel's own declaration must be taken thereupon, seeing the pursuer shews nothing in the contrary. And this judicatory admits no dyet to prove any thing that is found relevant, which is not proven *instanter*. And where it is alledged against that part of the Pannel's alleadgance, bearing, that the said interlined copy was never seen before it was produced before the Committee; and that the Pannel had promise not to be snared, and needed not to have produced it, except he had pleased; and that it is replied by my Lord-Advocat, That all that was urged from the Pannel by the Committee was by good warrant, whereunto he was obliged to answer upon his allegiance; and that the denial to answer before them would have inferred against the Pannel a more dangerous crime, if he had refused; and the Committee only urged a true declaration anent the author: It is duplyed, That the Pannel is not to dispute now anent the warrants of the said Committee, and upon the crime that might have followed if he had denyed to answer, and whether he might have declined them or not. But this he duplies in fortification of that part of the alleadgance, That albeit he had neither declined the said Committee (as he did not) nor had opposed in any case their powers or warrants; yet he might have lawfully proponed before them this defence, which to his great and heavy prejudice he did omit, That of law and reason he was not obliged, nor could not been urged to have made any depositions, nor given answers to interrogators anent any demand concerning the said libel quarrelled; because his answers and depositions might have been the ground of a criminal pursuit against him (as now it is.) And so with reason he might have been silent, and the saids lords of Committee could have taken no exception against him for his said silence. And therefore that part of the said Pannel's alleadgance stands relevant, notwithstanding of the answer bearing that he could not have been compelled to have made any deposition either upon his oath or declaration, if he had remembered, and had alledged the danger that was to follow and ensue thereupon. In respect whereof, the said replies, and every one of them, ought to be

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repelled, in respect of the said alleadgances and duplies made in fortification thereof.

It is farder duplyed for the Pannel by Mr. *Alexander Pearson*, That where it is replyed by my Lord Advocat to that part of the last defence, bearing that Mr. William Haig, the author and penner of the alledged libel, by his own grant in his missive letter, and also acknowledged by the Dittay, that his declaration that the pannel gave his allowance to the penning and forming of the said alledged libel, cannot be respected, nor have any faith, 'quia 'particeps criminis adversus socium, fidem non 'facit,' whereupon my Lord Advocat infers a grant against the pannel, of his giving allowance to Mr. Haig in the forming of the alledged libel: To which it is answered, That the inferenoe and the consequence is not good, and has no force; because the foresaid defence does no ways inforce a grant of allowance by the pannel to the forming of the alledged libel, but does only import that Mr. William Haig, the author and penner thereof, that his declaration (not granting any) bearing the pannel to have given allowance to him in forming the alledged libel, cannot be respected, nor have any faith at all against the pannel, himself being clearly the author and penner thereof; 'quia particeps aut socius criminis adversus 'alium, fidem non facit.'

It is also farder duplyed for the pannel by the said Mr. Alexander Pearson, That where it is replyed by my Lord Advocat, that it is against law and reason to oppone *jusjurandum in criminalibus*, and that the opposition of an oath given has only place *in civilibus*; it is answered, that the contrair is true in law, to wit, That causes criminal are sometimes even decided by oath of party by clear law. First Leg. 25, § 5, F. de Jurejurando: Verba Legis, 'Si quis juraverit se non capuisse, non debet 'adjuvari hoc jurejurando in actione furti, quia 'aliud est furtum fecisse, quod vel clam fieri 'potest.' Et Leg. 6, § 5, F. de his qui notantur infamia: verba legis, 'Sed et si jurejurando 'delato juraverit quis non deliquisse, non erit 'notatus; nam quodammodo innocentiam suam 'jurejurando approbant, quibus luce clarius 'est. Et in causis criminalibus juramentum 'deferri, ergo etiam causis criminales per jura-'mentum delatum decidi.' And it is alike, 'utrum jusjurandum a judice an a parte dela-'tum sit, utrumque enim decisorium est litis: 'expressa Leg. 1. F. de jurejurando: verba, 'maximum remedium expediendarum litium in 'usum venit jurisjurandi religio, quia vel ex 'pactione ipsorum litigantium, vel ex authori-'tate judicis deciduntur controversiæ: et ratio 'quia judex non defert, juramentum nisi in 'supplementum, et ubi res aliter probari non 'potest.' And therefore that part of the defence foresaid stands good and relevant, notwithstanding of the reply.

It is likewise duplyed by Mr. *John Nisbet* for the Pannel; Where it is replyed by my Lord Advocat, that the opponing of the pannel's depositions, wherein he disavows that he is author, deviser, conscious or accessary to the framing of the alledged libel; is not a defence, but a denyal; it is duplyed, That sundry points of the dittay being qualified, by the pannel's deposition, there results to him a relevant defence in law, upon the indivisibility and com-'plex taking of his depositions, 'quia confessio 'non potest pro parte acceptari, et pro parte 'sperni:' Bartol. in Leg. Aurelius, § Idem quæsit, num. 2. F. de Liberatione Legata. Pharm. Quæst. 81. num. 168. et aliis numer. 'Quando 'est præsumptio quod qualificato confidente 'occiderit ad sui defensionem, ut parte si oc-'cidens sit vir probus, nullamque occidendi et 'offendendi causam habebat, et quia occisus 'erat homo rixosus; talis qualificata confessio 'non potest dividi, nec pœna extraordinaria im-'poni, et sic confitens omnino absolvendus est.'

Whereas it is replyed by my Lord Advocat, that the relevancy of the qualification, and disconformity of the pannel's depositions, is not proper to be debated here, but must be remitted to the assize; it is duplyed, That all dispute and debate of law must be decided by the judge, and is not pertinent to be agitated before the assize, who are only judges *facti et quæsitores* to make inquiry into the verity of the deed.

Whereas it is replyed by my Lord Advocat, that interlining 'vel in actu ipso, vel post 'actum quocunque tempore,' of a piece drawn up for the use of the pannel and others interested, evidences the pannel's accessary concurse in the forming and devising the piece: it is duplyed, That it is most unreasonable, because it should follow, that interlining of any piece or book should import concurse in the first framing of it, which is contrair to reason.

Whereas it is replyed by my Lord Advocat, That 'principium et finis tanquam duo extrema 'medium includunt;' as is acknowledged by us in the use of that maxim; and consequently that the first intimation of the pannel's knowledge, and the immediate receiving of the piece challenged, and interlining *ex post facto*, are relevant to make the pannel author, or airt and part: it is duplyed, That that maxim is used by us in the interpretation of sundry passages of a piece done *unico contextu*, which therefore must be presumed to be done *uno animo et uno stylo*, by the analogy of the two extremes interpreting the midst; and can never be used to make disparat acts, to join preposterously, to prove accession in forming and devising, seeing the first imitation alledged by my Lord Advocat is of knowledge, which presupposeth a thing to be done.

Where it is replied by my Lord Advocat, that the Libel produced before the lords of the committee with the pannel's depositions, notwithstanding promise and assurance that they should not be used, may be used by my Lord Advocat, and that the procedure of the lords of committee is most warrantable, that the pannel was obliged to answer by his alleadgance: it is duplyed, That the warrantable procedure of the committee is not contested, nor

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cannot be; and that the pannel, albeit he could not decline his majesty's commissioners, might very well in reason and law have refused to depone his own dittay. And we adhere to the former citations, averring that the assurance given by judges should secure pannels against any use that could have been made of their depositions.

It is added to the duplies by Mr. *Robert Macgill*, That where my Lord Advocat has replied, that the oath of a party to be indicted may be urged in criminals, 'quod hoc vix sit 'auditum in jure,' Clarus § ult. Quæst. 63, et Quæst. 45, num. 9. And if it hath been practised in some parts, as likewise in this country in the Examination of these who are to be indicted, 'Consuetudo illa est vetustas erroris 'quæ non adeo suo momento valitura, aut ut 'legem vincat aut rationem.' Apud Gregorium, et Codice Justiniano, quæ sit longa Consuetudo. The reason of the law is, that the maintaining of our life is so natural, that what will we not say for the defence of it? 'Et su-'pra omnia evitandum est perjurium.' And the reasons of the practicians is nothing, which is lest crimes should be unpunished: for upon probation by writing, witnesses or other confession, *quæ non est jurata*, or upon presumptions *luce meridiana clariores*, an alledged criminal may be put to the knowledge of any assyze; or otherwise the question may be used, 'ad eliciendam veritatem.' And where celerity of punishment may be objected rather or a man perjure himself, 'vindictæ tarditas sup-'plicii gravitate compensetur.' But accepting the practique to be so, I say, that 'in confes-'sione jurata nullo pœnæ metu propter impu-'nitatem promissam.' The maxim of the law must be here received, *quod approbo, non reprobo*; especially seeing the pannel was so simple and careless in respect of his innocency, that he remitted the forming of his depositions to the lords of committees themselves, he being then removed the time of the dyting and wrting of them, and did subscribe them *fide implicita*.

Where it is replyed, that advising and devising may be attributed or qualified by any subsequent deed to the alledged crime; it is answered by that of Sallust, 'Et antequam inci-'pias consulto,' &c. and so it is *in mandato*. And as to the ratihabition, *est fictio juris*; and it is to be understood 'in criminibus manifes-'tis, et non ubi quæritur de nomine criminis;' as in our case. And remits to the distinction alledged in the hinder part of the first exception.

It is duplyed by Mr. *Roger Mowat* to the two practiques of Auchindrane and Carrarie alledged by my Lord Advocat, That they suit not this case, saying that depositions should not prove in favour of the pannel, because if any depositions were given by these two persons, not granting the same, they were given after their indictment for the crimes of murder; but here the depositions are given before any crime known. Secondly, If any depositions were given, they were the voluntary depositions of the party, not demanded by the judge. Thirdly, it is not replyed, that these delinquents proponed any defence upon their depositions, and craved their said depositions to verify the said dispute. Lastly, it was not there alledged and offered to be proven, That there was ane other author of the said murder, which was their crime; whereupon if they had condescended and offered to prove the same, their depositions would have been further respected. In respect of which clear differences of these delinquents from this case, no respect can be had to the practiques alledged.

The Dyet continued till to-morrow the 11th instant.

Curia legitime affirmata, the said 11th of December, 1634. Parties and Procurators as before.

The king's majesty's Advocat having heard the Duplies made to his lordship's Reply, declares that he finds nothing worthy therein to be answered, except one point of law moved very impertinently anent the division of confession in criminals, and another made *in facto* anent the challenge made to the committee in an alledged promise made to the pannel at the time of his examination. And for the first, which is disputable *in jure*, if it had been pertinent to the purpose, his majesty's Advocat declares he would have triplyed thereto in writing, and is ready, upon my Lord Justice's desire, to clear it to his lordship. And as to the other part *in facto*, it is more pertinent to be cleared before the assyze. And therefore he supersedes his answer, excepted he be enjoined thereto by my Lord Justice General.

Quinto, It is alledged by Mr. *Roger Mowat* for the pannel against the second alternative of the Dittay, That the pannel ought to be assoilzed, and cannot be put to the knowledge of an assyze, for alledged hearing, concealing, and not revealing, and not apprehending of the author of the alledged infamous libel, and alledged divulging and dispersing thereof, as the Dittay bears: because giving, and not granting, that the foresaid supplication quarrelled might be found scandalous against Mr. William Haig, the known author thereof; yet *quoad* this pannel, who is not, nor cannot be found the author, it cannot be so declared, because the addition of the act 1594, militats only against such writings as are manifestly, clearly, and without doubt or difficulty evident and seen, and known to be infamous libels, and at the very first sight may appear such unto every ordinary understanding. But the quarrelled supplication being of a dutiful strain, and such as might be mistaken even by very understanding readers and hearers, the addition of the said act can no ways be extended to the hearers, concealers, not revealers, and not apprehenders. But so it is, that the said quarrelled supplication was delivered by the said author to the pannel as an humble supplication,

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and given by him to the earl of Rothes as an humble supplication, and returned to him under the same name: likeas the pannel is content to make faith anent his knowledge and conception thereof, that he received and retained the same *eo nomine;* and therefore cannot be put to an assyze upon these points, seeing they are points that cannot in reason be found capital by the common and civil law, but by the said addition, which was made in turbulent times, and never took effect, but in continual desuetude, as has been said before. And it were very hard, upon such ane act, never practised heretofore, to make noblemen and others his majesty's good subjects obnoxious to a capital crime. And albeit the said quarrelled supplication might now be found to be infamous, yet the finding it now to be such, ought not, nor cannot be drawn back to infer the pain of death upon those who *bona fide* did not think it such, as now it is said to be by the said Dittay; they having 'justam et probabilem ignorantiam,' by doing that which truly they did, thereby not to have incurred the hard and rigorous censure of the said act of parliament. Secondly, It is alledged, that *absolvitur* ought to be granted *ut supra* to the pannel, because the supplication quarrelled was never declared heretofore infamous: and before it had been declared infamous and scandalous, and by the said declarator the pannel had been certified of the danger, the alledged having and hearing thereof cannot be now sustained as a relevant ground to infer this criminal pursuit and pains of death against him. And with reason it should have been first so declared against him, that he, and others his majesty's loyal and good subjects, being lawfully warranted by the said Declarator, might have thereafter eschewed to have offended in that kind. Thirdly, *absolvitur* ought to be granted, because the said quarrelled supplication was intended and offered to be presented to his sacred majesty; which intended offer of the said supplication by the earl of Rothes, put the pannel *in tuto*, that he could never have suspected any crime or punishment for hearing, keeping, &c. to have followed after the said intended offer: and so was thereby *in optima fide* to hear, keep, and not to reveal any thing thereanent. The making of the which offer to his royal majesty, in the pannel's judgment, did then vindicat him that he thought nor conceived not the said supplication scandalous or seditious; seeing it is presumed that no man of judgment, or ordinary sense and reason, would be so foolish as to offer his own Dittay to his prince.

And that the Pannel's innocency may farther appear, and that his Opinion and Judgment of the said quarrelled supplication, as he offers to declare the same then to have been, may be trusted above all other presumptions that can be adduced in the contrair; it is to be remarked, and gravely and wisely considered by the judges, that the pursuer in effect has no other evidence nor probation of the said particulars libelled in the said dittay against the pannel, but such as proceed from his own depositions made before the said committee: which point is so considerable, that in reason no advantage should arise thereupon against him, seeing he was not obliged thereto, but of his own accord. And as in law a person accused criminally cannot be compelled either to depone or declare at the command of the judge, so the depositions given by this pannel before the said committee, should not be respected, in so far as the same may be made ane ground of the said dittay, which concludes and infers no less against the pannel nor the pain of death. And for the point of concealing and not revealing the said writ, *de facto* the same was revealed by the pannel to the earl of Rothes, in so far as the same was appointed to be presented to his sacred majesty, and thereby to have been revealed to his highness: likeas accordingly the earl of Rothes did offer to present the same, as said is. In respect whereof, *absolvitur* from the said concealing and not revealing; *absolvitur* likewise for not apprehending, because, as is said before, the pannel is ready to declare, that in his judgment and conception he did not think the said quarrelled supplication to be such as it is libelled by the dittay, for the reasons before adduced. And in that respect it was hard for him as a private man to take upon him to apprehend the author of a writing, which before he had not conceived to fall within the compass of the said act of parliament. For albeit in matters of treason all good subjects are obliged in duty under all highest pain to discover and delate authors and practisers thereof; yet in other matters, in writing, and such like, wherein are doubtful and ambiguous expressions, which may suffer divers interpretations and constructions according to the humours, capacities, and conceptions of the readers; there is no such necessity posed by the said acts of parliament libelled, nor by the makers of the same, that a writing coming to a man's hands, whereof he makes not the right sense and meaning as others do make thereupon, that the said writing not rightly understood by him, shall thereupon be a ground of a criminal pursuit to make him lose his life for not taking, or not apprehending, or not revealing the author of the said writ. The preparative seems dangerous and singular; it would therefore be carefully adverted unto, specially at this time, and in this case; when as the putting of the said act in practice, seems to have the first beginning upon this pannel. And the taking and apprehending of leidges has heretofore been dangerous to sundry apprehenders; and is instanced by the earl of Queensbury and the laird of Geichtis practices, for taking of leidges at their own hands.

It is answered to that part of the said Dittay anent Mr. Haig's apprehending of his own danger upon the simple sight of the committee's letter by the pannel, That that cannot make the pannel accessary to his escape, no more nor his own consent anent the penning of the said

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quarrelled supplication can make the pannel airt and part of the forming and penning thereof; seeing the said pannel's second deposition bears that he was neither upon the counsel nor knowledge of his escape, and knew not of it 'till three or four days after he was gone. That part of the dittay anent the pannel's receiving of Mr. Haig's letter, is no way relevant to infer the pain and crime libelled against the pannel. First, because this is not a matter of treason, wherein receiving and writing of letters are prohibit. Secondly, The pannel was not prohibit by the lords of the committee to receive any letters. Thirdly, The said letters are produced and delivered to the saids lords, which in rigour of law he needed not to have done. Fourthly, Being produced, they prove nothing against the pannel, but are clearly in his favour; because Mr. Haig professes himself therein to be author and penner of the said supplication. And where it follows in the said dittay, that it is affirmed and avowed in some of the said missives, That Mr. Haig had the pannel's approbation and allowance to the making and penning of the said supplication, that is altogether irrelevant, as having no warrand from the said missive letter, which contains no such affirmation as is libelled. And the pannel craves the letter bearing that passage presently to be read, seeing it is in my Lord Advocat's hands; which desire should be granted, because the pannel has seen it, with the rest of his said missives, by warrand from my lord justice and his assessors.

It is added by Mr. *Alexander Peatson* to the Exception, That the pannel is not guilty of concealing, not revealing and divulging of the alledged infamous libel, because the writing quarrelled being in form of a supplication, and used as a supplication by offer made thereof to his majesty, who then gave no signification of any offence therewith, the pannel is not, nor cannot be counted formally a concealer, not revealer, or divulger of an infamous libel, there being no such knowledge nor opinion anent the writing foresaid of the pannel: 'Quia injuriam potest facere nemo, nisi qui scit se 'injuriam facere.' Leg. 3, § 3, F. de Injuriis. 'Sed accusatus non habebat hanc scientiam, 'sed justam causam credendi,' to think of it otherwise as a supplication, for the reasons above rehearsed. And as when any is accused of theft, it is a good defence to say, 'Quod domini voluntate et consensu rem contrectant, 'saltem putavit dominum consensurum, sive 'id falso, sive id vero putet;' expressa Leg. 46, § 7, de Furtis, 'maxime dum suberat infra 'causa ita credendum.' So by the like reason in the matter of meddling with the infamous libel, it must defend the pannel, that he had no knowledge or conscience of ane infamous libel, and that he had just and probable causes to think of it as a supplication, 'sive id falso 'sive id vero putavit, et generaliter ubi de 'obligando queritur, propensiores esse debere 'nos (si habeamus occasionem) ad negandum, 'ubi deliberando ad liberationem,' ait Arianus, Leg. 47, de Obligationibus et Actionibus: 'ergo in re præsenti rapienda est occasio ad 'liberationem accusati.' Specially anent the divulging, because this point of dittay anent divulging, is not founded upon any acts of parliament, but only upon the common and civil law, and therefore should be decided by the said law: by which the defence now alledged for the pannel is very relevant. Farder, that part of the dittay, bearing that the pannel by shewing to Mr. Haig of the warrant of his citation, did thereby give him occasion to escape furth of the country, is not relevant; because that which of itself is good, may give occasion to evil: and the pannel's shewing the warrant of his citation, is no more nor if being verbally cited, he had told Mr. Haig of his citation, which is no crime.

It is added by Mr. *John Nisbet*, that the dittay subsuming concealing of the piece quarrelled, is contrary to itself, bearing the imparting of it to my lord Rothes, of purpose to present to the king's majesty.

It is added, that the not apprehending the author of an infamous libel, is not relevantly qualified, by the not taking of Haig; seeing it is not libelled, that the alledged libel was declared to be of that nature, or conspicuously or notourly, at least to the pannel's knowledge, an infamous piece; and that it was in the pannel's power to apprehend the author without incurring any hazard of law, for the injurious interpellation or apprehending of any person, whom he was not able to convince to be author: specially seeing the not apprehending of the author of a treasonable piece cannot import any guilt against the not apprehender, who is not able to convince the author of the crime by lawful probation, and therefore not obliged to apprehend, since he cannot do it without the danger of retaliation, in case he succumb; James 6, par. 2, cap. 49. And in law, 'Qui injuriose interpellit in judicio civili 'tenetur injuriam,' F. de Injuriis, Lege 19. 'Et si liber pro fugitivo apprehensus sit, ap-'prehendens punitur.' And by the like reason, the apprehender of a party, whom he cannot convince by lawful probation, is punishable; and in the civil law, he is obnoxious in the pains of Lex Julia de Vi publica, and of Lex Cornelia de Injuriis.

Secondly, The apprehending injoined by act of parliament is only subsidiary, when a party is declared author, and cannot be well apprehended by the judge: and a party that is ready to delate the author of an infamous piece, to the end that he may be apprehended by the judge, he is not obliged to apprehend him summarly.

Thirdly, The not apprehending of the foresaid author is excuseable; because the pannel was enjoined by the lords of the committee not to divulge the business whereupon he was convened, and to keep all things secret until his deposition.

It is farther cited by Mr. *Robert Mergil*,

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anent the not apprehending, That the pannel ought to be assoilzed therefrom, because freedom is so natural and favourable, that even amongst the Romans many of their magistrates had not Prehensionem; and that which the tribunes of the people had, it was also for the people's freedom. Gellius, lib. 13, cap. 12. Wherein it is certain of the law, 'quod nec 'magistratibus licet aliquid injuriose facere, 'quin injuriarum teneantur.' Leg. nec Magist. 32, F. de Injuriis. 'Unde etiam captura 'debet esse ex decreto judicis et judicia quæ 'resultant ex processu generalis inquisitionis 'debent esse sufficientia ad capturam, decer-'niturque captura ex facti qualitate et debet 'processus esse informatus licet reus qui capi-'endus est, non citatus sit:' Clar. § ultima, Quæst. 28, et Quæstione 20, num. 2. 'Quod in 'delictis enormibus id ita hodie servatur.' If then it be so, *in magistratibus capturam jubentibus,* can it be thought that any municipal law can command apprehension, 'nisi in casibus de 'jure, et ratione competentibus?' And so 'in 'criminibus decorum enormitate jam satis con-'stat' (where the pannel professes before God) 'et jurisjurandum purgativum de jure recipitur.' Leg. Lex Cornelia 5. § 8, de Injuriis. That he never remembered of such an act, he could never have imagined at that time the piece quarrelled to have been of such a sort, much less to be treasonable; and remits here to the distinction of crimes propounded in the last part of my first exception, where crimes and pains ought to be ruled in reason even in municipal laws; and except in such seditious speeches, which is the first sort of inordinat speeches against a prince, 'Ubi et tractatus 'adesse debet, ut in conjuratione Catilinæ;' no lawyer did ever think the haver, hearer, and not revealer, not apprehender, to be punishable by death; 'et ut videtur absurdum.' All municipal laws ought to receive their own limitations according to reason: and remits here to the second part of my duply, in fortification of my first exception, grounded upon Gailus, lib. 2, Observatione 33, anent the interpretation of municipal laws; and to the limitation exponing the act 134, which forbids any man, of whatsoever quality, to speak in time coming anent the government: which would be absurd, if it received not its own limitation to speak (about it) in council and parliament. And repeats here again the gracious acts of our dread sovereign anent the surveying of the laws.

It is answered by my *Lord Advocat* to the fourth Exception propounded against that part of the dittay, whereby the pannel is indicted and is punishable by death; and that by the act of parl. 94. for not apprehending of Haig the author of the infamous libel, and for not revealing of the same, ought to be repelled in the hail members thereof. And notwithstanding the same, the dittay in that part is severally and *per se* relevant, ought to be put to the knowledge of an assize; because it is subsumed in the dittay precisely, according to the words of the act, That the pannel, who knew Haig to be author, did not apprehend, but concealed him and it, and not revealed them; and also gave occasion to Haig of his escape; and since his escape, received divers letters from him, which were concealed till the pannel was interrogat thereupon by the committee. And where it is alledged in the exception, that the dittay is not relevant in this point, not condescending that the infamous libel was declared to be an infamous libel; and in particular that the dittay in that part is contrair to itself, which bears the pannel to be guilty of concealing; and yet bears also that he delivered it to the earl of Rothes, to be presented to his majesty: it is answered, that the dittay is relevant, because it subsumes directly according to the act of parliament, which speaks not of an infamous libel declared to be so; but of an infamous libel of speeches, which are so really in the self. And there is no contrariety in the dittay, because giving to the earl of Rothes is concealing, except it were qualified that the earl of Rothes were such a person to whom the act of parliament ties the hearer to reveal, which he is not, not being of his majesty's secret council. And where it is alledged that the true meaning and sense of the act is only to be understood of reproaches and infamous libels, which are certainly, conspicuously, and nottourly so, and not of such speeches and libels which are of a doubtful and ambiguous, or indifferent nature, which at the first view and hearing could not appear to all men to be infamous and scandalous: it is answered, That 'Ubi lex non distinguit, nec nos distinguere 'debemus.' And seeing the act comprehends reproaches and scandalous libels, which are so really, 'et non opinione,' the judge and assize are obliged to judge and proceed according to the nature of the thing prohibited, as it is so really, and not to leave place to frustrate the execution of the law under the veil of opinion. And of the law, 'ignorantia juris neminem ex-'cusat ne quidem in delictis, licet sic ignoran-'tia probabilis præcipue in atrocioribus,' of which nature this is. Neither can the pannel pretend excuse upon the incertainty, obscurity, or ambiguity of the infamous libel; because this infamous libel, by the first view, reading, and inspection thereof, might and should have appeared to him to have been of that nature. And no nobleman, or whatsomever subject of whatsomever quality, being of the pannel's knowledge, learning, and understanding, can or could justly pretend any doubt or scruple; but that the said infamous libel was, in the first view and reading thereof, of the nature of a scandalous libel, punished by death. And albeit in infamous libels against subjects there might be some shadow of excuse, by reading and looking upon the same, and receiving thereof either for curiosity, or to learn the quickness of a wit evil set in the penning of such infamous libels: but such excuses are damnable in infamous libels which touch with

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the least aspersion or blame the honour, credit and glorious estimation of our gracious sovereign. Likeas the pannel cannot pretend ignorance, in so far as he granted in his depositions, that after his receiving thereof from Haig, when he did communicate the same with the earl of Rothes, that they found the same of such a strain as ought not to be presented to our gracious sovereign. And where it is alledged that this act of parliament 94, in the points of the addition anent not apprehending and not revealing, are not of crimes punishable to death by the common law; and that the same has been in long desuetude, and out of use; that ought not to be respected, because we are ruled by the laws of the kingdom, by the acts made by James 1, and James 4, before alledged; and there is no prescription in law. And where it seems to be adduced to infer 'probabilem ignorantiam,' it is answered 'Quod omnis ignorantia juris est improbabilis 'et punibilis.' And where it is alledged the pannel 'habebat ignorantiam facti eamque pro-'babilem quæ excusat in delictis;' in so far as albeit this infamous libel was punishable to death in the person of the author, yet it cannot be punishable to death in the pannel, not being author as he alledges, because it was delivered to him as a supplication, to be presented to his majesty; and that he presented it to the earl of Rothes, who made offer thereof to his majesty; and after returned it to the pannel, which (as the pannel alledges) put him 'in tuto 'et in bona fide' not to apprehend Haig, not to reveal it to any of his majesty's council as a scandalous and infamous libel, because he did not conceive it to be so; and is content to depone upon his great oath, that he did not know, nor apprehend the same to be an infamous libel: it is answered, that the nature and strain of the infamous libel must be the rule of punishment or impunity, and not the opinion of the pannel; the reproaches, exprobations, and scandalous aspersions thereby put upon his majesty's sacred person, estate, and government, being so nottour, evident, and conspicuous, that neither the pannel, nor none of his knowledge and judgment, could pretend excuse or ignorance in the reading thereof; 'Et est ignoran-'tia maxime inexcusabilis nescire hoc quod 'omnes sciunt:' but especially in the pannel, who adverted to it narrowly, and heard it not simply spoken, but had it delivered to him in writing, which he keeped, copied, and advised with, and found the strain thereof of that nature, as was not fit to be presented to his majesty. And where it is alledged, That the pannel cannot be punishable to death for not apprehending of Haig, and not revealing of him and his infamous libel, except it had been declared to have been infamous, and Haig to have been the author thereof) and that the apprehending of Haig in a matter so obscure and doubtsome, would have been dangerous to the pannel *per Taschwallar* or retaliation, ordained by the act of parliament of king James, his majesty's blessed father, of happy memory, parl. 2. cap. 49. It is answered, that act of parliament requires no other declarator but the real nature and quality of the speeches and infamous libel; neither could there have been danger in apprehending, being warranted by the law. And where it is alleged, That all depends upon the pannel's deposition which he made voluntarily for satisfaction of the lords of committee; and that therefore he must have yet place to clear his own depositions; and that for clearing thereof, he is ready to depone by his great oath, that at the receipt of the said infamous libel, he received the same as a supplication, and so keeped it, and retained it: it is answered, that the most substantial part of the dittay is founded upon the nature of the infamous libel, and not upon the pannel's depositions; wherein his denial of knowledge upon oath cannot liberat him from the punishment of death contained in the act of parliament.

And where it is alledged, that albeit the justice should find this libel to be infamous now, yet it cannot be drawn back to the time of his receipt from Haig; it is answered, that it needs no declaration of judge, and consequently is not to be drawn back, but was so from the beginning.

And where it is alledged, That albeit in matters of treason all subjects are obliged to delate, yet not in matters which are doubtsome, but certain; it is answered, That this is certain, 'et de jure et de facto:' *de jure*, because commanded to apprehend under the pain of death; *de facto*, because of the said infamous libel, which is really and of the own nature so.

And where it is alledged, that 'Credulitas 'in furtis præbet causam probabilem,' for the which the text of the laws are adduced; it is answered, 'Quod illa credulitas probanda est 'aliter quam per juramentum rei.'

And where it is alledged, that 'proniores 'esse debemus ad liberandum;' it is answered, That this has no place *in atrocuribus*, and which are so clear and manifest as this.

And where it is alledged, that the Pannel ought to be assoilzed for not apprehending and not revealing, because he did reveal it to the earl of Rothes, who did make offer of it to his majesty; it is answered, 'Quod nullo modo 'relevat,' in respect of the act of parliament which ordains the revealing to be to a counsellor, which Rothes was not. And the offer to his majesty by the earl of Rothes *non relevat*, except it be alledged, that the earl of Rothes offered it to his majesty as a scandalous libel, to be punished conform to the act of parliament; which is not nor cannot be alledged. And supposing that this revealing by the earl of Rothes to his majesty might be sustained as lawful for procuring impunity from the act, which is not granted: yet the Pannel is punishable to death upon the other member, for not apprehending of Haig, whom he in his depositions declared to have been the author thereof, and whom he might have apprehended, both at the time of receipt

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thereof, and also at the time when the Pannel shewed to Haig the warrand of his citation before the Committee, he having him then in his power. And where it is alledged, that he could not apprehend him then, in respect of the command given to the Pannel by the Committee, to acquaint no persons with the causes of his warning: that cannot be adduced for an excuse, but rather makes the Pannel inexcusable, because he transgressed the command of the Committee in shewing of the warrand to Haig, and yet did not apprehend him; but, shewing of the warrand, gave him occasion to escape. And where it is alledged, that giving of occasion is not relevant, and also that receiving letters from him (not being in a matter treasonable) is not punishable; it is answered, That these circumstances are not essential parts of the Dittay *per se*, but used as adminicles to aggravate the Pannel's crime in not apprehending of Haig, and entertaining with him correspondence after his flight.

And where it is alledged the letters, if they were produced, would prove nothing against the Pannel, but in his favours, *non est hujus loci*, because now we are only upon the relevancy of the Dittay. But when they shall be used in the proper place before the assize, it will be clear, that the same make rather against than for the Pannel, in respect whereof the said fourth exception, and hail members thereof, ought to be repelled.

It is duplyed by Mr. *Roger Mowat*, in fortification of the Defence proponed for the Pannel, bearing, that giving and not granting that the foresaid supplication quarrelled might be found scandalous against Haig the author; yet *quoad* the Pannel cannot be found, because the addition of the act 94 militats only against clear writings, clearly known to be infamous; and at the first this appears not so, being of a doubtful strain, as the exception bears.

Whereunto it is replied, that the hail members of the Dittay, anent hearing, not revealing, not apprehending the author, are severally relevant, in respect of the act of parliament; whereupon it is subsumed, that the Pannel knew Haig to be the author, and did not apprehend him, but concealed and revealed neither him nor the said alledged libel, and sicklike occasioned his escape, and received letters from him since. It is duplyed, that the said fourth alleadgance proponed for the Pannel, stands relevant in the hail members thereof, notwithstanding of the said reply founded upon the said act of parliament; and the Pannel refers himself to the said exception and hail members thereof, to be judicially pondered and considered. And farther alledges, that the said reply is not relevant, bearing that part of the subsumption of the Dittay is founded upon the said act, bearing, that the Pannel knew Haig to be the author, and did not apprehend him: Because albeit the Pannel knew him to be the author, as his deposition bears in these words, that he took him to be the author; yet it followeth, not by good consequence in law or reason, that he took him to be the author of this as a seditious and scandalous libel, as my Lord Advocat in his replies bears hardly upon us, which were to take *controversum pro confesso*: And so the Pannel still abiding by his former defence, acknowledges, that if he had known the libel to have been infamous, he was tied to the strict observance of the act of parliament made against libels of that nature and kind. But seeing the Pannel was still denied all such knowledge as is inforced upon him by the Dittay and reply, and that it is against reason that any farder knowledge of a writing should be inforced upon a party, otherwise than he declares himself, and has declared *ab initio*; for he has still affirmed, and yet does affirm, that he never conceived that quarrelled writ to have been infamous, or to have carried or rubbed any aspersions upon his sacred sovereign; which if he had perceived, he would rather have lost his life before he had concealed one jot thereof, as he was bound in duty. And so seeing the gloss and commentar of his knowledge of the said libel, must always be referred to himself, and not by the gloss made in the Dittay, importing no less than the loss of his life; the said reply ought to be repelled, unless it were alledged that the Pannel, by his knowledge and by his understanding, had perceived the said libel to be as the Dittay bears, which he professes he never did. For if this ground hold, that all men reading writings should have a like knowledge thereof; and that any reading a writing should understand all the sense or commentaries that could be made thereupon, or else to incur such pains as might follow; this inconvenience might ensue, that bairns, or mere ignorants, or fools, reading writings of this kind and nature, might incur the self-same dangers; which is a great inconvenience, for certainly they know no better: and by their knowledge they apprehended not the danger, which wiser and more learned men prying more narrowly thereinto, did perceive and find out. For it has pleased God to give every man his own particular knowledge, and not all knowledge to one. And except it were replied, that the Pannel either by word or writing had signified or expressed any other knowledge or conception of the said quarrelled writing, which may verify against him that he acknowledged the same to be scandalous, as the Dittay bears, the said reply should be repelled as irrelevant. And the conception and knowledge of the said writing must necessarily be referred to the Pannel's own declaration, whose life and fortune cannot be taken away upon another man's exposition of a writing, which the Pannel is content to make faith that it never entered in his judgment or sense to know that to have been the meaning; which if he had known, he could not but at the first view have fulfilled and obeyed the law set down in the saids acts, as his disposition, and his carriage, and his bygone actions clearly evince, and needs no farther questioning. In respect whereof, the said reply ought to be

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repelled, as altogether irrelevant, for the reasons before alledged.

And where it is replied by my Lord Advocat, That the giving of the said infamous libel by the pannel to the earl of Rothes, is *de facto* concealing, except the said earl were such a person to whom the act tyes the hearer to reveal; which he is not, because he is not ane counsellor: to that it is duplyed, That the said reply is no ways relevant, because albeit the said act of parliament expresses a number of kinds of persons in place, to whom the crimes prohibit by the said act are to be revealed; yet it excludes not other persons, but that such crimes may be revealed to them as well as to the persons contained in the act: and the revealing thereof to other persons would be counted good service, and not taken for a fault in the revealer. Secondly, The said earl, to whom the said writ was revealed, albeit he be not privy-counsellor, yet by the laws of this country he is born a counsellor, and was so at the making the said act, as all the earls in Scotland were then: and therefore the revealing to the said earl may be estimat to have been done conform to the said act. Thirdly, The said earl is ane sheriff, and by the act of parliament the saids crimes are ordained to be revealed to sheriffs, as one of the persons mentioned in the said act: and therefore the delivery of the said quarrelled writ to the earl of Rothes by the pannel, is clear revealing, and not concealing; at the least is such revealing, that in law and justice should liberat and free the pannel from the crime libelled in the dittay, and from the heavy pain that follows thereupon, being no less than the loss and tinsel of his life.

And where it is replied by my Lord Advocat to that part of the said defence, bearing that the act of parliament is of notorious and known seditious libels, and not of doubtsome and ambiguous writs, which in reading may suffer divers senses and constructions, of the which last kind it is alledged that the writ quarrelled is: to the which it is replied, 'Ubi lex non distinguit, neque nos distinguere debemus.' And seeing the act comprehends reproaches and scandalous libels, which are really so, *et non in opinione*; the judge and assyze should proceed according to the thing prohibited, and not leave place to the veil of opinion: To that part of the said reply it is duplyed *ut supra*, That albeit the said act comprehends reproachful and scandalous libels, which are really so; yet it follows not, for the reasons adduced in the first duply made to my Lord Advocat's first reply immediately preceding, which I here repeat *brevitatis causa*; for here is all the controversy, Whether my Lord Advocat's opinion in the dittay, or the pannel's opinion in the defence against the dittay, shall carry the greatest force, seeing they are both different opinions. And it seems most favourable and most reasonable, that a nobleman's life being *quarrelled* and drawn in question and hazard upon the interpretation and commentary, that the pannel should have the preference anent the interpretation, for preservation of his life, honour, and estate; especially in respect that it is not only simply offered, that he would declare the true meaning, which he always knew and understood, of the said writing, but likewise offers to make faith thereupon. And as this is most reasonable, so it ought to be favoured upon the pannel's part in this case, so heavy and so dangerous to him; for it is not denyed, but the act prohibits the hearing, having, concealing, &c. of infamous and scandalous writings; but this writing *quoad eum* cannot be called so: neither prohibits the act, that readers of such writings should otherwise read, know and understand the same, nor according to the knowledge that it has pleased God to give them.

And to that part of the Reply, bearing that the Pannel cannot pretend excuse upon the uncertainty and ambiguity of the said quarrelled writing, because by the first view it might and should have appeared to him to have been of that nature; albeit in libels against subjects there might be some excuse by reading, retaining, and looking upon them; yet the pannel cannot pretend ignorance after the receiving thereof from Haig, and communicating the same to the earl of Rothes, that they found it of such a strain, as should not be presented: It is duplyed, That this part of my Lord Advocat's reply doth unwillingly force the pannel to fall upon the exposition of the words of the said libel; which cannot be eschewed, in respect of that part of the reply, bearing that by the first view it might and should have appeared to him to have been of the nature of a seditious libel: which the pannel flatly refuses, and is formally contrair, because he never took it to be so; for the first words of the said quarrelled writ are thir, (these) 'To the king's 'most excellent majesty, the humble Supplica-'tion of the lords and other commissioners of 'the late parliament, humbly sheweth,' &c. And these being the first words of the said writing, if in reason it may be affirmed that the pannel cannot pretend excuse, because by the first view that writing containing these words; if, I say, it might and should have appeared to him to have been a seditious writing, the pannel remits himself about it to the wise and judicious deliberation of the judges and noble auditors. For as it has been oft said before, and now not to be repeated, the pannel declares that he never took the said writing in his opinion and judgment for any other kind of writing or libel, but for ane humble supplication and remonstrance, in all humility to have been presented to his sacred majesty; and which accordingly was delivered to the earl of Rothes, to have been presented and by him offered to his majesty, and refused in manner contained in my Lord Advocat's own declaration of his sacred majesty's own speech and words uttered to the said earl of Rothes, the time of the offering thereof: whereupon the pannel takes instruments. And so the said quarrelled writing not being at the first view seditious, as is libelled in the dittay, and contained in the reply, but

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in the said first words being a most humble supplication; the pannel most justly pretends excuse, that seeing *de facto* the said first words are not seditious at the first view, that therefore he ought not to be convened by this dittay, as haver, hearer, and concealer of the said seditious writing; but ought to be suffered and permitted to make his own interpretation, that he never thought it so; and therefore cannot be pursued criminally upon his life therefore, as the dittay bears.

And at that part of the Reply, bearing that albeit in libels against subjects there might be some excuse by reading, receiving, and looking upon the same; yet the pannel cannot pretend ignorance, in respect of his depositions, after receiving from Haig, by communicating the same to the earl of Rothes, that they found it of such a strain as should not be presented: to that it is duplyed, That the saids depositions make nothing against the pannel; for the pannel did never deny the receipt of the said quarrelled writing from Haig, nor that he did communicate the same to the earl of Rothes, and that they found it of such a strain as should not be presented. But the times being distinguished, the doubt is soon solved; for the depositions apparently express not the times. For the pannel did not depone, That before delivery of the said quarrelled writing to the earl of Rothes, and before the earl of Rothes his intended offer thereof to the king's majesty, that they found it of such a strain as should not be presented: but that conference betwixt the earl of Rothes and the pannel, was long after the intended offer and refusing. At which time, upon the occasion of the harshness and misconstruction of some words, that speech was uttered betwixt them; and from that time furth, nothing further followed. And therefore the pannel's deposition makes nothing for the said argument. That the pannel could not pretend ignorance: in respect whereof, the said reply, and hail members thereof, ought to be repelled.

It is farther duplyed by Mr. *Alexander Pearson*, That where it is replied by my Lord Advocat, that the pannel's opinion of the writing, and the alledged probable cause of his ignorance to be a scandalous libel, adduced, cannot defend the pannel from concealing, &c. because the writing in itself is really scandalous, and at the first view might and should have appeared in that nature to any man of the pannel's understanding; and who can pretend opinion 'nesciendo hoc quod omnes 'sciunt?' It is answered, That the pannel's opinion of the writing, and the probable causes of his ignorance of the same to be scandalous, does defend the pannel from the crimes libelled, not only for the reasons and laws already adduced, in the matter of injury and other crimes, which are most pregnant; but also because no capital crime whatsoever is or can be committed *sine dolo*, whereof the pannel is altogether free in all sorts thereof; 'Et a dolo vero et a dolo præsumpto ex qualitate facti.' 'A dolo vero,' which the pannel's innocent intention evinceth in the defences proponed for him in the second exemption; and there he is purged abundantly, for the reasons contained therein, which are here repeated *brevitatis causa*.

The Justice and Assessors continues this Dyet till to-morrow, the 12th instant.

Curia legitime affirmata, the said 12th of Dec. 1634, &c.

It is alledged by the said Mr. *Alexander Pearson*, and duplyed by the pannel. *Secundo*, That the said Pannel is free 'a dolo præsumpto, 'quia tunc præsumitur dolus ex qualitate facti, 'ubi quis facit quod scit vel scire debet se non 'debere facere: At in proposito nostro nulla 'scientia nec conscientia criminis in accusato, 'nec ignorantia ejus quod omnes intelligunt.' But most just and probable cause of ignorance of the writing to be scandalous, which would have affected even the wisest and most sagacious then; although now *ex post facto*, by pregnancy and vivacity of spirit, the writing quarrelled being searched unto exactly, the same being interpret by the dittay, and urged upon the pannel as seditious; which interpretation now of it, cannot make damnable the estimation and opinion of the writing quarrelled, which it had of before amongst men of common understanding, to make culpable of capital crime: 'quia injuriarum æsti-'matio non addit tempus quo judicatur, sed ad 'id quo facta est referre debet;' Expressa Leg. 21. F. de Injuriis. 'Et nunquam crescit ex 'post facto præteriti delicti æstimatio.' And it is hard that the pannel, upon error of judgment, should incur capital punishment.

Where it is replyed by my Lord Advocat, That the pannel cannot pretend ignorance of the writing quarrelled, because by his deposition the 7th of June, he has declared that he thought it not fit to be presented to his majesty; It is answered, That the reply is not relevant, and that the pannel then thinking it not fit to be presented, hinders not but the said writing being thought fit by others to be presented to his majesty, and indeed offered to his majesty, the pannel thereby was confirmed the more to think of it as a supplication, and may make the defences thereupon, his credulity foresaid.

Where it is replyed by my Lord Advocat, 'Quod omnis ignorantia juris est improbabilis 'et punibilis,' and that the pannel can pretend no probable ignorance thereof; It is answered, That the addition of the act of parliament 94, anent concealers, whereupon this part of the dittay is only founded, had never strength nor vigour of law, (never being yet practised against any since the first making thereof) but being as it were by desuetude abolished, *ut supra* in our first exception, shews that the ignorance thereof is neither improbable, nor punishable against the pannel.

Where it is replyed by my Lord Advocat to

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that part of the fourth exception, bearing 'quod 'credulitas id furtis præbat causam probabi-'lem,' and that by parity of reason it should have place also in the matter of infamous libels; to the which it is replyed, 'Quod illa credulitas 'aliter probanda est quam per juramentum 'rei:' It is answered, That the Pannel urges not his credulity of the writ quarrelled upon his own Declaration, only, but also upon other circumstances, evidences, and presumptions, already adduced in the said fourth exception and former defences; which clearly evinces the pannel's credulity, and the justness thereof.

Where it is replyed by my Lord Advocat to that part of the exception, proporting the words of the law where it is said, 'Ubi de obligando 'et liberando quæritur, propensiores esse debe-'mus ad liberandum;' to the which it is replyed, That the law cited has no place in clear and manifest crimes, as this is: It is answered, that the reply takes *controversum pro confesso*, That the crime whereupon the pannel is accused is clear and manifest, which it is not; but in the notion of a crime (if any there be, which we do not grant) the same is most abstruse and obscure: and if any clearness be, it is for the pannel's innocency; in respect whereof, the exception stands relevant, notwithstanding of the reply.

It is further duplyed by Mr. *Roger Mowat*, to the reply made by my Lord Advocat to that part of the said fourth defence, bearing that the pannel is not punishable for not apprehending and not revealing, upon an act become in desuetude, because the leidges are ruled by the laws of the kingdom, as the acts of k. James 1, and k. James 4, bears; and that there is no prescription in laws, and that 'omnis 'ignorantia juris est improbabilis et punibilis.' It is duplyed, That albeit the leidges are and should be ruled by his majesty's laws, yet where laws are become in desuetude, and have never been practised, the leidges ought to be certified thereof, and new intimation ought to be made, as in the first defence at length is contained. And neither of these can be alledged in this present case; and therefore the dangerous consequence of this and the like laws ought to be prevented before the same be practised, which is the mind of the law-giver. And to that, bearing that there is no prescription in laws; is is duplyed, that desuetude must be estimat equipollent to the prescription of laws obscure, or that are not in daily custom. And where it is replyed against probable ignorance, 'Quod omnis ignorantia juris 'est improbabilis et punibilis;' it is duplyed, That 'ignorantia juris in damnis vitandis non 'nocet:' and this is our case. And where it is replyed to that part of the said fourth defence, bearing that the pannel had probable ignorance, the defence ought to be repelled, because the nature and strain of the quarrelled writing must be the rule of the punishment or impunity, and not the opinion of the pannel; 'Et quod 'est ignorantia maxime inexcusabilis nescire 'hoc quod omnes sciunt:' it is duplyed to the said reply, That the pannel still contends that the nature and strain of the supplication quarrelled may be the rule of his punishment and impunity, according to his opinion of the right meaning and sense that he made thereof, for the reasons already adduced in the former duplies immediately preceding; wherein the pannel contends, that with reason he himself must be the only trucheman and interpreter of the said writing, in case any other commentar or interpretation be made thereof, containing such a sense and meaning, as being received and admitted, will bring upon him the punishment of death: which duply is here repeated *brevitatis causa*.

And where it is replyed, That the Reproaches and Exprobations therein contained are so nottour, that the pannel nor none of his judgment could pretend ignorance on the reading thereof; it is duplyed *ut supra*, that the pannel refuses his having knowledge of any such reproaches, and professes his ignorance thereof; albeit he read the same, and others likewise of better judgment than himself, who did never observe nor find out the like, according to their judgment and understanding. Which reproaches and scandals, if they had perceived and remarked, (as they did not) would have touched them as near as any other of his majesty's subjects whatsoever of their quality or degree: but seeing the pannel, and the rest of the hearers and havers of the said quarrelled supplication, pretend their ignorance foresaid of any such knowledge, as is now expressed in the said dittay; the pursuer can never be heard to force any other knowledge upon them, to that end that they may be found guilty of the crime libelled, and punishment of death therefore.

And where it is replyed, That it is 'igno-'rantia maxime inexcusabilis nescire hoc quod 'omnes sciunt;' it is duplyed, that my Lord Advocat will do well to apply that rule to the present case, and show 'quod sit hoc quod 'omnes sciunt.' For if his lordship means by his dittay, then that rule can have no place here, because no man knew any such glosses or interpretation of the said supplication, but the pursuer himself, before the coming furth of the said dittay. And if before that time many were of another opinion, concerning the meaning of the said supplication; then my Lord Advocat cannot be heard to say, that it was 'ignorantia maxime inexcusabilis' in the pannel 'nescire hoc quod omnes sciunt,' seeing no man knew that which was set down in the said dittay, but my Lord Advocat himself: and many knew, and yet know, that the said quarrelled Supplication in their judgments and conceptions carried with it no such meaning or construction.

And where it is replyed, That the Pannel's Defence, founded upon his depositions which he made voluntarily for satisfaction of the committee, cannot be respected, because the most substantial parts of the dittay are founded upon the said quarrelled supplication, and not upon

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the pannel's depositions; and that his denial of knowledge by oath, cannot liberat him from the pain of death: It is duplyed, That albeit many substantial points of the said dittay be founded upon the said supplication, yet they are founded upon the pannel's depositions also. And albeit the said dittay quarrels and impugns the said supplication in sundry passages, which the pannel doth not maintain as they are expressed in the dittay, because when he and the other supplicants read and heard the said supplication, they found no such meaning in it; and they leave the defence of that commentary to the author himself, and declare *ut supra* by their judgment they found it not of such a strain as the dittay bears: the declaration ought now to be received, for clearing of the pannel and remanent supplicants from all suspicion of such knowledge as the dittay bears upon them, for the reasons foresaids, contained in the former defences and duplies. In respect whereof, the said reply ought to be repelled, in respect of the saids depositions already given, and of the pannel's declaration upon oath, which he now offers to give.

Where it is replyed to that part of the said Defence, bearing that albeit the said alledged libel should be now found to be infamous, yet cannot be drawn back, that there needs no declarator of the judge; consequently may be drawn back, because it was infamous from the beginning: it is duplyed, that the defence stands relevant notwithstanding the reply. Which defence bears expressly that the pannel and other supplicants received the said libel (now quarrelled) as an humble supplication; and in token of their said knowledge addressed the same to be presented to his sacred majesty, as the said defence bears. And so what has been found out since to be therein by the pursuers, and those of deeper wit and knowledge than the pannel and other supplicants, cannot be laid to their charge; for whom all presumptions are most clear and evident, that the pannel had never so much as one thought or opinion, as is contained in the dittay.

Where it is replyed to that part of the exception founded upon the instance of treason, as the same bears; it is duplyed, that my Lord Advocat in that answer takes *controversum pro confesso*, ever taking this for a ground that the supplication is seditious and scandalous, and so to be reputed and holden against the pannel and others in like case, which is still denyed, for the reasons before adduced. Where it is answered by my Lord Advocat, that that part of the said defence anent the revealing to the earl of Rothes is not relevant, in respect of the act of parliament; it is duplyed, and ought to be repelled in respect of the former duplies answering this point, that earls, the time of making the said act, were born counsellors; and that the earl of Rothes was a sheriff, which the act allows.

And where it is replyed, That the offer to his majesty *non relevat*, except it were alledged that he offered it as a scandalous libel; it is duplyed, that the said reply is no ways relevant, because it was sufficient by presenting it to his royal majesty to reveal the same in that manner: and it cannot be now known whether it would have been so thought by his sacred majesty, albeit he refused the samen; but it is certain that the pannel and the presenter would never have presented the same, if they had thought it scandalous. And that part of the defence, bearing that it was revealed by the presenting, needs not to bear that it was offered to be presented as scandalous, for that was not their end, neither had they any such meaning by the said presenting; their intention being, as is contained in the said defence, to have it presented as an humble supplication, to receive a gracious answer, as other remonstrances had gotten before. And so there is no necessity to alledge it was to be presented as a scandalous libel.

And where it is replyed, That (granting) the said revealing to his majesty might have been sustained as lawful, yet the pannel is guilty of death for not apprehending; it is duplyed, that the said reply is not relevant, because if the said revealing was lawful, *ergo* there was no necessity of apprehending; for the words of the act of parliament anent the prohibition are alternative. And albeit, as it is answered before, that the pannel thought Mr. Haig to be author, yet in respect of this conception of the said libel, he thought him not to be such an author as merited apprehension, because the said libel in his opinion fell not within the said act of parliament. And repeats his former answer, and the two practicks about the apprehending of free leidges; adding thereunto the late lord Maxwell's practick, who having apprehended by virtue of a commission, was notwithstanding forefaulted therefore.

To the reply, bearing that my Lord Advocat granted that the circumstances of the receipt of Haig's letter are not essential parts of the dittay *per se*, but used as adminicles to aggravat the pannel's crime of not apprehending, and giving him occasion to escape, and entertaining of correspondence with him thereafter: it is duplyed, that the pannel and his procurators accept of the said answer, and protest that no respect be had thereto, as ane essential part of the dittay. And the alledged correspondence is no ways relevant, not bearing that the pannel did write letters to Haig: for correspondence must be mutual, otherwise it can be no correspondence.

Where it is replied, 'quod non est hujus loci' to produce Haig's letter; it is duplyed, That it is 'maxime hujus loci' to be produced, if that part of the Dittay founded upon it be found relevant, because they were already produced by warrand of my Lord Justice; and being now produced, nothing shall be found in them to carry any warrand for that part of the said Dittay. And being produced to the pannel, and his procurators for their information and defence, must yet be produced to be compared with the said Dittay. For if they shall

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find that the Dittay and the Letter do not agree, then that part of the said Dittay founded upon the said missive will not be sustained, and so cannot be put to the knowledge of an inquest. In respect whereof, the hail replies and all the members thereof ought to be repelled.

It is duplyed by Mr. *John Nisbet;* Where it is replyed by my Lord Advocat, That the dispute against the relevancy of the qualification is superfluous, because the general subsumption conform to the act of parliament is *per se* relevant: it is duplyed, That the general is not relevant, 'quia non oportet in crimi-'nibus vagari,' Leg. Libellorum, F. de Accusationibus: 'Et locus, et tempus, et minutia 'delicti exprimenda sunt; alioqui accusatio 'ipso jure est nulla.' Clarus, § final. Quæst. 12, num. 8.

Whereas it is replyed by my Lord Advocat, That the Dittay is not contrair to itself, because of the acquainting his majesty by my lord Rothes's means does not expiat and purge the concealing, my lord Rothes not being one of these persons to whom the delators of such pieces, and authors thereof, is appointed by the act of parliament: it is duplyed, That these persons are only specified for receiving of such delations *in subsidium*, where the revealer knows not any other summar and secret way to acquaint his majesty; and not to tye them to an unnecessary circuit, where by a more compendious way his majesty may be acquainted, and the authors suppresst. And we represent the inconvenient to ensue, if parties by whose means his majesty has been acquainted with pieces of that kind, shall be obnoxious to the pains of the act for not seeking a bailly or sheriff, to tell unto them that which by other and more direct means is shown to his majesty.

Whereas it is replyed by my Lord Advocat, That the acts of parliament require not a judicial declarator of the nature of such pieces, nor the former knowledge of the party challenged, but without distinction punish the not revealers and not apprehenders of the authors of pieces materially seditious; 'Et ubi lex non distin-'guit, nec nos distinguere debemus:' it is duplyed, That statutes being particular conclusions of law, presuppone *principia universalia et prima*, and imply intrinsecally the common notions of law and reason. And therefore seeing in reason there cannot be a crime of concealing, unless the piece or author alledged to be concealed were either declared to be, or to the pannel's knowledge were, such as he ought to reveal, because *celare* is relative to knowledge; it is not relevantly subsumed that Haig was author of ane piece materially scandalous, and that the pannel revealed him not, unless a former knowledge were assumed likewise. And the law itself furnisheth a ground for this distinction, because the word 'conceasing' importeth knowledge: 'Et statuta punientia de-'licta capitaliter non habent locum nisi dolo 'interveniente, etiam quod de dolo non fiat 'mentio.' Paulus de Castro in Lege Nemo, num. 5. Codice de Episcopis et Clericis, 'Ubi perstringit imperitiam judicum qui verbis 'statutorum mordicus inherent, et multo magis 'cum dolis requiritur, vel expresse vel tacite, 'tunc enim nec lata culpa sufficit, tacite au-'tem requiritur dolus, cum statutum utitur 'verbis, nullus audeat vel præsumat.' Which are expressly in the act of the 10th parliament; and must of necessity be considered to understand the addition contained in the act of the 14th parliament; 'Idque multo magis in de-'lictis quæ de sua natura requirunt dolum 'prout est falsum injuria et similia.' Phar. Quæst. 87, per totam. Whereas it is replied, 'Quod judex debet procedere secundum natu-'ram rei prohibitæ,' and should not leave place to elude the law *sub velo opinionis;* it is duplyed, That by all statutes of that nature crimes are only obviated and prohibited: And the judge should proceed to try whether crimes be committed, or not, and not to condemn escapes or errors of judgment, which are not arbitrary to the will to shun, but depend upon the disposition of organs and representation of fantasms, which are exhibited 'ab intellectu 'agente,' and 'necessitate intellectum patien-'tem,' to ane assent, where it is furnished with no probable grounds to elide the same; as is known even to the novices in philosophy by that trivial maxim, 'Intellectus per assen-'sum præmissarum convincitur ad assentien-'dum conclusioni, saltem quoad specifica-'tionem.' And where my Lord Advocat would expose the weakness of the pannel's judgment in not discovering the nature of seditious pieces, to enforce the punishment of a crime, it is duplyed, That the law is not eluded by the slender pretence of opinion; but the pannel's conception of the piece, verified by his oath, and by all possible presumptions, which we have at length deduced, must liberat him from the guilt and pain of the crime, seeing in law 'carent animo injuriandi ex quo crimen 'consistit,' verified by the oath of the party; and any assisting presumption imports *absolvitur*, as is already shewn by the forecited laws, and the harmony of doctors. And whereas it is replied, 'Quod ignorantia juris non excusat 'in delictis atrocioribus;' it is duplyed, That 'ignorantia juris' being at the most 'lata cul-'pa æquiparatur dolo, et non excusat in ac-'tionibus descendentibus ex contractu, vel 'quasi, sed excusat in criminibus vel delictis, 'quia voluntas, quæ maleficia distinguit, spec-'tatur, non veritas vel exitus.' Leg. Divus Hadrianus, F. ad Legem Corneliam de Sicariis. Phar. Quæst. 87. 'Ubi regulariter do-'lum requirit, et ubi abest dolus, pœnam as-'scrit cessare, idque etiam in crimine læsæ ma-'jestatis,' num. 10, et per totam. And the atrocity of the crime excludes not a probable excuse, 'Quia causa quælibet, etiam levitas, 'credulitas excusat a dolo regulariter.' Phar. Quæst. 90, num. 1. 'Et non solum si sit levis 'sed colorata et irrationabilis imo etiam teme-'raria et bestialis.' Idem ibid. num. 3. Ubi refert doctores concordantes Claudius Battan-

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diæ, Reg. 'Si fatua credulitas a dolo excusat 'cum vehementibus præsumptionibus proba-'tur,' num. 1 & 2. 'Et causa levis excusat 'in crimine injuriarum, et ad excusandum suf-'ficit error verus vel præsumptus.' Phar. dicta Quæst. num. 29, 'Et levis causa excusat etiam 'in crimine læsæ majestatis.' Ibid. num. 26. 'Et multo magis in iis qui de sua natura nec 'de jure civili reprobata sunt:' As is the points of not apprehending and concealing. 'Ibi 'enim dolus non presumitur, et si quis sic ege-'rit sine dolo et animo delinquendi creditur 'agentis assertioni ex quo habet pro se juris 'præsumptionem.' Num. 14, et num. 90. 'Et ignorantia juris excusat a dolo.' Num. 91. 'Et crassa supina et affectata excusat ex opi-'nione Baldi et Tiraquelli,' quo citat. num. 99. 'Nisi sint circa ea quæ sint de jure natu-'rali gentium et divina prohibita.' Whereas it is replyed, That the pannel cannot pretend ignorance in respect of the piece conspicuously infamous, and of the pannel's sufficiency and qualifications, and in respect of the person injured, being his sacred majesty; and therefore excludes all excuse upon curiosity, or any other respects, excusable by the law, and, at last, in respect of the pannel's disapproving of the piece in his own depositions: It is duplyed, That the piece is not notiourly infamous for the reasons adduced. And here we protest, That my Lord Advocat's odious decyphering of the piece, necessitates us to vindicate not itself, but the conception that the pannel had, and that any man may have, that is not preoccupied with the unnatural glosses of the Dittay. And for the pannel's qualifications, it evinceth that he would not have delivered a piece notiourly infamous to be presented to his majesty, as is acknowledged by the Dittay, and so to have endangered his honour and life, if he had had any such conception of it. And for the pannel's disproving of the piece, it convinceth not his sinistrous intention in using or having a piece disprovable, because it is not deponed that he disproved it as seditious or infamous, but 'quando verba confessionis sunt 'dubia, possunt et debent declarari et interpre-'tari per confitentem, et in meliorem partem.' Phar. Quæst. 81. num. 38. 'Et confessio du-'bia et incerta interpretatur in bonam partem 'in favorem confitentis, et secundum illius in-'tentionem.' Bald. in Leg. Unica num. 23. Codice de Confessis. And the pannel declares that he disproved it not as seditious, but fit to be suppressed in respect of his majesty's will expressed to my lord Rothes anent pieces of that strain. Whereas it is replyed by my Lord Advocat, That the defect of the common law, in the points of concealing and not apprehending, cannot be obtruded, and that there can be no prescription of laws; yet there is antiquation and desuetude, as we have before shewn: And the defect of the common law is adduced as a probable candour of the desuetude in points debording from the common law. Whereas it is replyed by my Lord Advocat, That the nature of the piece must rule, notwithstanding of the pannel's conception thereof, because it is only required that the piece should be really seditious; it is duplyed, That in matter of crime the intention and conception is most considerable, as is already inculcat; and when there is a question anent the credulity of the party, his credulity is probable by oath, Barad. § Recte Lege inter omnes, F. de Furto; especially where there concur some presumptions. Whereas it is replyed, That 'ignorantia est inexcusabilis 'nescire quod omnes sciunt;' and that the pannel's narrow advertency and canvassing of the piece challenged, in reading, copying, advising, interlining, joined with his opinion anent the presentation thereof, excludes all presumptions of ignorance: it is duplyed, that it cannot be said 'quod omnes sciunt,' seeing my lord Rothes, a nobleman of eminent quality and sufficiency, made offer, at least mention thereof, as a supplication to his majesty, for the pannel's opinion. It is already answered for his perponding of the piece; it is so far from aggravating or convincing his knowledge of the piece to be of that nature, that he is confident that indifferent and impartial judgments, the more they advert to the strain of it, they will be the more edified of the nature of it, that it is not so notiourly injurious. And therefore the pannel protests that his procurators may vindicate his conceptions of it, and remonstrate the strange inferences that the Dittay makes of it. Where it is replyed by my Lord Advocat, That apprehending is warranted and enjoined by the acts of parliament, and therefore not dangerous; it is duplyed, That apprehending is warranted, when parties are able, by lawful probation, to bind upon the persons apprehended the guilt of the crime for which they delate and apprehend them. And that even in the crime of lese majesty there is no warrant to apprehend parties, albeit known to the apprehenders guilty of the crime, unless they be able to qualify and prove the guilt, under the pain of Talionis and retaliation in case they succumb. Where it is replyed, That the most material parts of the Dittay are founded upon the nature of the piece itself, and not upon the pannel's depositions; it is duplyed, That howsoever there results a relevant defence in law upon the pannel's *absentia animi*, which is probable by his oath, assisted with presumptions; and is admitted in the most strict inquisitions, as is constant by the uniform and constant harmony of all criminalists. Whereas it is replyed by my Lord Advocat, That there needs not a declarator of the judge to be drawn back; it is duplyed, That in all countries where the concealing of heretic books is punished, a judicial declarator is necessarily required; and the private opinion and mistaking of parties before declarator was never censured, much less punished.

Whereas it is replyed by my Lord Advocat, That the maxim, 'Proniores debemus esse ad 'liberandum non habet locum in atrocioribus 'et delictis contra principem;' it is duplyed, That we retort this answer, 'ubi lex non dis-'tinguit nec distinguere debemus. Et non de-

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'linquit qui in dubio contra fiscum respondet,' F. de Jure Fisci; 'et turpe est et principi injuriosum credere inventum qui principem omnibus benefacientem, neminem ledentem, injuria velit efficere; et quavis excusatio etiam levissima et maxime fatua in criminibus atrocissimis admittitur.'

It is added by Mr. *Robert Macgill* to the preceding duplyes, That where my Lord Advocat replieth, that 'juris ignorantia non excusat;' that the said rule may be understood 'in jure, 'quod usu invaluit:' for even if in these petty statutes anent the inflicting of pecunial pains contained in the 9th act, parl. 21, 1612, a new intimation of them is thought fitting to put the leidges in *mala fide* before they be practised, what then in this act, and some others, under the compass whereof sundry here may fall, shall there not an intimation be required where life, honour, and lands, are in danger, and a capital pain to be inflicted for to put the leidges *in male fide?* Item, Where it is replyed, 'Quod nec ignorantia facti excusat propter præsumptum 'dolum;' it is answered, that the pannel's 'ignorantia facti' is 'ab omni doli præsumptione 'aliena;' who could never think that under the general law, contained in the addition, could come in all sort of inordinate speeches, and all sort of bearers, concealers, and not apprehenders. And for the excusing of any dole that can be presumed, he adduces the knowledge of law and reason, which ought to expone all municipal laws, *ut evitetur absurdum;* which is, that all sorts of inordinate speeches or writs, even against a prince, and all concealers and not apprehenders, should be punished alike: For the Prætor says, 'Si quis adversus ea fecerit, prout 'quaque res erit, animadvertam.' Leg. item apud Labionem 15. G. 251. 28. 'Ubi de pœnarum distinctione ex circumstantiis juxta Legem aut facta 16. in principio,' F. de pœnis, 'quam consideratione affectus et animus facientis maximum habet momentum,' Leg. illa 3. § 1. dicta Leg. 15. § 38. Lege si quis certum 26. in fine, F. de Injuriis. So that my Lord Advocat's reply anent credulity, that it excuses not, and that it is not a sufficient warrant *ad juramentum purgativum*, and that it ought not to be here received; the same ought to be repelled, because 'credulitas sive justa sit causa sive 'injusta excusat ubi dolus requiritur,' as in our case. Clarus, § finali, Quæst. 60. num. 22. 'Et quod recipiatur juramentum purgativum 'concurrentibus aliis ad animi boni probatio-'nem indiciis constat,' per Phar. Quæst. 105. Inspect. 3. post num. 111. 'Leva vero judicia 'sufficere,' ait Alexander, Conc. 115. Columna penultima, Volumine quarto. 'Et à delicto 'etiam conventicula, et malæ congregationis, 'causam vel levem excusare,' ait Cravetta, Conc. 4. num. 26. But so it is, there may be many good reasons alledged, wherefore the pannel had a good mind; as, that all which is in this quarrelled petition, might have been proponed in parliament. And the rest of the reasons adduced in my second exception, 'adeo 'ut dolus non sit præsumendus' against the pannel; neither is the argument good that the pannel disallowed it, or thought it not fit for a time, *ergo* he thought it seditious *negatur sequi.* And because my Lord Advocat, in all the members almost of his reply, returns upon this, That the piece of itself is really seditious; and that obscurity and ambiguity of words may receive evasion and excuse among subjects, but not in the case of the pannel: I answer, that the exception stands good, notwithstanding of the reply, in respect of the examples and cases following. And, first, I confess that such inordinate speeches and writings as were uttered betwixt Catiline and his complices against a government, and against a prince's progenitors, or his person, in that sort are punishable both in the person of the speaker and penner, as also of the hearer, not revealer, and not apprehender; wherein the case of this addition is verified: and no others are hearers, not revealers, and not apprehenders. Clarus, § ultima, Quest 87. num. 2, et 3. But mark in a second case, 'Quod nobilis qui directis verbis et 'assertionibus dixit, ait, scripsit, principem 'suum non habere animum remunerandi;' by Matheus, De Afflictis, decisione 307. num. 27. is not thought punishable by the ordinary judge: but 'remittendus,' ut in Leg. Unica, 'si 'quis principi maledixerit ubi tamen improperatur defectus liberalitatis, quæ est præcipua 'virtus in principibus;' as our Saviour himself affirms, Luke chap. 22. Εὐεργέται Bountiful. The third case is of him who spake or writ that which by interpretation might be misconstructed to ane evil sense, as was said in the second part of my first exception: and remits also to that comment of Menochius, adduced by Mr. John Nesbit. And where my Lord Advocat would eschew, by saying that Menochius had not such a law as we, and that we ought to be governed by our own laws; remits to the end of my first exception anent the exposition of all municipal laws, according to reason. *Ubi* Gaylus expones the maxim, 'Ubi 'lex non distinguit nec nos distinguere debe-'mus, et ut vitetur absurdum paritatis;' our laws may be so expounded. *Ergo* if the authors of these last speeches and writings be scarcely punished, far less ought the hearers, not revealers, and not apprehenders; for even in apprehension, 'quæ est captura oportet ut con-'stet de criminis enorm tate,' which is not here.

It is triplyed by my Lord Advocat, That he finds no necessity to triply. But if the justice, and his lordships assessors, require any thing to be explained in that which is duplyed, upon signification of their pleasure, he shall be ready to expend all doubts *verbo*, which he did.

The Justice General continues this Dyet till to-morrow the 13th.

The said 13th of December, 1634. The Justice continued the Dyet till the 16th of December, 1634.

Curia legitime affirmata, &c. and Procurators in Defence, as before.

Mr. *Roger Mowat*, as procurator for the

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pannel, repeats only the former defences, and duplies of them, anent the revealing by the pannel to the earl of Rothes of the supplication or petition contained in the dittay, and the earl of Rothes his offering thereof to the king's majesty; and that the act of parliament is satisfied thereby, which does not exclude the revealing to other persons, nor are mentioned in the said act: but affirms positive all manner of revealing, whereby knowledge may come to his majesty, which is the end of the said revealing, sufficient, as said is, in ane act of this kind, which has never been in custom. And so revealing being clear, as said is, there needed no apprehending.

My *Lord Advocat* repeats his former answers, That the revealing is not clear nor relevant; and albeit it were, that the not apprehending makes the pannel guilty, and so to fall under the punishment contained in the act of parliament libelled.

It is alledged by Mr. *John Nisbet* under Protestation, That the vindicating of the libel challenged from the glosses of the dittay, shall not import any approbation thereof either by the pannel or his procurators; but in so far as they are necessitat, by my Lord Advocat's replies, to vindicat the pannel's innocency in the hearing, or any other accession to the said libel challenged. It is first replyed by my Lord Advocat in his replies, bearing that the nature of the piece is so notoriously infamous, that at the first view it is apparent to the most shallow and ordinary understanding, to be injurious to his majesty in all the points libelled: it is duplyed thereto, that the points of the alledged libel import no reproach to his majesty's person, estate, or government, in the pannel's conception, for these reasons: 1st, That point anent gesture is not reproachful, because, 'subjecta sunt talia qualia prædicata demonstrant,' Bartolin, Primario Leg. 3. F. de Instructo vel Instrumento Legato. And there is no injurious attribute enumerat, to defame his majesty's gesture; but it is only affirmed, that his majesty's notes bred a fear, which is ane attribute of casuality, and not of quality. Secondly, the intention of his majesty's noting could not be conceived by the pannel to be ane taxing of his majesty of any point of indiscretion or injustice, unless the act of noting had been qualified in the alledged libel to be unjust, or indiscreet; which were sacrilegious to think of a prince estranged from his country, and from the occasions of knowledge and knowing of his subjects: for he may in justice and wisdom remark the opinions of the lords of parliament, and thereby probably to found a conjecture of their inclinations to his majesty's service. Thirdly, the alledging the noting of the names of the dis-assenters could not at the first be conceived to imply an officious prying into the gesture of the prince, but rather a loyal fear of incurring the king's displeasure; taking hold of a simple gesture, whereby his majesty might have seemed to have taken notice of their untowardness to his majesty's service. Fourthly, there is no ground of reproach inferred upon his gesture, as the dittay bears. It is duplyed to that point anent his majesty's refusal to hear the reasons of some dis-assenters, That the first part of the Answer to the former point quadrats here. Secondly, The alledged refusal of his majesty to hear the reasons of the dis-assenters, cannot be so readily conceived to rub matter of reproach upon his majesty's sacred person or proceedings; but in the contrair argues his majesty's royal goodness in not accepting the scrupulous, preposterous anticipations of reasons before voting in parliament, as being derogatory from the antient and hereditary liberty of noblemen's votes, and from his majesty's royal bounty, ready to acquiesce in the free opinion of his estates; and far from a previous and partial espousing of either part of any debatable point, before the final decision in parliament. And as for the inference of fear to become obnoxious to his majesty's displeasure, it is not ane inference of ane reproach, but rather of a dutiful love, which debords (runs out) ofttimes into a needless fear.

It is answered to that point of the Dittay challenging that passage, viz. 'That the opposing of resolutions carried by plurality of votes, was never censured by a prince of so much justice,' contains no subject of reproach; but on the contrair, ane ample and due acknowledgment of his majesty's undoubted goodness and justice, used as an argument to deprecat his majesty's censure, as incompatible with his majesty's goodness, and the example of other princes like to his majesty.

It is answered to that point of the Dittay bearing that his majesty's honour is undermined by the affirming a general fear of innovation in essential points of religion, that his majesty's honour is not stained; because there is nothing affirmed to have been done by his majesty, which might occasion any such fear; and the panick and groundless fear of subjects, reflects no reproach upon a blameless prince. Secondly, It is affirmed that there is fear of novation intended, but not by his majesty, as is clear by the motives of that fear adduced by the supplicants, viz. 'That there is allowance of printing Arminian books;' which is not positively affirmed, but upon report, and the impunity of Arminian preaching, which reflects upon churchmen only, to whom it is incumbent to advert to the printing and preaching of orthodox tenents. And therefore albeit it were false, cannot fall under the compass of the acts of parliament, as seditious, and reproachful to his majesty, his estate, person, and proceedings.

It is answered to the point of admission of Papists upon the parliament and articles, That in the Pannel's conception it reflects not against his majesty, and therefore is not relevant to infer the crime of seditious libelling, or accession thereto. Item, It is answered to that point of the Dittay, bearing the king's majesty's proceedings to be misconstructed in the alledged prohibition of the gentry to meet, That his majesty's royal procedure is not taxed as unjust;

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but without dyving upon the words of justice or injustice of the interruption of those meetings, it is only insinuat, that albeit in parliament they might have objected against the interruption of those meetings, and had occasion to oppose his majesty's will, as they thought, that these meetings should be interrupted, they contented themselves and were not refractory. And herein, and in the bail strain of the following points, (in the Pannel's conception) it is only an endeavour to shew that the dissenting from some acts, was not from any faction and waywardness to oppose his majesty's will, as they feared he might have been possessed with; seeing in other points, wherein they had occasion, and probable grounds in their opinion to oppose it, they were silent. Moreover, it is answered for this point, and all others following, 'Quod in causa criminali quando verba 'possint interpretari ad bonum vel malum, in 'dubio debent intelligi ad bonum, et excludetur 'præsumptio delicti.' Cravetta, Concil. 9, num. 21. 'Et secundum subjectam materiam,' Leg. Procullus, F. de Usufructu: 'Et quando 'verba dubia sunt, non debent intelligi captiose indamnum proferentis, sed secundum 'ipsius mentem: et convenit animadvertere, 'qua mente quid dicatur, et multo magis quid 'concipiatur.' Leg. penult. F. ad exhibendum. 'Et quando verba sunt dubia, ut videntur injuriosa, vel non, standum est declarationi ejus 'qui ea dixit vel scripsit.' Menoch. Concil. 197. lib. 12. 'Multo magis ejus qui imprudens et bona fide iis usus est. Et quando 'verba sunt dubia, declaratio sumitur a verbis præcedentibus vel subsequentibus, vel 'utrisque.' Menoch. Concil. citat. num. 7. And therefore if the strain of the words, the nature of the subject being a supplication, the declaration of the Pannel's conception of them, and other ensuing words which declared them, be adverted unto; it will be found the Pannel is excusable, if in this conception they import no reproach to his majesty: for the bail last part of the supplication resolves in an innunciation *de possibili præterito*. We might have represented *quo verificatur ratione præsentis*; and therefore if at the time of the parliament they had power to represent these things, the enunciation of that power cannot import calumny or reproach to his majesty. And seeing the actual representation of these things could have imported no injury to his majesty, 'quia ubi 'licentia loquendi nisi in dando consilio et sermone?' Menoch. Concil. 107. num. 2, far less could the affirming of their forbearance from an act not injurious in itself, have been conceived or interpreted to be reproachful to his majesty. And whereas it is libelled, that the prohibition of the nobility and gentry to meet amongst themselves, or with the lords of the articles, is false; *non relevat*, because it is not positively affirmed that they were prohibit, but only that they might have represented the prohibition of these meetings. For the verity of the which enunciation, and the defence of it from being reproachful, the power of representing is sufficient with any probable ground to believe that these meetings were prohibit, whether upon surmises, or upon any other occasion. And lastly, it is declared afterward, that they forbear to make use of these reasons, which they might have probably represented, to give his majesty full content in every thing that in their opinion maketh not a breach in our religion or laws: whereby the justness and lawfulness of all they consented to or forbore to oppose, is clearly acknowledged; And that it appeared to the Pannel, and may appear to any, that they might have opposed the king's procedure. It is not to traduce it as unjust in points which they both by their silence acquiesced unto, and expressly acknowledge that they import no breach in our religion and laws, but to show how probably they might have opposed divers points thereof, if they had been possessed with a seditious spirit of opposition, and thereby carried to dis-assent from other acts, as they feared his majesty might have been moved to believe.

It is answered to the point of slighting the grievances of the country, That his majesty's proceeding is not taxed, because it is not said that they were proponed in parliament, and rejected or slighted; but only whereas in the convention of the estates the person chiefly intrusted by his majesty undertook to acquaint his majesty therewith, and to procure redress, nevertheless no notice was taken thereof, and they were slighted not by his majesty, but by those who undertook to acquaint his majesty, and therefore reflects only upon them.

It is answered to that point of the dittay bearing the ignorant and false affirmations, that before the 1609 year of God, the noblemen made choice of some of their rank to be on the articles, the supplicants ignorance, in the pannel's conception, lays no aspersion upon his majesty or his proceedings.

It is answered to that point of the dittay, bearing the taxing of the undutiful choice made by the bishops, of noblemen insufficient, or unexperimented, to be upon the articles, That it is not injurious in the pannel's conception to his majesty, in his person, estate, or government. Secondly, Repeats the general answer, that it is not positively affirmed of the bishops, that they did undutifully, or that the noblemen elected upon the articles were popish or ignorant; but that they had probable grounds in their opinion to think so, and to represent.

It is answered to the point of reproaching of his majesty for the acceptance of the taxations, That in the pannel's conception his majesty is not challenged upon his speeches in parliament, nor upon the narrative of his proclamations, nor by the antitheses of king James 1, his practice: but his majesty's speeches in parliament, his proclamations, king James 1, his practice, and the parallel of the estate of the country, and the end of taxations under either king, and his majesty's father of worthy memory, is adduced in the pannel's conception as specious reasons wherewith they might have

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oppos'd the granting of the taxations, if they had had ane disloyal intention to mar his majesty's ways and benefits.

It is answered to the point of challenging of his majesty for employment of his taxations, and for his liberality in rewarding his officers, That in the pannel's conception it is not spoken positively and by way of reproach, as the former points, shewing how far the dis-assenters were from averseness or tepidness in his majesty's service; seeing without expatiating on the common head usual on such occasions, against the granting taxations; without inquiring of the reasons and causes of granting the taxations; without representing the inconvenience to ensue, they all unanimously favoured his majesty's benefit.

It is added by Mr. *Rob rt Macgill,* That the remedies applied to a disease, must be thought both by the physician, and the patient or sick man, meetest and most fitting for the curing of the disease. But so it is, that the pannel and supplicants were sick of a disease; and therefore they in curing by the remedies as were thought fittest and most helpful by them, contained in the supplication, must be thought therein to have had a good mind, and that they thought and used the remedies according to the nature of the disease, as being most fit. Their disease was fear of displeasure from his majesty; for we must not think according to the Stoicks, That only 'vires animi quas phantasias philo-'sophi appellant, quibus mens hominis prima 'statim specie rei ad animum accedentis pel-'litur, non voluntatis sint, neque arbitrii:' but that also 'assentiri et co-ordinari incidunt in 'virum sapientem.' But so it is, that this disease was filial, *erga patrem patriæ.* And like bairnes who are dung (i. e. children that are beat) go back again to their father, so the pannel and other supplicants having by chance looked upon the piece quarrelled, did think it a very good remedy to appease his most sacred majesty, their father. As it is reported of the spear of Achilles, that he who wounded them with fear, might cure the same wound, in shewing that they might have represented grievances, which are diseases, to the only physician. And in our acts of parliament, declamations are forbidden *ad plebem:* so it must be thought of writings also, in the conception of the pannel, 'quæ per plebem distribuuntur atque ita divul-'gantur,' which is not in our case; *ergo,* &c.

It is answered by his majesty's *Advocat,* That all ought to be repelled, in respect of the dittay, and of the particular points of reproaches, which not so mickle (much) as by the conception or meaning of the pannel can be justified. And all which is opponed, is either against the relevancy of the dittay, which is remitted to the justice; or against the verification thereof, which is proper to the assyze. And if the justice and assessors desire a more special answer to be made to the particulars the King's Advocat offered to clear the samen by word in hearing of parties.

It is last alledged by Mr. *Roger Mowat* for the pannel, That that part of the dittay anent the pannel's alledged divulging and dispersing of the said alledged libel, is not relevant to infer the crime and punishment concluded in the said dittay; because divulging and dispersing are not contained in the acts of parliament whereupon the dittay is libelled, and so cannot be the ground and warrand thereof. Secondly, In so far as the dittay bears, that the said libel was divulged by giving the said copy to Dunmure; giving, and not granting, that divulging is warranted by the said acts, or can be sustained as a warrand against the pannel to infer the said crime and pain, that cannot be called divulging, because Dunmure's own depositions bear not, that he received the said libel from the pannel to copy or divulge, but that he took it up only to read upon very strict conditions; which being the true manner of his receipt thereof from the pannel, cannot be called properly divulging: because to divulge, properly, is to affix *in loco publico,* as Mr. Thomas Ross did, whom my Lord Advocat cited; who affixed his seditious pasquils, and invectives against his nation, whereof he was the confessed author, upon the public parts and places of the town and university of Oxford. Or to divulge is to tyne (drop); and cast down papers in kirks, tolbooths, or high-streets, as did Francis Tenant, likewise cited by my Lord Advocat; who left and of purpose tynt (dropt) his infamous missives in the kirks. And it is universally maintained, that the delivering of a libel or writing to one only, cannot infer divulging; albeit it is not granted that the pannel delivered the said writ to Dunmure.

To that part of the said dittay bearing that the said libel was divulged by delivering thereof to the earl of Rothes; it is answered, That that was not divulging, because it is confessed in the said dittay, that it was delivered to the earl of Rothes to have been presented to his sacred majesty: and it is contended, as before, That that which is affirmed in the said dittay to be divulging, is more properly to be called revealing, as indeed it was. So that it is retorted, to free the pannel not only of divulging, but of all crime for hearing or not apprehending; because if the pannel delivered it, as the dittay bears, to have been presented to his sacred majesty, *ergo,* not as infamous, reproachful, or scandalous: which must be presumed by all manner of presumptions in favour of the pannel, that he did not consent to the presenting thereof to his highness, as being in his least thought or imagination scandalous, or otherwise as the dittay bears; but only to have been revealed to his sacred majesty as a piece which he and the other supplicants did think and conceive might have been graciously accepted, as others of that kind had formerly been received by his gracious majesty.

To that part of the dittay bearing the copying thereof by Mr. Robert Dalgleish, the pannel's servant: it is answered, *quod non relevat* to infer divulging, because the said Mr. Robert his deposition bears, that he did only deliver

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the copy to my lord his master, and did no farder. Neither depones he, that my lord did any farder but took the copy from him; which in no sense can be properly called divulging, for the reasons before adduced.

To that part of the said dittay bearing Mr. J. Dunmure's keeping the said copy in his hands, by the space and in manner libelled; it is answered, *non relevat*, because it is not, *ut supra*, that the pannel gave him the copy, but that he took it, as the deposition bears. And what he did thereafter without any warrand, command or allowance of the pannel, cannot be laid to the pannel's charge, but to his own; seeing the manner of his receiving and divulging thereof, is nottourly known to have been against his promise, or without the knowledge or consent of the pannel, by abusing his trust given to him by the pannel, though innocently, who was free of all his subsequent proceedings. And there being no fraud or malice in that point upon the pannel's part, who was wronged by Dunmure, though innocently; that cannot be called the pannel's divulging: for who lives, and may not be deceived and abused in that manner as he was, though innocently, on Dunmure's part?

To that part of the dittay anent Mr. John Dunmure his answer to the earl of Traquair; it is answered, That the same cannot be respected as relevant to infer divulging, because the pannel's deposition bears that he gave no warrand nor direction to Dunmure to return answer to the said earl: but that in discourse with Dunmure, the pannel answered not those words, 'That as honest men would put their 'faces thereto' (*i. e.* justify it) 'as the pannel 'himself;' but the pannel's answer only was in these words, 'That as honest men as the pan-'nel himself knew of it:' meaning of the earl of Rothes and other supplicants, who had intended to cause make offer of the same to his royal majesty, and accordingly did make offer thereof by the said earl of Rothes.

And to that part of the said dittay, concluding that the said pannel being a nobleman of good learning and understanding, should have revealed, should have not concealed, should have apprehended the author; it is alledged, *non relevat ut supra*, and *absolvitur* ought to be granted from that conclusion, for the reasons mentioned before in the defences and duplies made for the pannel, who still contends that as he never did conceive or understand the said supplication, as the dittay inforces and bears the same upon him; so his own commentary and declaration anent his meaning and sense thereof, ought only to be received, to free and vindicat him from the crime and pains libelled. In respect whereof, the said dittay anent the point of divulging can no ways be respected as relevant, but *absolvitur* ought to be granted to the pannel therefrom.

It is added by Mr. *Alexander Pearson* to this last and fifth exception, That the point of Dittay anent divulging is not relevant, and cannot infer the pains concluded by the Dittay, because the said point of Dittay is not founded upon any act of parliament mentioned in the proposition thereof, but only upon the civil law, which the leidges cannot nor are obliged to know in all the sanctions thereof; specially seeing by divers acts of parliament, to wit, king James 1, parl. 3, cap. 48. king James 4, parl. 6, cap. 79. by the which it is statute, That all the king's leidges live and be governed under the king's laws and statutes of the realm only, and not by any laws of other countries: And therefore cannot infer the pains concluded by the Dittay.

Farder, The pannel ought to be assoilzed from that point of the Dittay of divulging, because the pannel is not nor cannot be counted formally divulger of the alledged infamous libel; he not having knowledge or opinion of the writ quarrelled, that it was infamous: but having just and probable cause to think of it otherwise, *ut supra*. And as credulity by the civil law defends in theft, so by the like reason it ought to defend the pannel here, anent divulging, as is confirmed in the fourth exception proponed for the pannel, which I here repeat, and which defence is most relevant by the civil law, whereupon only this point of Dittay is urged, and therefore should elide the same.

Item, Farder, The civil law does not make any to be divulger of an infamous libel, but after knowledge of the same to be infamous: which is clear by the ordinance of the law set down in Lege Unica, Codice de famosis Libellis, which commands the finder of ane infamous libel presently to destroy it; which the finder cannot do, but after knowledge of the writ to be such. And 'tis also clear by the prohibition of the said law, bearing, 'si vim earum 'manifestaverit;' which requires divulging of an infamous libel, in the form and strength thereof. In respect whereof, the pannel ought to be assoilzed from that point of divulging.

It is added by Mr. *John Nisbet*, That divulging is not relevantly qualified in law, by the imparting of the alledged libel to my lord Rothes and to Mr. John Dunmure; because it was imparted to neither of them in quality of an infamous libel, but to my lord Rothes in the contrair quality of ane supplication, to be presented by him to his majesty, as is acknowledged in the Dittay; and to Mr. John Dunmure as a confident of the pannel's, under promises of secrecy; which procedure and qualities of imparting are far from the nature of divulging; for the word itself implieth a public dispersion, and the express law requireth 'manifestationem publi-'cam et dolosam publicationem;' Canone qui in alterius, Causa 5. Quæst. 1. Dolosum. Canone 4. eadem Causa et eadem Quæst. 'Et Li-'bellus famosus dicitur Pasquillus, quod in urbe 'Roma ad truncam Pasquini cujusdam statuam 'affigi solet.' Harprechtus in Tractatu Criminali, § Injuria Sectione de famoso Libello, 'Et 'qui libellum famosum ab alio acceptum vicis-'sim alii, et uni tantum secreto tradidit, libelli 'famosi pœna non est plectendus, quia ex tra-'ditione secreto facta non obscuro colligitur 'animus non diffamandi; et quia libellum fa-

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'mosum non dicitur publicasse, nisi qui cum 'pluribus impertitus est.' Harprechtus, ibidem.

It is added by Mr. *Robert Macgill*, That the divulging qualified in the Dittay is not relevant according to the civil law, where a publication and out-setting is required: Pharm. Quæst. 105. Inspect. 11. num. 485. 487. And the reason is, 'quod convicium dicatur quasi convolium,' Leg. Item, apud Labionem 15. § 4. F. de Injuriis, ubi § 'sequenti ait dici vociferationem in usum 'collatum:' additis § 8. et 11 et 12. 'Quod 'oportet in cætu dici, et cum vociferatione vulgare, etiam Nænio Marcello est in vulgus dare, 'et quasi multis audientibus ac non taciturnus 'dicere.' Then 'ei dispersionem et divisionem 'superaddunt, ut sit in plurium manus sparsio 'ab una eademque facta, et maxime si in ple-'bem distributio fiat, unde sævitque animis ig-'nobile vulgus. Quippe ut Cicero pro Plancio, 'non est consilium in vulgo, non ratio, non dis-'crimen, non diligentia.' And even in that title of the ninth book of the Cod. de Seditiosis, it is added, 'Et his qui plebem contra rempublicam 'audent colligere.' And so have I said not long since, that these private writings, and the dispersing of them, must be understood in our acts of parliament, as the declamations therein mentioned, that is, to the meanest and commonest sort; and that to ten at least, 'quia non dicitur 'notorium nisi per decem saltem transeat;' Boerius Tractatu de Seditiosis, Præmiss. 7. 'quippe quod populus dici non posse, nisi sint 'decem:' Ibidem Præmiss. 3. And remits here what I have said de Seditiosis, in the end of my second exception. But so it is, that the communicating of the piece quarrelled to Mr John Dunmore, in that mean sort as is contained in the deposition, and consequently in the Dittay, cannot be thought a divulging in manner above expressed; *ergo* the pannel ought to be assoilzed from that part of the Dittay.

It is answered by my *Lord Advocat*, That the alleadgance ought to be repelled, in respect of the Dittay, which in this part anent divulging is founded upon the common law, Leg. Unica de famosis Libellis. And which common law, in the case where we have no particular law nor statute of our own, is obligatory against the leidges. And the acts of parliament cited by the defenders, That the leidges shall be ruled by the laws of the kingdom allenarly, (only) and not by the laws of other kingdoms, excludes only the particular laws of particular kingdoms; but excludes not neither the laws of God, neither the laws of nature, neither the laws of nations, nor the common law: otherwise, odious crimes against which there are no municipal laws, as *Sodomia, Plagium, privati Carceres*, &c. should be unpunishable. And as to the exception proponed against the relevancy, and the alleadgance of the civil law anent divulging *uni;* oppones the Dittay, bearing the divulging thereof to three particular persons in manner therein libelled.

It is duplyed by the pannel and his procurators, That the point of divulging being founded only upon the civil law, if it were sustained, is only relevant to infer the pain of the civil law, which is not capital, 'Nisi non libellus famosus 'continet delicta capitalia in alium improperata. 'Secus in eo improperetur delictum non capi-'tale, aut alia quævis culpa.' Glossa in Leg. Unica. Codice de famoso Libello, in verb. si quis famosum. Phar. Quæst. 105. num. 11. And of the canon law, which has ever had more force with us: 'Pœna etiam atrocissimi libelli 'est tantum flagellatio.' Canone, qui in alterius Causa 5. Quæst. 1.

It is farder duplyed by Mr. *Roger Mowat*, to that part of my Lord Advocat's reply, bearing, That the alleadgance made against divulging ought to be repelled, in respect of the Dittay, bearing the divulging by the pannel to three several persons: it is duplyed thereto, That the said reply ought to be repelled, in respect of the said alleadgance proponed against the said member of divulging, and hail qualifications thereof, to the saids three persons; whereunto there is no answer given by my Lord Advocat. And therefore remits the said alleadgance, and hail members of it, as yet unanswered, to be considered by the judge as most relevant in itself. In respect whereof, the said alleadgance, and hail members thereof, stands relevant, notwithstanding of the reply.

It is triplyed by my *Lord Advocat*, That the pain by the common law is capital; and the quotation by Mr. John Nisbet is a gloss, without warrant. And albeit some respect might be had to an infamous libel against a subject, yet none in that which concerns our sovereign, tending to the disturbance of the estate and public peace.

It is quadruplyed by Mr. *John Nisbet*, That we oppone the glosses aforesaids acknowledged and followed by all the doctors, and founded upon the equity of retaliation; and oppone likewise the foresaid Citations out of the canon law itself, and the hail title of the canon law De Maledictis, where detractors of the pope himself are only obnoxious to the pain of flagellation.

The Justice continues till to-morrow the 17th instant.

Curia legitime affirmata, the said 17th of December, 1634, &c.

My *Lord Advocat*, after some speech delivered by the pannel's procurators, *verbo* declared to my Lord Justice-General, That what was spoken was only a summary recapitulation of that which is at length set down by the pannel's procurators in their defences; and offered to his lordship, if it were his lordship's pleasure that he, as pursuer, should clear by his answer *verbo*; and otherwise, that my Lord Justice, with consent of his assessors, would close (put an end to) all farder writing, and declare that no more should be added, but that *interloquitor* may be pronounced of that which is proponed and written already. To the which my Lord Justice made answer, That there was no necessity to answer farder than is said and written already.

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It was thereafter humbly craved by the pannel and his procurators, that if any thing should occur to be demanded whereupon he desired to be heard before *interloquitor*, that my Lord Justice would be pleased to hear him, he proponing the same, *verbo* in his lordship's audience.

My Lord Justice-General, with advice of his lordship's assessors, declares that all farder writing in this matter shall cease before the dittay be found relevant, and referred by *interloquitor* to an assize; and continues *interloquitor* upon the exceptions proponed in this process, and answers made thereto, till Friday next, the 19th of December instant.

The said 19th of December it was continued till the next day, the 20th.

The said 20th of December, 1634, Curia legitime affirmata, &c. Pannel and Procurators as above.

My Lord Justice-General and his lordship's assessors having read and considered the Dittay, hail exceptions, replies, duplies, with all that is proponed for the pannel by his procurators in this process, and my Lord Advocat's answers made thereto; by *interloquitor* repel the first exception proponed by the pannel and his procurators against the relevancy of the dittay, in respect of the acts of parliament standing unrepealed. Repel the second exception in respect of the dittay, and acts of parliament whereupon the same is founded. Repel the third exception in respect of the dittay, and that there may be more authors than one; and likewise sustain these words of the dittay, '*That the Pannel*' is '*Adviser, Deviser, and Consulter*,' in respect they all signify one thing with airt and part. And as to the qualification of the interlining, set down therein, remit the same to the assize, as proper to be cognosced by them, with the hail remanent qualifications and presumptions contained in the said dittay, to be proven to the said assize. Repel the fourth exception in respect of the dittay, and scandalous and reproachful libel mentioned therein; which my Lord Justice, with advice of his lordship's assessors, find to be of that nature, notwithstanding of any thing propounded in the contrair in the pannel's favour. As to the last exception, repel the samen, and sustain the point of the dittay anent the divulging of the infamous libel, to be tryed and proven *conjunctim* with any one of the rest of the articles of the said dittay found relevant, as said is; to infer the punishment prescribed by the act of parliament; and declare, That if it shall be only proven *per se*, to be punished *per panam arbitrariam*. And in respect of the former *interloquitor*, ordain the dittay to pass to the tryal of an assize. And for that effect, continues this matter to the 11th day of February next to come; and ordain the pannel to be returned to his ward within the castle of Edinburgh.

Curia legitime affirmata, the said 11th of February, 1635.

John Lord Balmerino delated of the Crimes contained in his Dittay, contained in his preceding Process.

The Justice Deputs (being Alexander Colvil of Blair, and Mr. James Robertoun, Advocat) foresaids, with advice of the Assessors, before mentioned, continues this Dyet, anent the Trial of the said John Lord Balmerino, for the crime specified in his Dittay, to the 11th of March next to come. The persons of Assize are warned, &c.

The said 11th of March, it is continued till the 18th of March, 1635. And the said 18th day, in respect of the absence of Mr. Roger Mowat, the Pannel's principal Procurator, by reason of sickness and the gout, the Justice continued the Dyet till the 20th of March thereafter, 1635.

The said 20th of March, 1635. Pannel and Procurators as before.

The names of the persons of Assize (Jury) William earl Mareschal, James earl of Murray, William earl of Dumfreis, Mungo viscount of Stormond, John earl of Lauderdale, John earl of Traquair, George lord Forrester of Corstorphine, James lord Johnstoun, sir Alex. Strachan of Thorntoun, knt. sir Robert Grier of Lagg, sir John Charters of Amisfield, sir Alex. Nisbet of Westoisbet, knt. sir Patrick Agnew of Lochnair, knt. sir James Baille of Lochend, John Gordon of Buskie.

It is alleged by the pannel and his procurators, that the Earl Mareschal cannot be admitted upon the assize, because he has received information and particular instruction—of the pannel's guiltiness of the crimes given up in the dittay, and particular direction what to do in case he pass upon the assize; which they refer to the nobleman's own oath and declaration: who being sworn, declared that he received no such instruction or information of any person. Whereupon, being purged of partial counsel, the justice admits him upon the assize.

It is alleged against the earl of Dumfreis, that he cannot be received upon the assize, because he has given out his prejudiced opinion against the pannel, affirming, before any probation led, that the pannel is guilty of the dittay; which the pannel referred to his lordship's oath, alleging that in law a declinator is only to be proven against ane assizer by his oath: and farder affirms, that the said William earl of Dumfreis has been solicited and dealt with by prayer to find the pannel guilty of the dittay, which being referred to the said earl his oath, he denied any such matter, that he either gave out speeches of the pannel's guiltiness, or that he was solicited or dealt with by prayer, or otherwise; the justice admits him, in respect of his declaration.

It is alleged against my lord Blantyre, that he cannot be upon his assize, because he has publickly reported to sundry, that the pannel to his judgment is guilty of the dittay, and cannot be cleared thereof; which they refer to his

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lordship's oath: who being sworn, declared that he could not deny that he had spoken such speeches. Whereupon he was repelled, and ordained to stand aside.

It is alledged by the pannel and his procurators against my lord Johnstoun, the laird of Lag, the laird of Amisfield, the laird of Thorntoun, the laird of Westnisbet, that they cannot be received upon the assize, because they have all been solicited by prayer and request to find the pannel guilty; and that the lord Johnstoun has declared to sundry, that if he were on his assize, he could not but find him to be guilty: likewise, affirmed by Thorntoun, that as the dittay is founded upon the acts of parliament, the pannel must be guilty, and none can acquit him thereof; and that Westnisbet had affirmed in public conference, by his bewrayed opinion, that he would file (convict) the pannel, and do his endeavour cause others file him of the dittay. Whereupon the forenamed persons having by their oaths denied the premisses, the justice thereupon having purged them of partial counsel, admits them upon the assize. Whereupon my Lord Advocat asked instruments. Likewise admits my lord of Traquaire, notwithstanding of the declinator proponed against him *verbo*, by the pannel's procurators.

My Lord Advocat, for verifying of the dittay, 1st, Repeats the acts of parliament whereupon the dittay is founded, (viz.) the 10th act of the 10th parliament of his majesty's dearest father, king James the sixth, holden at Linlithgow the 10th day of December, 1585; the other act being the 205th act of his majesty's 14th parliament, holden at Edinburgh upon the 8th day of June, 1594.

2dly, Produces his majesty's warrant or letter, direct for examination of Mr. John Dnnmure, whereof the tenour follows:

"To the right reverend father in God, our right trusty and well-beloved counsellor; To our right trusty and right well-beloved cousins and counsellors; To the reverend fathers in God, our trusty and well-beloved counsellors; and to our trusty and well-beloved counsellor, the Archbishop of St. Andrews, Primate and Metropolitan of all Scotland; the Earl of Mortoun our Thesaurer, the Earl of Traquair our Deputy-Thesaurer, the Bishops of Edinburgh and Ross; and to sir John Hay of Baro, our Clerk-Register of our said kingdom."

"C. *R.*; Right reverend and reverend fathers in God, our trusty and well-beloved counsellors, right trusty and right well-beloved cousins and counsellors, and trusty and well-beloved counsellors; we greet you well. Having seen the copy of a Petition, which hath been in the hands of Mr. Peter Hay of Naughtoun: And he being required by us to declare from whom he had the said Petition, hath done the same by naming one Dunmure, dwelling in Dundee, a notary there: It is our pleasure, that you call them before you; and having received the said Mr. Peter Hay his information, and examined the said Dunmure concerning the author of that petition, and who may be any wise accessary unto it, you inform yourself so far as you can in all things concerning it, and certify us what ye find thereanent, that we may cause take such further order with these that shall be found to have had hand therein, as we shall think fitting. And for your so doing, these presents shall be your sufficient warrant. From our court at New-Mercat, the 3d of March 1634."

3dly, Repeats the infamous Libel produced by Mr. John Dunmure before the lords of the committee upon the 14th day of March 1634, with his deposition made in presence of the committee that same day; which infamous libel, with his said deposition, is produced by his majesty's Advocat upon the 3d day of December 1634, before my lord justice, and is registrat in this process that day.

4thly, Produced the Double (copy) of the infamous Libel, interlined by the pannel, whereof the tenour follows. [This is exactly the double of the former, only with the Addition of the pannel's interlinings, which are these; First, at letter A, on the 14th page (or of this vol.) there is interlined by his lordship these words, which are not mentioned in the former double, viz. 'In such a case as this, it hath not been 'unworthy to have represented to your ma-'jesty's observation, that.' And at this mark also these words are wanting in this double, which the former has, viz. 'Which blessed 'king James would never have confounded.' And betwixt letter B and C, on the same page thus, B of religion C, is interlined in this double. And the last interlined words in this double are to come in as marked on the page, betwixt C and D, these words, viz. To suffer to be introduced.]

Item, Produces Mr. John Dunmure's two Depositions, made the 15th of March 1634, and the 7th June after, whereof the tenour follows:

"I Mr. John Dunmure confess and declare, That the copy of the petition, remonstrat to the king's most sacred majesty, to have been delivered by me to Mr. Peter Hay of Naughtoun, was intrusted by me to him upon his faith and promise never to have been imparted or divulged to any other, and that he should redeliver to me the same, after the reading and consideration thereof: And that I extracted the said copy with my own hand against the direction, and by (without) the knowledge of him from whom I had the first copy and warrant thereof. So help me God. And this for amplification of my confession of the said matter, made in presence of the lords commissioners, receivers thereof, the 14th of March instant, by thir presents written and subscrived with my hand at Edinburgh the 15th of March 1634. *Sic subscrib.* JOAN. DUNMURE."

At Edinburgh, 7 June, 1634. Sederunt, St. Andrews, the earl of Roxburgh, Traquair, Brechin, Clerk-Register, Advocat.

The which day Mr. John Dunmure, being

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deeply sworn upon his knees, ratified, and approved his former deposition of the date the 15th of March, 1634; and declares, That at the time he received his said supplication of my lord Balmerino, the said lord Balmerino desired him that he would take it, and give him his opinion thereof; and as he loved his credit, he would keep it, and shew it to no man living, but only give his own opinion there-anent: And declares that there was nothing spoken about the copying thereof; but is persuaded, if that my lord Balmerino had known that he would have copied it, he would never have given the same out of his hand. And depones, after the receipt thereof he abode three days in Edinburgh, and during that time copied the same, and did return the same to my lord Balmerino: but no ways told him that he copied the same. And depones, he shewed the same to no person, nor had no purpose to divulge it, but did take it home with him to Dundee, and did keep it close and secret by himself by the space of six weeks, till the laird of Naughtoun came to him in his own chamber in Dundee of purpose to ask his advice in some affairs, in respect he was his ordinary writer, as his custom was: And depones, that after some conference with the laird of Naughtoun, he took the same out of his pouch (pocket), and said to the laird, He knew that he was a man of judgment, and well-acquainted with the affairs of the kingdom; and said, Here is a paper whereof he would be glad to have his judgment, providing he would keep it secret, and return the same back again: Which the laird faithfully promised. Whereupon the deponer gave the said paper to the laird. Whereupon he began to read: And before he had ended it, he said to the deponer, Mr. John, I intreat you heartily that I may have this paper to Naughtoun, that I may read it, and consider it at leisure. To the which the deponer answered he would, providing he would keep it secret, and shew it to no man, as he had promised: which the laird of Naughtoun faithfully promised to do. And declares upon his great oath, That if he had known the laird would not have keeped it secret, he would not have given it for all the world. As also depones, That within a month or five weeks after the deponent went to the laird of Naughtoun's house, as he was going through Fife, and craved the paper back with great earnestness; who answered tritle, tratle, ye need not be so curious; that there was a gentleman at his own table told him that there was three copies thereof going through Fife, and my lord Balmerino had given one thereof to Mr. William Scott, another to Mr. Alexander Henderson, and the third that the gentleman would not name. And the deponer declares, after that time he met Naughtoun divers time in Dundee, and asked the paper back, which he ever shunned. And declares, about October last Naughtoun came to the deponer's chambers in Dundee, and told him that he had given the paper to my lord St. Andrew; at which the deponer was mightily moved. Item, depones, After his first declaration he went to my lord Balmerino, who after conference with him, my lord Balmerino desired him to go to the earl of Traquair, and tell him that better men nor my lord Balmerino himself would set their faces thereto. *Sic subscrib.* JOAN. DUNMURE.

St. Andrews, J. Morton, Roxburgh, Traquair, Da. Episc. Brechin, J. Hay, Tho. Hope.

5thly, Produces three Depositions subscrived by the pannel and the lords of committee, one dated the 9th of June 1634; the second the 16th of June 1634; and the third the 1st of August 1634. Of the which three Depositions the tenour follows, viz.

Apud Edinb. the 9th of June 1634. Sederunt St. Andrews, Thesaurer, Roxburgh, Traquair, Brechin, Clerk-Register, Advocat.

The which day John lord Balmerino being examined upon his great oath, depones as after follows: *Imprimis*, depones, That the libel produced is the just copy of the libel given by him to Mr. John Dunmure, so far as he remembers. *Item*. Being interrogat to what use he gave him the same, and upon what occasion, depones, That Mr John Dunmure having given to him the copy of my lord Brechin his sermon preached at his majesty's coronation, and Mr. John having seen the paper, he gave it to him to look upon, but to keep it to himself alone, and to shew it to no other, as he respected his lordship's credit: And depones, That he never knew that Mr. John Dunmure had copied the same. *Item*, Being interrogat from whom he had the paper he gave to Mr. John Dunmure, depones, As he remembers he received the principal of the same from Mr. William Haig. *Item*, Being interrogat who was author and penner of the said libel, depones, That it was Mr. William Haig who gave it him, and as he thinks, was the author thereof. *Item*, Being interrogat to what use Mr. William Haig gave his lordship that paper, depones, That Mr. William Haig said he thought it a fit supplication to be presented to his majesty which he had made out of some collections which he had gathered upon some conferences which he had with sundry persons the time of the parliament. *Item*, Being interrogat what he did with the paper which he received from Mr. William Haig, depones, he received two of them from Mr. W. Haig, whereof one was to be presented to the king, if it had been thought expedient, which he delivered to my lord of Rothes; and the other he caused his man Mr. Robert Dalgleish copy; and gave Mr. Haig his own back again, which he thinks he destroyed. And the paper which he shewed Mr. John Dunmure, was it which his man wrote, as he remembers. *Item*, Being interrogat if Mr. William Haig had any warrand or command to draw up the said supplication, or if any lord or any of his knowledge was at the penning thereof, depones, That he had no warrand from him, nor knew of any warrand given to him, nor that any was present at the forming thereof. *Item*,

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Declares that the earl of Rothes and the deponer having read the supplication, thought it no ways fit to be presented to his majesty, but to be absolutely suppress. *Item*, Being interrogat if he had any of the saids copies, declares, After the receipt of Mr. John Dunmure his copy, he cast the samen in the fire; and for the other, he did diligence to seek the samen out and find it, and exhibit the samen to the lords: and declared, that he had no more concerning that purpose. *Item*, Being interrogat if he gave any copies of the said supplication, or shewed it to any person, depones, That he neither gave copies thereof, nor shewed it to any except to the earl of Rothes and Mr. John Dunmure. *Sic subsc.* BALMERINO.

St. Andrews, Morton, Roxburgh, Traquair, Da. Ep. Brechin, J. Hay, Thomas Hope.

Follows the Tenour of the second Deposition.

Apud Edinb. decimo sexto Junii, 1634.

The whilk day John lord of Balmerino being examined upon his oath if he knew any thing of Mr. William Haig his going out of the country, depones, That he knew nothing of his away going until Wednesday last; that a man of the lady Yeaster's told him, when he was going to Balcleugh's burial, that Mr. William Haig was gone out of the country. *Item*, Being inquired anent that part of Mr. John Dunmure's deposition, That after his first declaration he went to the deponer, who after conference with him desired him that he would go to the earl of Traquair, and say, 'That 'better men than the deponer himself will set 'their faces thereto:' the said lord Balmerino depones, That he never gave Mr. John Dunmure such a commission, but only told him in conference, That there were better men than the deponer himself who knew of that matter. And being inquired what these were that he meaned of, depones, That it was the earl of Rothes, to whom he delivered the supplication, conform to the former deposition. *Item*, Being inquired whether he had interlined some lines in the said libel which was exhibited by him to the lords, and whether he did the same before he shewed it to Mr. John Dunmure, or to the earl of Rothes, depones that it was the earl of Rothes to whom he delivered the supplication, conform to his former deposition. *Item*, Being inquired whether he had interlined some lines in the said libel which was exhibited by him to the lords, and whether he did the same before he shewed it to Mr. John Dunmure or to the said earl of Rothes, depones, That Mr. John Dunmure never saw this interlined libel, but only the copy which was cast in the fire after the redelivery thereof: And depones, That the copy interlined lying before the lords was the copy delivered by him to the earl of Rothes, but was not interlined, while the earl of Rothes redelivery thereof to him: And depones, That never any saw it since the interlining thereof.—*Sic subs.* BALMERINO.

St. Andrews, Morton, Roxburgh, Traquair, Da. Ep. Brechin, J. Hay, Thomas Hope.

Follows the Tenour of his lordship's third Deposition.

Apud Edinb. the first day of August 1634.

Sederunt, St. Andrews, Thesaurer, Roxburgh, Stirling, Traquair, Bishops of Edinburgh, Ross, Clerk-Register, the King's Advocat.

The which day John lord Balmerino being asked upon his great oath, if he shewed to Mr. Haig the Warrand of his appearance before the lords upon Saturday the 7th of June, depones, that after dinner Mr. Haig came to his house, and asked by what warrand he was convened before the lords; and the deponer took the warrand out of his pocket, and shewed the same: and adheres to his former deposition, anent Mr. Haig his parting, or to the purpose thereof. Item, being interrogat if he received any letters from Mr. Haig since his parting, deponed, that he received at his back coming from Balcleugh's burial a letter from his lady, direct from Mr. Haig, but without either date or place, which he produced: as also received from Thomas Haliburton a letter direct from Mr. Haig, with some note concerning my lord Jedburgh's business. And sick-like depones, he received a letter from Adam Watt, which concerned some business betwixt my lord Yeaster and Mr. Haig; and in the end desired the deponer to assist sir Lewis Stewart, and other friends that he had written unto for procuring of him a remission: which letter, after the deponer had dealt with the lord Yeaster, he cancelled and burnt. And last grants he received a letter from Camphire the 27th of June, which he received from Mr. Robert Bruce; which he exhibits, and which letter bears Mr. Haig has granted that he was the penner of the said supplication, and therefore protests that the same may be delivered up and given to him. And being asked anent that part of the said letter, which bears that the earl of Rothes and such other honest men that did once approve the said supplication, if the deponer did ever allow and approve the samen; answers, that he did never allow nor approve the samen to be presented to his majesty, but thought it fit to be suppress. And in the rest adheres to his former depositions.—*Sic subs.* BALMERINO.

The same day, in presence foresaid, it being asked whether he did allow and approve the same himself, in the matter and substance; he declared, that he neither allowed nor allows the samen, and declares he condemns the same both in matter and form. *Sic subs.* BALMERINO.

St. Andrews, Morton, Roxburgh, Stirling, Traquair, Da. Ep. Edinb. Jo. Rosse, J. Hay, Thomas Hope.

6thly, Produces Mr. Robert Dalgleish, servitor to the pannel, his Depositions, dated July 3, 1634, whereof the tenor follows,

Apud Edinb. 3 July 1634.

The which day Mr. Robert Dalgleish being

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sworn upon his knees; and the libel being shewn to him, denies that he knows the hand-writing or the writer: grants that my lord Balmerino being in his place of Barnetown shortly after the parliament, and being to go to Edinburgh, about four after noon delivered to the deponer a paper to be copied, which he did copy that same night, and sent it with the copy thereof to his master inclosed in a paper, the next day in the morning. And being asked if that he had copied another to himself, grants that he had made another copy which he keeped to himself, which he did without the command or knowledge of his master; which copy he exhibited presently in presence of the lords. Item, being demanded if he did communicat that copy which he keeped to himself to any other, depones upon his great oath, that he did neither show nor give the copy thereof to any other: but grants, while he was copying the same in Barnetown, Mr. William Colvill minister of the parish came in and read the same, but got no copy thereof. And also depones, That since the beginning of the trial about Pasch (Easter last, the lady Balmerino asked of the deponer if he had keeped a copy of the foresaid libel to himself, and desired a sight thereof; and when she heard the same read, she said that he was a fool in keeping, and bad him cast it in the fire.—*Sic subsc.* Mr. ROBERT DALGLEISH.

St. Andrews, Mortoun, Roxburgh,
Stirling, Traquair, Jo. Rossen.
J. Hay, Thomas Hope.

7thly, Produces Mark Cass his Deposition, dated apud Edinb. the 31st of July, 1634.

Sederunt, St. Andrews, Roxburgh, Stirling, Traquair, Rosse, Clerk of Register, Advocat.

The whilk day Mark Cass, writer, being examined upon his great oath, depones, That about eight or ten days before Mr. Haig his going away furth of the country, he being in Mr. Haig's chamber, Mr. Haig asked him what news: to whom he answered, he had no news, but that he heard that my lord Balmerino was troubled for a petition that had been written. Likeas Mr. Haig asked him if he knew who was writer thereof, whilk he depones that he answered him he knew not, neither did he know. Thereafter Mr. William Haig told him that he was the penner thereof, and took out the paper and read it over to him, and said that Rothes and Balmerino knew the paper, because it should have been presented to the king. *Item*, Being asked if he knew of Mr. Haig's away going, depones, That upon Sunday the 8th of June the deponer being in Newbottle kirk at the communion, Mr. Haig sent a boy to him before the ending of the sermon in the afternoon, and desired him to come out to him; who came out and met with him in the hall of Newbottle, but spake nothing with him there. And then they went out together to the green of Newbottle, where he told the deponer that he was to go to the South Country, and that he had received for his comprizing of Maxwellheugh, disponed by him to the earl of Roxburgh, the sum of 20,000 marks, which he had paid to Mr. John Sharp and others; and that there rested yet 8,400 and some odd marks: And that he had taken the deponer his name to the bond thereof to his own use, and that he would trust him with it till his return; and then delivered to him the bond thereof, and said to him that he would return shortly. *Item*, Depones, that he received a letter from Mr. William Haig from Yarmouth, in which there was inclosed a letter direct from Mr. William Haig to Thomas Haliburton, which he sent to the said Thomas: And the contents of the letter to himself was, that he desired the deponer to assist his nephew, the said Thomas Haliburton, to get a trunk carried to Holland by the address of Mr. Robert Bruce; and that he should make the said Thomas forbear to do it, if I should find by sir Lewis Stewart the appearance of the quitting of this service. And depones, That he shewed this letter to Thomas Haliburton, who was then present in Edinburgh, and declared to the said Thomas, that he would not speak the said sir Lewis Stewart in such a business; and rave (tore) out so much of the letter as concerned sir Lewis Stewart, and desired the said Thomas that he would take it to him, because sir Lewis knew Mr. Haig his hand-writing: which the said Thomas refused, and said that sir Lewis would believe him but (*i. e.* without) the letter: And immediately after he read the hail letter in presence of the said Thomas. *Item*, Remembers that the letter did bear that he was presently going abroad. *Item*, Remembers that he received from Mr. William Haig since his parting in all three letters, whereof the said letter was one, and the other two which he exhibited to the lords.—*Sic subs.* MARK CASS with my hand.

At Edinb. the 31st of July, 1634. Sederunt, St Andrews, Thesaurer, Roxburgh, Traquair, Edinburgh, Rosse, Clerk-Register, Advocat.

The foresaid deponent depones, That the 20,000 marks paid to Mr. William Haig upon the Saturday, was employed as after follows, viz. 8,400 marks to Mr. John Sharp; then rested 11,600 marks, whereof there was lent to the earl of Lothian 7,600 marks, and 4,000 marks to the lord Balmerino; qherefore (for which) the deponer received bonds which are blank in the name, in the deponer's hands. *Item*, The deponer produced two letters from Mr. Haig, one of the date *nono Junii* from Bimerside, with a command to him to receive a packet to be delivered to my lord Balmerino; which packet to his knowledge and memory Adam Watt delivered to my lord Balmerino. *Item*, The other letter of the 23d of June, dated from no place, which the deponer received from Adam Watt, who had in hand a letter to my lord of Lothian, which he received: and delivered a letter to my lord Balmerino, and

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another to the earl of Traquair; which letters were received by Adam Watt from sir Lewis Stewart. *Item*, Depones upon his great oath, That he never opened the little coffer, nor trunk; but once that he opened the little coffer, and took out the keys of the trunks, but never stirred the papers, nor none others to his knowledge: but that he heard that Thomas Haliburton had looked in the coffer before, but knows not whether he took any papers out or not. *Item*, Declares that since Mr. William Haig his away going, there came a trunk of his home, which is in William Dick his hands, whereof he has the key; and that he never opened the same, but allenarly (only) once at the desire of Mr. Alex. Johnstoun advocat, who alledged he had some clothes and other gear therein, which he had put in Mr. Haig's trunk when Mr. Haig and he was at London the last vacance. And the deponer grants he received the key of the trunk from William Frier, inclosed in a letter from London written by the said William Frier, and dated before Mr. Haig's going away out of the country. *Item*, The deponer remembers, that Mr. Haig told him that the pamphlet was written by a man employed by the lady Limplum for that effect.—*Sic subs.* MARK CASS, with my hand.

St. Andrews, Mortoun, Roxburgh,
Traquair, Da. Ep. Edinb. Jo.
Rossen. J. Hay.

8thly, Produces four letters from Mr. Haig to the pannel, dated 27 June, 1 July, 10 July, and 1 August, 1634. Of the which four letters, the tenour follows:

To the right honourable my singular good lord my lord Balmerino, These at Barnetown; to be sent to him by Mr. George Lawson, or Adam Watt, writer in Edinburgh.

My lord; now that it has pleased God to bring me safely through the seas, though slowly (in three days and three nights from Yarmouth) to this place, I begin with these to pray your lordship either to use your talent to get me home otherwise, or to give vigour to that way I wrote to your lordship from Yarmouth. I thought it fit to be taken, to get a compendious way to an end of my troubles by their means, who for private respects have given the name of a crime to that Supplication, which though I cannot deny the penning of, yet would not have brought to me any inconvenience, if it had either been used as once intended, or, after changed of purpose, kept from those base bodies that put it into the hands of such, as have been able to make hard constructions of it. And seeing for whatsoever I now suffer in my private fortune, in my weak body, or in my name, by the contrivance or knavery of Mr. John Dunmure, I may justly blame your lordship; I do here adjure your lordship, by the persuasion I have of your own integrity, of your honourable mind and good-will to mewards, and by your knowledge of the pains I have been ever willing to take for an ingenuous furtherance of all that concerns my lord of Somerset amongst us; even to take pains to obtain to me a remission, for doing that which is termed a crime, and that by means of these that have termed it so; and make them sensible that it shall be more for their credit so to make an end of the business, than to drive me to such defences and apologies as the publishing of will gall them, more than the blazing of the Supplication. Withal it may please your lordship to represent to my lord of Rothes, and such other honest men, as I know did once approve that Supplication, that since a hard character is made of it by these that have wrested in the king's ire the sense of it, they should do right both to themselves, their prince, and country, by another Petition to represent that whereas they intended to have deliverd to his majesty the foresaid Supplication by such as did dis-assent to that church-article, and changed purpose, because the paper could not hold all their subscriptions, and other good respects, very compatible with their most humble duties to his majesty; yet since the foresaid Supplication has come to his majesty's hands by such as have made wrong constructions of it, therefore to conclude craving humbly that his majesty would give them leave to be interpreters of their own language, and the desire of their Petition (for the reasons it containeth), which is, that no private respect, but mere affection to his majesty, did rule their whole carriage in the late parliament. But in this I submit my desire to your lordship and their judgment and pleasure. Howsoever, since I suffer for that which truly had their allowance, I think they are in honour bound to use discreet means to relieve me off this cross, at least to help my poor estate in some measure to bear out the burden of it. I suffer enough in the toil of my body, and wounds given to my name, though your lordships amongst you free me of all the charges that will be inevitable to me in this course: a little help from each honest man, that will possibly pity me, would do this business. Thus your lordship may see there lieth a heavy burden on my stomach, when it is brought so low as to beg; yet I shall rather starve than discover so much to any other than your lordship, to whom only I can lay open the silly and low thoughts that misery, and the fear of it, may bring to, my lord, your lordship's most respecting servant,

Camphire, June 27, 1634. WM. HAIG.

Postscript. Whatsomever bonds are in moneys to my behoof, I do not think one groat thereof mine, till my lord Yeaster be satisfied; which will be easily done (upon the grounds I have sent a note of to Mark Cass), if your lordship move him to a submission (wherein Mark Cass and Thomas Haliburton shall take burden for me); but we will never end otherwise. Pray my lord of Rothes to help your lordship to induce him to a submission to any that your lordship and he can condescend upon; and tell him of his old letter to my lord of Anchram, That he should settle with me at any man's sight I liked. But get him to a sub-

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mission in writing for his good as well as mine: for if God please to call me, he will find that he shall not make so good a condition, as he may do now.

The Second Letter.

My lord; Just as I had done closing of my letters written to your lordship with others at Camphire, the conservator newly arrived here from London came to my chamber in ane inn kept by his mother-in-law: and hearing I was arrived there from Scotland, was very curious to ask news. And because I could tell him nothing, at last wandering, asked me by way of question, If I heard nothing of a petition, which a number (35) said he of lords had resolved to give to the king, craving a relief of the act made in the church-business, and a discharge of any further payment and taxations. I laughed, and told him that I durst assure him there was no such matter. That cannot be, said he, for I have this from such as has best intelligence about the court; and have seen a letter, bearing under the hand of one of the Commissioners, that they had had my lord Balmerino that day before them, who had behaved himself very modestly, and was to be before them the next day, where they hoped to get good satisfaction in all they were about. Then I answered, I heard your lordship was called for by some of the council, but had not learned, nor so much as asked for what: and that the council might have many things ado with your lordship that I was ignorant of, and could not in good manners inquire. I protest, said he, that is a business in all men's mouths about court; and I wonder, said he, you have not heard of it. I have not truly, said I: And so we left that theme, and drunk together, and within a quarter ane hour after I left that town, and to one Alexander Speir, a factor in it, a packet to Mr. Robert Bruce; under whose cover there is a letter of the 27th of June to your lordship, the contents whereof I will not repeat here, but beseech your lordship to have respect unto it, as well in so far as it beseecheth your lordship to use your talent for shortening my troubles, as in the care I humbly beseech your lordship to take to induce my lord Yeaster to a submission, without which there is no hope of any conclusion with him. I will long to hear from your lordship what posture this business works itself unto, and what success I may expect in the way I am contented be taken to end my troubles, by their means that has occasioned them. Thus having nothing to say but what I have formerly written, and beseeching your lordship not to be swear (slow) in writing to me, (under cover to my lord of Auton, James Howstoun or James Wright, merchants in Amsterdam, or to Alexander Speir in Camphire, or to William Murehead by the way of London) I crave leave, and rest, my lord, your lordship's most respecting servant, WM. HAIG.

Amsterdam, July 1, 1634.

Directed to the right honourable my singular good lord, my lord Balmerino, These, at Barnetown.

The Third Letter.

My lord; I know that repetition of my desires exprest in my letters to your lordship from Yarmouth, Camphire, and Amsterdam, were enough to accuse me of distrust of your lordship's either memory or good-will to me-wards. Wherefore these are only to beseech your lordship to let me know what posture that business is in, which occasioned my voyage hither; and what issue I may expect by your lordship's means, and such others as I have written unto there, as well of the troubles I am now under, as of that business I prayed your lordship to manage with my lord Yeaster. I intend to fix about Delft before the 27th instant, and stick there till I hear from Scotland or England what I may expect. So your lordship may put all you write to me under cover to Mr. John Forbes, a minister (though now silenced by order from Canterbury) of the English that are about their staple in that place, Mr. Robert Bruce, or Mr. Alexander Colvill, by David Junken's means; and otherwise also will get them sent to Mr. Forbes, and he will make them find me: so will William Murehead, if your lordship please write that way too. My lord, your lordship's most respecting servant,

Croning, 10 July 1634. WM. HAIG.

Directed, on the back thereof, To the right honourable my singular good lord, my lord Balmerino, These, at Barnetown.

The Fourth Letter.

My lord; I send here to your lordship my lord Jedburgh's discharge for the crop 1633, and his daughter Mary's receipt for 100*l.* with a protection for my lord Jedburgh, to be made use of, as your lordship has occasion. His lady was speaking to me to procure her a house near New-bottle, called Bryankirk; which cannot be, because my lord of Lothian has lent it to his uncle sir John Murray. But I intend to speak to Mark Cass, and try if he can spare Cockpen; which being near Coal, and out of Tiviotdale way, I think were very convenient for my lord Jedburgh, since he suits some house in Lothian, to be free of the importunity of his Tiviotdale creditors, and other inconveniences his dwelling at Jedburgh makes him obnoxious unto. There is also within this packet Mr. Lewis his discharge of 600 marks to my lord Jedburgh, and a note of Mr. Lewis his writings, with an assignation to be subscribed by my lord Jedburgh, for recovery of some moneys he paid for Mr. John Home: I intended it for Mrs. Anne's help, before your lordship and I went to Tiviotdale; and when his brother captain Home was assisting his chief's process, and was likely to have adventured to pay that sum for Mr. John, if he had found him pressed (being then in Edinburgh) by some good caption. It shall be well done to make the best use of it yet that can be. I have also inclosed in this packet Mr. Cornelius Aneslie's discharge for 200 marks for the interest of his money preceding Whitsunday

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last: I was not able to pay the principal till the 7th of June, and then he refused: I hope to do it honestly at Mertimas, before which time I hope to return armed against all inconveniences that cost or power shall be able to put upon me, by evil interpreting what was well meaned. I have left to my nephew Thomas Haliburton the key of my chamber and trunks, with direction to be given to your lordship to be made use of during my absence; whereof I shall write to your lordship the reason at more length by the first occasion. I rest, My lord, your lordship's most affectionate, and respecting servant, WILLIAM HAIG.

Direction on the back, To the right honourable my singular good lord, my lord Balmerino, These, 1 Aug. 1634.

Produced to the lords examinators by my lord Balmerino.

9thly, Produces three extracts of parliament, whereof two containing the names of the earls and lords present at parliament 1633, together with the names of the articles at that same parliament; of the which three extracts the tenour follows:

The Names of the Lords of the Parliament.

Archbishops; St. Andrews, Glascow. Bishops; Dunkell, Murray, Rosse, Brechin, Galloway, Dumblaine, Caithness by Dunkell his proxy, Isles, Argyle, Orkney. Duke of Lennox. Marquis of Haddingtoun, marquis of Huntley by the duke of Lennox his proxy, marquis of Dowglass. Earls; Argyle by Mortoun his proxy, Erroll, Mareschall, Sutherland by the duke of Lennox his proxy, Mar by Haddingtoun his proxy, Buchan by the marquiss of Haddingtonn his proxy, Rothes, Eglingtoun, Cassiles, Glencairne by Rothes his proxy, Murray by Lauderdale his proxy, Nithsdale, Wintoun, Linlithgow, Perth, Dumfermling, Wigtoun, Kinghorne, Abercorne, Tillebarne, Kellie by Kinowll his proxy, Galloway by Traquair his proxy, Seaforth, Annandale, Lauderdale, Carrick by Traquair his proxy, Lothian. Viscounts; Fulkland by Stirling his proxy, Dunbar by Traquair his proxy, Stormounth, Drumlanerk. Lords; Lindsay, Gray by Mortoun his proxy, Yeaster, Semple, Sinclair, Herries, Elphinstoun by Balmerino his proxy, Ogilvy, Torphichen, Spynie, Lindores, Loudon, Kinloss by Mortoun his proxy, Balmerinoch, Burlie, Halyrood-house, Cowper, Cranstoun, Deskfoord by Cranstoun his proxy, Melvill, Carnegie, Ramsay, Naper, Cameron, by Traquair his proxy, Newburgh by Stirling his proxy, Weemes, Corstorphin, Forfar, Rae by viscount of Air his proxy, Dalzell.

Commissioners for the burroughs; Sir George Forrester of Corstorphin, and Mr. Patrick Hamilton of Little Prestoune, for Edinburgh, principal; sir Patrick Murray of Elebank, and sir John Hamiltoun of Prestoune, for Haddingtoune; sir Alexander Nisbet of that ilk, and John Home of Rentoun, for Berwick; William Dowglass of Calvers, and sir Walter Riddell of that ilk, for Roxburgh; James Murray fiar of Phillipaugh, and James Pringle of Whitebank, for Selkirk; James Hay of Smithfield, and James Naswith of Posso, for Peebles; sir James Lockhart younger of Ley, and Gawn Hamiltoun of Raploch, for Lanerick; sir Robert Grierson of Lagg, and sir John Charters of Amisfield, for Dumfries; sir Patrick Agnew, of Lochnair, knight baronet, for Wigtoun; sir William Cunninghame of Cunninghamehead, and James Chalmers of Gaitgirth, for Air; sir Lodovick Howstoun of that ilk, and James Muirhead younger of Lachope, for Dumbarton; Hector Bannatyne of Keymes, and John Stewart of Escoke, for Bute; sir Archibald Stewart of Blackhall, and Patrick Flemming of Barreichine, for Renfrew; Archibald Edmingstoun of Duntreath, for Stirling; sir Walter Dundass of that ilk, and William Drummond of Richartoun, for Linlithgow; sir Archibald Ogilvie of Inchmarten, for Perth; sir Robert Grahame of Morphie, for Kincarden; sir Alexander Irvine of Drum, and Thomas Crombie of Kemno, for Aberdeen; sir John Mackenzie, of Tarbit, for Inverness; John Campbell fiar of Calder, and John Dunbar of Moyne, for Nairne; sir Thomas Urquart of Cromartie, for Cromartie; sir John Scrimger of Duddope, and Duncan Cambel fiar of Auchinbreck, for Argyle; sir Laughlane Maclane of Morvere, for Tarbet; sir John Lessie of Newtoune, and Thomas Myretoune of Cambo, for Fyfe; sir Harry Wood of Bonnitoun, and sir William Grahame of Claverhouse, for Forfar; John Gordon of Innermarkie, for Banff; sir Patrick Macgie of Large, for the stewartry of Kirkudbright. *Sic subs.* J. HAY, Cl. Regist.

The Lords of the Articles.

Pro Clero; archb. St. Andrews, archb. Glasgow, bishops Murray, Rosse, Dumblaine, Brechin, Isles, Argyle. Pro Nobilibus; duke of Lenox, marquis of Hamilton, marquis of Dowglass, earl of Mareschal, earl of Wintoun, earl of Roxburgh, earl of Lauderdale, viscount of Air. Pro Baronibus; sir George Forrester of Corstorphin, sir Patrick Murray of Elebank, sir Patrick Ogilvie of Inchmarten, sir John Leslie of Newtoune, William Dowglass of Cavers, sir James Lockhart younger of Ley, sir Robert Grierson of Lagg; sir John Scrimger of Duddope. Pro Burgis; John Sinclair and Gilbert Kirkwood, Andrew Gray, Mr. Alexander Wedderburne, Paul Menzies, Gabriel Cunninghame, Mr. James Cockburne, Mr. John Hay, Andrew Bell.—*Sic subs.* J. HAY, Cl. Regist.

And last produced ane Note of Articles in Parliament in annis 1600, 1606, 1607, 1617, and 1621, whereof the tenour follows.

"In the parliament held at Edinburgh the year of God 1600 years, the noblemen after named were chosen to be of the lords of the articles, viz. The duke of Lennox, the earl of Mareschal, the lord Seaton, the lord Newbottle, the earl of Errol, the earl of Mar, the lord Levingstoun; lord Fyvie.—*Sic subs.* J. HAY, Cl. Regist."

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"In the parliament holden at Edinburgh in the month of June 1606, the noblemen after named were chosen to be of the lords of the articles, viz. marquis of Hamiltoun, marquis of Huntley, earl of Argyle, earl of Erroll, earl of Mar, earl of Glencairne, earl of Linlitgow, lord Glames.—*Sic subs.* J. HAY, Cl. Regist."

"In the parliament holden at Edinburgh in the month of March 1607, the noblemen after named were chosen to be of the lords of the articles, viz. earl of Argyle, earl of Angus, earl Mareschal, earl of Mar, earl of Kinghorne, earl of Lothian, lord Elphinstoun, Roxburgh, Blantyre.—*Sic subs.* J. HAY, Cl. Regist."

"In the parliament holden at Edinburgh in the month of May 1617, the noblemen after named were chosen to be of the lords of the articles, viz. duke of Lennox, marquis of Hamiltoun, marquis of Huntley, earl of Argyle, earl of Montross, lord Ogilvy, lord Sanquair, lord Scoone.—*Sic subs.* J. HAY, Cl. Regist."

"In the parliament holden at Edinburgh in the month of June 1621, the noblemen after named were chosen to be lords of the articles, viz. the earl of Angus, the earl of Mortoun, the earl of Nithsdale, the earl of Wigtoun, the earl of Roxburgh, the earl of Balcleugh, lord Scoone, lord Carnegy.—*Sic subs.* J. HAY, Cler. Regist."

After the production whereof, his majesty's Advocat affirms, that the writs now produced for verification of the dittay, the said dittay is thereby verified in the hail points thereof, referred to the assize; and in respect thereof protests, if they cleange (clear) upon so clear probation, for wilful error.

Thereafter it was alledged by the pannel, that the earl of Rothes's deposition ought to be produced and read.

To the which it is answered by my Lord Advocat, That he uses not the same as a point of his probation.

To the whilk it is duplyed, That it will serve (being read and produced) for clearing of the pannel's innocency; and that by *interloquitor* of before, the said deposition was by the justice's *interloquitor* produced and given up to the pannel; and therefore it is most necessary to be produced to the assize, and cognosced by them.

Thereafter my Lord Advocat, for eschewing of delays, did produce the earl of Rothes his deposition, with this protestation, That he uses not the samen as a verification of the dittay, but only for satisfying of the *interloquitor* given out by the justice before, and to cut off all occasion of clamour that any part of the process were withdrawn; and when the pannel shall found any alleadgance or objection thereupon, he shall have a sufficient answer, of the which deposition the tenour follows.

At Edinburgh, the 3d of July, 1634.

The which day John earl of Rothes, being sworn upon his great oath, and the libel being shewn to him, grants that this is the libel that was shewn to him by or from my lord Balmerino; which he took and read till about twenty lines in the beginning, and no farder, in presence of the earl of Cassiles and the lord Yeaster, being with him in coach, going to Dalkeith: who finding it of such a strain, and having told them that his majesty had given him an express command to suppress all that was of that nature, the deponer and they, all in one voice, thought it should be suppressed; and the deponer did put it in his pocket. And having occasion that same day to meet his majesty at Dalkeith, and his majesty falling in conference with him anent information made to his majesty against him, he purged himself clearly to his majesty; and having received from his majesty of before strait commandment for suppressing all petitions of the nature of that which was moved in the time of the parliament, he shewed to his majesty that he had faithfully done the same ever since, and added thir words; 'Sir, there is a Petition given me 'presently to be looked upon and considered, 'which I have in my pocket, which I have 'according to your majesty's command sup-'press'd; if your majesty be pleased to look 'upon it.' Which his majesty answered, 'It 'is no matter: I have no leisure: I am 'going to the park.' And declares, that it remained in his pocket unlooked upon by him, or any other, by the space of eight days, or thereabouts; after the which he returned the same back again, inclosed in a paper which was sealed, to my lord Balmerino, to whom before he had told his judgment of it, that it was altogether to be suppressed. And depones upon his great oath, that he neither shewed it to any, nor gave any copy thereof to any; but remembers before he sent it to my Lord Balmerino, he caused copy it by his own servant, which is yet extant, uncommunicated to any, and whereof he had no memory at all, till he heard that Mr. Peter Hay of Naughton had shewn it to others; and then he searched the same, and found it out. Item, Being interrogat if he knew the hand-writ of the libel, or who was the author or penner thereof; depones, he knows not the writer thereof, and knew not certainly who was the author and penner thereof, till he heard that Mr. William Haig was bruited (i. e. named) for the penning thereof, of whom he had ever suspicion, because he has ever been busy upon such idle and foolish toys. And being asked if he gave his advice anent the penning thereof to Mr. William Haig, or any other; depones upon his great oath, that he neither gave his advice to him, or any other, anent the penning thereof, but ever thought it fit to be suppresst; and declares, that he never knew any consultation either before or after anent the same. And the said earl of Rothes promised with all diligence to send the copy which he has inclosed to the lords; and promised upon his oath and honour not to copy the same. *Sic subs.* ROTHES.

My *Lord Advocat* declares that he uses not the last part of Mark Cass his deposition.

It is objected and alledged by Mr. Alex. Pearson against the probation of the dittay ad-

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duced, First, To the probation of the first part thereof against the pannel, as author, consultor, &c. that the pannel's alledged interlining does not prove him to be consultor with Mr. Haig, in the penning and first drawing up thereof, because the alledged interlining is long after, yea, after the offer made thereof to his majesty, to whom no subject can be presumed to represent a supplication interlined. And deposition to that point of dittay, the pannel's the 16th of June, which bears the interlining not to have been made while after the earl of Rothes's redelivery of the writing to the pannel, which was more than six or seven months after. Oppones also the other copy of the writing quarrelled, produced by my Lord Advocat, which wants the interlining; and which evinces the interlining not to have been at the penning and forming thereof, and consequently the alledged interlining proves not the pannel's advice in the penning and first drawing up thereof.

Item, The alledged interlining proves not the pannel to be consultor anent the scandalous libel, because the said alledged interlining is not of any matter of reproach or scandal, whereupon the said libel is now challenged, or can be challenged, and so has no accession thereto as scandalous; and therefore proves not the pannel's advice anent the scandalous libel.

Item, The alledged interlining proves not that point of the dittay, because by the pannel's deposition, 16 June, never man saw it since the interlining thereof; and therefore nothing can be enforced or concluded thereupon, and is alike as if the same had never been interlined: For even an infamous libel found with a party in secret, who did suppress the same, and never manifest it to another, does not make or prove him guilty of the infamous libel.

That part of the dittay, bearing, That by letters sent by Mr. Haig to the pannel, it is affirmed by Mr. Haig, that he had the allowance of the pannel to the penning of the writ quarrelled, is no ways proven by the missive letter, nor by any of them. And where the said missives, or any of them, may seem to concern any purpose of allowance of the writing quarrelled, that is no ways of the pannel's allowance, nor can be so expounded; for the letter from Camphire, dated 27 June, directed to the pannel himself, and which speaks of their allowance in the third person, extends not to the pannel, and makes not the allowance therein mentioned (if any be) to be the pannel's allowance.

Farder, Although the said missive affirmed as the dittay bears, yet the same can no ways be respected, nor make faith against the pannel for his conviction; because Mr. Haig being guilty as author, his alledged declaration, if any be, (no ways granting the same) can be no probation at all against the pannel; because it is an undoubted maxim in law, 'Quod socius 'aut particeps criminis adversus alium fidem 'non facit:' Accomplice in a crime's declaration cannot make probation against any other whom he alledges to be guilty.

To the first part of the dittay, and probation thereof, oppones the dittay itself, which bears Mr. Haig to be author, and which makes point of dittay against the pannel for not apprehending of Mr. Haig, author thereof. Oppones also Mr. Haig's grant that he was author and penner thereof, contained in his missive letter, 27 June. Oppones also Mr. Haig his fleeing furth of the country for the same cause; and since his flight, his intreating of his friends for procuring to him a remission for it, as is proported in the pannel's depositions the 1st of August. Oppones also the pannel's oath and declaration the 9th of June, wherein he has deponed, That Mr. Haig had no warrant from him, and that he knew nothing of the forming of it. Oppones also Mark Cass his deposition, which bears Mr. Haig to have confessed to him that he was the penner thereof.

It is alledged by Mr. *John Nisbet* against the verification of the dittay, That the pannel's depositions cannot be used to verify the dittay, inferring capital guilt and punishment upon the pannel, because the pannel was induced to depone under promise and assurance of impunity: And in law, a confession elicit upon promise of impunity, cannot inforce capital guilt, as is abundantly astructed in the dispute. It is likewise alledged by him that Dunmure's deposition, Dalgleish's depositions, and Haig's letters cannot be used against the pannel, because they being all involved in the same acts whereupon the pannel is indicted, they cannot prove against the pannel to disburden themselves; seeing in law these with whom scandalous pieces are found are presumed to be authors, unless they condescend upon the author or deliverer of these pieces to them.

It is alledged by Mr. *Alexander Pearson*, That the second part of this dittay against the pannel, as guilty of hearing, concealing, not apprehending, divulging of ane infamous libel, &c. is not proven, because there is nothing adduced against the pannel, to prove the pannel's knowledge of the writing quarrelled to be scandalous or seditious, without which the pannel is not, nor cannot be counted guilty of the crimes libelled. And oppones thereto the just and probable cause contained in the second exception, and remanent defences proponed for the pannel, which the pannel had moving him to think otherwise of the writing quarrelled; to wit, The writing itself in title, form, strain, beginning and ending, and in all, an humble supplication; the same being first delivered to the pannel as a supplication to be presented to his majesty. [The pannel's deposition 9 June.] Next was delivered by the pannel to the earl of Rothes of purpose to be presented to his majesty. [The pannel's deposition foresaid; and also affirmed by the dittay itself.] Last it was offered by my lord of Rothes to his majesty; as the earl of Rothes's deposition bears, 3 July: Whilk offer of my lord of Rothes to his majesty is acknowledged by my Lord Advocat, conform to his lordship's answer in the defences proponed for the pannel. Op-

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pones also the pannel's quality, life and conversation, which is in such a far distance from the crimes libelled, that it excludes all presumption and probability thereof against the pannel.

To that point of the Dittay aggravating the pannel's not apprehending Mr. Haig, by the pannel's shewing to him the warrant of his citation before the committee and thereby giving him occasion to escape; oppones the pannel's deposition of the 16th of June, which bears that the pannel knew nothing of Mr. Haig his going off the country before the third day after Mr. Haig's escape.

That part of the Dittay bearing the pannel to be guilty of divulging and dispersing of the alledged infamous libel, is not proven. 1st, The pannel his causing Mr. Robert Dalgleish his servant copy the same, proves not the pannel's dispersing thereof in public; Mr. Robert Dalgleish being the pannel's houshold servant, and he having copied the same *infra privatos parietes*, which proves not dispersing in public. 2dly, The delivery of the writ quarrelled to the earl of Rothes of purpose to be presented to his majesty, proves no ways divulging of a scandalous libel: But the delivery thereof, qualified as said is, and followed with ane real offer thereof made to his majesty, cuts away its being offered as a scandalous libel, and divulging thereof; both because of his majesty's sacred person, which is far transcendent above all presumed injuries, and also, 'quia calumnia 'est adversus absentem.' Farder, since in law and reason, intention of law and reason differences crimes by the purpose of the party, let the purpose of the pannel difference now this his act, which does make the same to be presentation of a supplication, and not divulging of an infamous libel. 3dly, The delivery of the writ by the pannel to Mr. Dunmure proves not divulging; and oppones thereto the pannel's deposition of the 9th of June, which bears that the pannel gave the writ to Dunmure to look upon to himself alone, and to shew it to no other, and that he never knew that Dunmure had copied the same, till Dunmure was called in question for it. Oppones likewise Mr. Dunmure's deposition, which bears in this same manner. Oppones also the law 'quod in male-'ficiis voluntas spectatur, non exitus;' and that the pannel's purpose is declared by his deposition foresaid.

It is answered by my *Lord Advocat*, That the interlining is not found relevant *per se*, but with the remanent circumstances; and so far as interlining is libelled, which is indefinitely, without respect of time, (whether before or after shewing of it to Dunmure) it is clearly proven by the pannel's own deposition, and by ocular inspection of the scandalous libel produced by the pannel, which is interlined with his own hand in two divers places. And for proving the pannel to be author, adviser, &c. his receiving it immediately from Haig, delivering it to the earl of Rothes, interlining of it *quocunque tempore*, dispersing of it to Dunmure, and giving the power of it to Dalgleish his own man, is sufficient to verify that part of the dittay. To the whilk is added Haig his confession in his letter, which in two passages thereof bears, that it was allowed by them in whose name the same was framed, of the which number the pannel was one. Where it is alledged that the not apprehending is not verified, or concealing of Haig, &c. because it is not proven that the pannel had knowledge that it was a scandalous libel; it is answered, That the pannel knew Haig to be author, which is proven by his depositions: and the justice by *interloquitor* has found it to be a scandalous libel, and there is no necessity to prove his knowledge. And as to divulging it is not found relevant *solo*, but being conjoined with any part of the Dittay; and it is proven *in terminis* as it is libelled by the pannel's depositions. And as to the pannel's intention, it is not a part of the dittay, the pannel being verified to have been author or deviser, not apprehender of Haig, or concealer of him, or divulger of the scandalous libel; which is clearly proven by the writs produced. And therefore alledges that the assize, notwithstanding of their objections proponed, ought to find the dittay clearly proven: otherwise, protests for wilful error and remeid of law.

It is duplyed by Mr. *John Nisbet* for the pannel, Whereas it is replyed by my Lord Advocat, that the receipt of the piece from the author immediately after compiling of it, joined with interlineation, and the author's testimony of the pannel's approving of it, verifies the pannel's concourse with the author in framing the piece found scandalous; we oppone the pannel's reiterat depositions, bearing that he had no accession in the framing, and gave no previous warrant to the framer, and disclaiming knowledge of the framing of it, which must elide all the presumptions adduced by my Lord Advocat; seeing it is incontraverted in law, that a qualified confession cannot be disjoined, as is clearly proven in my dispute, chiefly since the pannel has deponed so ingenuously, without any obligation in law, and upon assurance foresaid.

Whereas it is replied by my Lord Advocat, That the pannel intrusting of his man Mr Robert Dalgleish with the piece, his imparting of it to Dunmure, and to my lord of Rothes, verifies divulging, oppones our dispute, and the authorities of the laws cited by us, requiring a public exposing, and a fraudulent intention to defame. And we oppone the condition of the pannel's delivery of it to Dunmure, that it should be *illi soli*; Dunmure's copying of it without the pannel's knowledge: then of the pannel's delivery of it to Dunmure, to found his opinion in judgment; all clearly verified by Dunmure's deposition.

Where it is replied by my Lord Advocat, That Haig's evasion, the pannel's knowledge that he was author of the piece now found scandalous, verifies the point of not apprehending the author; and that it is not necessary to prove the pannel's knowledge of the piece: It is duplyed, That we oppone the uncontraverted practick of

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all countries where apprehending of parties is enjoined, and resetting is prohibit; that declarator should precede, as in authors of heretical books, forbidden to be received by the law; because every man is not able to discern those pieces, which are debated and contraverted amongst the learnedest. And we oppone the panner's own depositions, bearing that he knew not assuredly Haig to be author thereof, but thought only he was author; and therefore not obliged to apprehend summarly and abruptly. In respect hereof the assize can no ways find the pannel guilty of the Dittay, and alledged crime specified therein.

The Assize by plurality of votes, elects and choises John earl of Traquair Chancellor, (Foreman.)

Whilks persons of assize being received, sworn, and admitted, after accusation of the said John lord Balmerino by dittay of the crimes foresaids, mentioned and set down therein, and production, and reading judicially of the writs, and probation used and produced by his majesty's Advocat for verifying thereof, they removed all together, furth of court to the council house of Edinburgh, where first, by plurality of votes, they elected and chused the said John earl of Traquair Chancellor. Thereafter received and voted upon the hail points of the said Dittay; and being riply and at length advised therewith, and with the writs and probation used and produced by his majesty's Advocat for instructing of the same, and with the objections made by the pannel and his procurators there against, and answers made by his majesty's Advocat to the said objections, all read in their presence and audience, re-entered again in court; where they by report and judicial declaration of the said John earl of Traquair, Chancellor of the said Assize, found, pronounced, and declared the said John lord of Balmerino to be cleared and acquit of the first part of the said Dittay, wherein he is indicted as author, deviser, consulter, adviser, airt and part of the forming and penning of the infamous or scandalous libel mentioned thereintil: As also of not apprehending of Mr. William Haig, whom he affirms in his deposition to have been author of the said libel: And likewise to be cleared, assoilzed, and acquit of the divulging and dispersing of the said scandalous libel amongst our sovereign lord's subjects, in manner specified in the said Dittay. And last, found, pronounced, and declared the said John lord of Balmerino to be allenarly filed and convict of the hearing of the said infamous libel, concealing and not revealing of the said Mr. William Haig, affirmed by him to be the author thereof.

The Justice General upon consideration of the said John lord Balmerino his conviction by the fore-named persons of assize of the foresaid point of Dittay, anent the hearing of the infamous libel therein contained, concealing and revealing of Mr. William Haig, author and penner thereof, found and declared, by advice of his lordship's assessors, That the said John lord of Balmerino has there-through incurred the pain of death contained in the acts of parliament; suspending always the execution thereof, until the time his majesty's gracious will and pleasure be shown and declared thereanent: to whose sacred majesty the manner, time, and place of the execution of the said sentence is remitted by the justice: and the said John lord of Balmerino ordained in the mean time to be returned to ward within the castle of Edinburgh, to remain therein while his majesty's pleasure be signified.*

The King being informed hereof, was pleased to grant him a Pardon.

* 2 Rush. Col. 281.

145. Proceedings in the Star-Chamber against Dr. JOHN BASTWICK, Mr. HENRY BURTON, and WILLIAM PRYNN,* esq. for several Libels:† 13 CHARLES I. A. D. 1637. Written by their Friends.

AN Information was exhibited in the Star-Chamber by the Attorney-General, against John Bastwick doctor in physic, Henry Burton batchelor of divinity, and William Prynn barrister at law, Defendants, for writing and publishing seditious, schismatical and libellous Books against the Hierarchy. They prepared their Answers, but the counsel being backward for

* 1 Clar. Hist. p. 73. 158. 2 Rushw. p. 380.

† Kennet, after mentioning the opinion which the judges had given on the legality of Ship Money, proceeds: "It was a less invidious opinion which the same Judges had delivered in the case of Burton and Bastwicke, who had been so fierce in their Libels against the government, that it was considered by the king's counsel how to draw them into an arraignment of High-Treason. For which purpose there was a meeting of the Judges at Serjeant's-Inn, before whom the king's counsel laboured to prove, that divers passages in the Books of the said authors did amount to High-Treason. But when the council withdrew, the Judges in debate among themselves, came to these resolutions. 1. 'That if there were any thing in 'the Books that amounted to treason, no In-'dictment could be found good for treason, 'unless it was grounded upon the statute of '25 Ed. 3. either for compassing the king's 'death, or imagining the same, or else for levy-'ing of war. 2. That if any man seditiously, 'maliciously and of purpose to raise rebellion, 'and to incite rebellion, did take arms to reduce 'the course of government of the state, either

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fear of offending the court, they petitioned they might sign their Answers themselves, which was denied; and the 28th of April the court ordered them to put in their Answers by Monday sevennight under their counsel's hands, or else the matters of the Information to be taken *pro confesso*. Mr. Prynn, May 5, again petitioned them, that having been for above a week debarred access to his counsel, and his servant who should solicit for him being detained close prisoner in a messenger's hands, and it being difficult to get his counsel to repair to him during the term; he having been a barrister at law, prayed he might (according to former precedents in that court) have liberty to put in his Answer by the day prefixed, under his own hand, and not under his counsel's, who refused it out of fear and cowardice; for which he alledged these Reasons:

1. Close, Dr. Layton, and others, had been allowed this, and there is but one precedent against it; where, upon a special reason, and in case of a woman, not of a man, much less of a lawyer, it was denied. 2. Upon an *ore tenus* in this court, in many cases at the Council-Table, in parliament, and in the King's-Bench upon Indictments and Informations (especially in cases of felony or treason) the Defendants make their defence without counsel. 3. Counsel is allowed not of necessity but favour, as a help to the Defendants; but when they find them no help, but that they advise them to their prejudice, why may they not answer without them? 4. Every Answer, in the eye of the law, is the Defendant's, not the counsel's. 5. Shall an innocent man suffer without conviction, through the want, fear, neglect, ignorance, diversity of opinions, or treachery of counsel? 6. The law of nature teacheth every creature, man especially, to defend himself, and in the present case the Defendant's Answer resteth upon Books, matters of divinity, and other points, wherein counsel have little skill: how can they defend him in a cause they understand not? 7. At the general Day of Judgment, every man shall be allowed to make Answer for himself; much more should earthly Judges allow the same, where others will not or dare not. 8. By the judicial law among the Jews, and by the civil law among the Pagan Romans, every one might answer for themselves: Naboth, Susannah, Christ, and others, though unjustly condemned, yet were not condemned as guilty for not answering by counsel. 9. St. Paul, when he was slandered and accused by Ananias the high-priest, and Tertullus, and several times before Felix, Festus, and king Agrippa (three heathen magistrates) was suffered to speak for himself without any counsel assigned.—The Defendant therefore hopes, he being accused in this court, by the English prelates and high priests instigations, of sedition and other such like crimes, as St. Paul was, shall enjoy the same privilege and freedom before Christian Judges, as St. Paul had among Pagans; which his adversaries will not be against, unless they will be deemed more unreasonable than Ananias himself: especially the Defendant having been a barrister and counsellor at law formerly, and admitted in this court to put in Answers under his hand in other men's cases.

Upon reading this and a Petition from Dr. Bastwick to the same purpose, alledging his counsel refused to sign his Answer, the court adhered to their former order, that they should by Monday put in their Answers under counsels hands, or else to be taken *pro confesso*. Prynn and Bastwick thereupon left their Answers under their own hands at the office, and tendered another draught thereof to the court.

Before this petition of Mr. Prynn, he and the two other Defendants put in a Cross-Bill under all their hands, against the archbishop of Canterbury and others of the prelates, wherein they charged them with usurping upon his majesty's prerogative royal, with Innovations, licensing popish and Arminian Books, &c. and set forth the substance of their Answers. The Bill being ingrossed and signed by them, Mr. Prynn tendered it to my Lord-Keeper, praying it might be accepted without counsel's hands, who durst not sign it: The Lord-Keeper upon reading the Cross-Bill refused to admit it, but delivered it to the king's Attorney. The Archbishop nettled thereat, demanded the Opinion of the Judges, whether they could not be punished as Libellers; who all but one answered negatively: for it was tendered in a legal way, and the king's courts are open to all men. The Archbishop then applyed to the court of Star-Chamber, and informed them, That in some Books and pamphlets lately published, his grace and the other bishops are said to have usurped upon the king's prerogative, and proceeded in their courts contrary to law. He prayed the court would require the Judges to give their Opinions therein; and the court accordingly desired their Opinions in the points following:

1. Whether process may not issue out of the ecclesiastical courts in the names of the bishops? The Judges answered affirmatively.

2. Whether a Patent under the Great Seal be necessary for keeping Ecclesiastical Courts, and for citations, suspensions, excommunications and other censures? Whether citations must be in the king's name, and under his seal of arms? The like for institutions, inductions, and corrections of ecclesiastical offences? They answered, that a Patent under the Great Seal is not necessary in any of these cases; nor is it necessary that summons, citations, or other

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' ecclesiastical or civil, and thereby to compass ' the king's destruction, this was treason. 3. ' That such Indictment was to be framed upon ' the said statute of 25 Ed. 3.' This Resolution being delivered by the Lord Chief Justice to the king and council, had this regular effect, that the said offenders were not indicted of High-Treason, but prosecuted in a softer manner, though afterward thought severe and arbitrary."

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process ecclesiastical, or institutions, inductions, or corrections of ecclesiastical offences should be in the king's name, or with his stile, or under his seal, or that their seals of office have in them the king's arms, the statute of 1 Edw. 6. ch. 2. being not now in force.

3. Whether Bishops, Arch-deacons, &c. may keep any Visitation, without commission under the Great Seal? They answered they may. Which Opinion of the Judges being certified into the Star-Chamber under the hands of 11 of the 12, the court, at the prayer of the Attorney-General, ordered the said Certificate to be recorded there, and in the other courts at Westminster, the high commission and other ecclesiastical courts; and afterwards the original certificate to be delivered to the archbishop of Canterbury, to be preserved among the records of his court.

Dr. Bastwick having left his Answer at the office as aforesaid, the court taking notice that it was five skins and a half of parchment close written, and (as was alledged) contained much scandalous defamatory matter, ordered, That all the matters of the Information, wherewith he was charged, should be taken *pro confesso*. Dr. Bastwick notwithstanding petitioned again, that his Answer might be accepted under his own hand, but to no purpose: And Mr. Prynn in a second Petition desiring of the court not to require impossibilities of him, his counsel's hands not being at his command (for thus the most innocent man may be betrayed and condemned, through the unfaithfulness, wilfulness, fear, corruption, or default of counsel), he prayed them to deal with him as they would be dealt with themselves, were they, which God forbid, in his condition, and as they would have Christ proceed with them at the Day of Judgment. He craved only so much favour and justice as Christ found before Pilate, and Paul before Felix, Festus, and Agrippa, or as every traitor or felon enjoys in the court of justice, to answer for himself, when his counsel will not, cannot, or dare not; especially in this weighty cause highly concerning his majesty's Royal Prerogative, the safety of Religion, and the good of the whole realm. He prayed the Cross-Bill and Answers of him and the other Defendants against the prelates late dangerous encroachments, innovations, practices and oppressions, may be accepted under the defendants own hands; and the petitioner, upon granting his Petition, should ever pray for their lordships, &c.—The Court hereupon commanded Mr. Holt, one of Mr. Prynn's counsel, to repair to him in the Tower, and take instructions for his Answer: and the Lieutenant of the Tower was sent for and checked by the lords for suffering Mr. Prynn to dictate such a Petition; and one Gardener who writ it from his mouth by the Lieutenant's license, was the same evening, by a warrant from the Archbishop and others, apprehended by a pursuivant, detained about 14 days, and not released till he had given bond to appear when called.

Mr. *Prynn*, upon Mr. Holt's repairing to him, gave him his fee, and Instructions for drawing his Answer; and the same being agreed on and settled by Mr. Holt, and Tomlins his other counsel, Mr. Holt's clerk ingrossed it; but Holt then refused to sign it, saying he had express order to the contrary, and would not do it for 100*l.* and in the mean time Tomlins went into the country. Mr. Prynn thus deluded, requested the Lord Keeper, the Chief Judge of that court, to command Mr. Holt, who had drawn it, to sign it; but the Lord Keeper answered, he had no power to command counsel to sign an Answer. And the court, May 19, positively ordered that for their contempt in not putting in their Answers, the matters against Bastwick and Prynn should be taken *pro confesso*, and the Cause against them should be heard the first sitting of the next term. As for Mr. Burton's Answer, it was signed by Mr. Holt; but after it had been near three weeks in court, upon Mr. Attorney's suggestion that it was scandalous, the court referred it to the two Chief Justices Bramston and Finch. The latter reviled Holt exceedingly, and told him he deserved to have his gown pulled over his ears for drawing it: Holt replyed, it was only a Confession or explanation of the charge in the Bill, and a recital of acts of parliament, and how that could be scandalous or impertinent he could not conceive. But the two Justices certified it to be all scandalous and impertinent, except the usual words in the beginning, 'The said Defendant by Protestation not con-'fessing,' &c. and the words in the latter end, containing his plea of Not Guilty, the common averment that he was ready to prove the matters of Answer, his Prayer of a favourable interpretation, and to be dismissed. So all the body of his Answer, containing about 40 sheets of paper, was expunged, and nothing but the head and feet remained: And by his Plea of Not Guilty to all, he was made to deny what he had confessed, and justified in his Answer: And the Examiner coming to him afterwards to the Fleet, with Interrogatories grounded on his Answer, he refused to be examined unless his Answer might be admitted as it was put in, or he permitted to put in a new one. The Court ordered the Examiner to repair to him a second time with the Interogatories; but he persisting in his refusal to be examined, for that the Answer now in court was none of his, the court ordered the matter of the Information and Interrogatories to be taken against him *pro confesso*; and on the 13th of June the Court ordered the cause against all the three Defendants to be heard the next day, and that in the mean time they should have liberty with their keepers to attend their counsel. This was looked upon as a short warning by some, who affirmed, that by the course of the court, a *subpœna ad audiendum judicium* should have been served upon them 15 days at least before the day of hearing, which was not done. However Mr. Prynn made use of his liberty, and repaired to Mr. Tomlins (then newly returned) with his Answer

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newly drawn up and ingrossed as aforesaid, who signed it, but Mr. Holt said he durst not; then Mr. Prynn tendered it thus signed to Mr. Goade at the office, but he utterly refused to take it.

Mr. Burton in his Answer, set forth the substance of his Sermon which he preached the 5th of November in his parish church in Friday-street, touching the innovations brought into the church.

Dr. *Bastwick* in his Answer termed the Prelates Invaders of the king's Prerogative, Contemners of the Scriptures, advancers of Popery, superstition, idolatry, profaneness, oppression of the king's subjects, in the impious performance whereof they shewed neither wit nor honesty; Enemies of God and the king, and servants of the Devil.

Mr. *Prynn's* Answer was much against the Hierarchy, but in more moderate and cautious expressions.

June 14. The Lords being set in their places in the Star-Chamber, and the three Defendants brought to the bar, to receive their Sentences, the Lord Chief Justice Finch looking earnestly on Mr. Prynn, said, I had thought Mr. Prynn had no ears, but methinks he hath ears; which caused many of the lords to take the stricter view of him, and for their better satisfaction, the usher of the court was commanded to turn up his hair, and shew his ears: upon the sight whereof the lords were displeased they had been formerly no more cut off, and cast out some disgraceful words of him. To which Mr. Prynn replyed, 'My lords, there is never a one of your honours, but would be sorry to have your ears as mine are.'

L. Keeper. In good faith he is somewhat saucy.

Mr. Prynn. I hope your honours will not be offended, pray God give you ears to hear.

L. Keeper. The business of the day is to proceed on the Prisoners at the bar.

Mr. *Prynn* then humbly desired of the court to give him leave to make a motion or two, which being granted, he moved, First, That their honours would be pleased to accept of a Cross-Bill against the Prelates, signed with their own hands, being that which stands with the justice of the court, which he humbly craves; and so tendered it.

L. Keeper. As for your Cross-Bill, it is not the business of the day; hereafter if the court shall see just cause, and that it favours not of libelling, we may accept of it: for my part I have not seen it, but have heard somewhat of it.

Mr. Prynn. I hope your honours will not refuse it, being it is on his majesty's behalf. We are his majesty's subjects, and therefore require the justice of the court.

L. Keeper. But this is not the business of the day.

Mr. Prynn. Why then, my lords, I have a second motion, which I humbly pray your honours to grant; which is, that your lordships will be pleased to dismiss the Prelates here now sitting, from having any voice in the censure of this cause (being generally known to be adversaries) as being no way agreeable with equity or reason, that they who are our adversaries, should be our judges. Therefore we humbly crave they may be expunged out of the court.

L. Keeper. In good faith, it is a sweet motion, is it not? Herein you are become libellous. And if you should thus libel all the lords and reverend Judges, as you do the most reverend Prelates, by this your plea, you would have none to pass Sentence upon you for your libelling, because they are parties.

Mr. Prynn. Under correction, my lord, this doth not hold, the case is not alike, for here are only one or two members of the court, who are said to be libelled against, and your lordship yourself in your case against Norton absented yourself from the hearing, because a party, which is usually done by the lords in like cases.—But this prevailed nothing.

Mr. Prynn. Then I have a third motion, which is, that your lordships will receive my Answer to the Information signed with one counsel's hand, which as soon as I could get signed, I tendered at the office, but it was refused.

L. Keeper. Your Answer comes now too late, proceed to the business of the day. Read the Information, which was read being very large, and having these five Books thereto annexed, Dr. Bastwick's Latin 'Apology,' his Litany, Mr. Burton's book entitled, 'An Apology for an Appeal to the king's most excellent majesty, with two Sermons for God and the King,' preached on the 5th of November last: The News from Ipswich, and the Divine Tragedy, recording God's fearful Judgments against Sabbath-Breakers.—The king's counsel being five, took each of them a several Book.

Mr. Attorney began with Dr. Bastwick's Latin Apology; next unto the Attorney, serjeant Whitfield falls upon Mr. Burton's book, saying, In good faith, my lords, there is never a page in this Book, but deserves a heavier and deeper Censure than this court can put upon him.

Next followed the *Archbishop*, who in like manner descanted on The News from Ipswich, charging it to be full of pernicious lyes; and especially vindicating the honour of Matthew Wren, bishop of Norwich, as being a learned, pious, and reverend father of the Church.

Next followed the king's *Solicitor*, (Mr. Littleton) who descanted upon the Divine Tragedy; to which part of it concerning God's judgments on Sabbath-Breakers, he said, That they sat in the Seat of God, who judged these accidents which fell out upon persons suddenly struck, to be the judgments of God for Sabbath-breaking. He enlarged himself upon that passage which reflected upon his majesty's late Attorney-General, Mr. William Noy, who, (he said) was most shamefully abused by a slander laid upon him, as if God's Judgment fell upon him, for so eagerly prosecuting Mr. Prynn for his 'Histrio-mastix,'* which judgment was this;

* See No. 142.

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that he laughing at Mr. Prynn, while he was suffering upon the pillory, was struck with an issue of blood in his privy-parts, which could never be stopt till the day of his death, which followed soon after: but the truth of this, my lords, you shall find to be as probable as the rest, for we have here three or four gentlemen of good credit and rank, to testify upon oath that he had that issue long before. And the Solicitor called out for room to be made for the gentlemen to come in, but none such appeared.

Lastly followed Mr. *Herbert*, who descanting upon Dr. Bastwick's Litany, concluded jointly with the rest, that it deserved a heavy censure.

L. Keeper. You hear, gentlemen, wherewith you are charged, and now lest you should say you cannot have liberty to speak for yourselves, the court gives you leave to speak what you can, with these conditions: 1. That you speak within the bounds of modesty. 2. That your Speeches be not libellous.

They all three answered, they hoped so to order their speech, as to be free from any immodest or libellous speaking.

L. Keeper. Then speak in God's name, and shew cause why the court should not proceed in censure (as taking the cause *pro confesso.*)

Mr. *Prynn.* I expected some particular Charge to be proved against me: Dr. Bastwick and Mr. Burton are charged with particular Books to the Information annexed, but none of the Books are laid to me; my sole offence, for which the Information must be taken *pro confesso*, is my not putting in my Answer under counsel's hand by a day prefixed; whereas I entered my appearance, and took out a copy of the Information, which being taken out, I endeavoured to draw up my Answer; but being shut up close prisoner, I was deserted of all means by which I should have done it; for I was no sooner served with the Subpœna, but I was shortly after shut up close prisoner, prohibited of pen, ink, and paper, and so disabled to draw up my Answer, or Instructions for counsel; my servant who should solicit for me was in prison, without being admitted to bail, my friends denyed access, and my chamber twice searched; and after I had drawn some Instructions, and part of my Answer (having then obtained liberty of pen and ink) they were taken away by Mr. Nicolas, Clerk of the Council; your lordships refused to let me put in my Answer under my own hand, though a counsellor at law, contrary to former precedents; your lordships did at last assign me counsel, but they neglected to come to me, and when by order of the court Mr. Holt came to me in the Tower, I gave him my Fee and Instructions, and afterwards Mr. Holt and my other counsel agreed upon my Answer, caused it to be ingrossed, and promised to sign it, but Mr. Holt refused to do it then; afterwards Mr. Tomlins signed it, and it was carryed to the office, but they refused it. Here it is, I tender it upon my oath, which your lordships cannot deny with the justice of the court.

L. Keeper. We can give you a precedent, that this court hath proceeded and taken a cause *pro confesso*, for not putting in an Answer in six days; you have had a great deal of favour shewed you, in affording you longer time, and therefore the court is free from all calumny or aspersion for rejecting your Answer, not signed with counsel's hands.

Mr. *Prynn.* But one word or two, my lords, I desire your honours to hear me: I put a case in law, If an award be made that A shall together with B and C enter into a bond of 100*l.* to S, the award is void, because A hath no power to compel B and C to enter into such a bond: my case is the same. The court ordered me to put in my Answer under counsel's hands; I endeavoured it, they refused to sign it, I had no power to compel them, and desired the court to order them to sign it; but the court replied they had no power to force them; how then could I, a close prisoner, compel them, if the court could not? By this means the most innocent person in the world may be made guilty of what crimes you please. I appeal to Mr. Holt, if I have not used all my endeavours to get him to sign my Answer.

Mr. *Holt.* There was so long time spent ere I could do any thing after I was assigned his counsel, that it was impossible his Answer could be drawn up in so short a time as was allotted; for after long expectation, seeing he came not to me, I went to him, where I found him shut up close prisoner, so that I could not have access to him; whereupon I motioned to the Lieutenant of the Tower to have free liberty of speech with him concerning his Answer, which being granted me, I found him very willing and desirous to have it drawn up; whereupon I did move in this court for pen and paper, which was granted, the which he no sooner had gotten but he set himself to draw up Instructions, and in a short time sent me 40 sheets, and soon after I received 40 more; but I found the Answer so long, and of such a nature, that I durst not set my hand to it, for fear of giving your honours distaste.

Mr. *Prynn.* My lords, I did nothing but according to the directions of my counsel, only I spake my own words: my answer was drawn up by his consent, it was his own act, and he did approve of it; and if he will be so base a coward, to do that in private which he dares not acknowledge in public, I will not have such a sin lie on my conscience, let it rest with him. Here is my Answer, which though it be not signed with their hands, yet here I tender it upon my oath, which you cannot in justice deny.

L. Keeper. Your case is good law, but ill applied; the court desires no such long Answer, but whether you are Guilty or not Guilty.

Mr. *Prynn.* By the statutes of Phil. and Mar. and of Eliz. in the case of libelling the king or queen, the party's confession, or two witnesses face to face are required, else no

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conviction, and here is neither; nor is there in all the Information one clause that doth particularly fall on me, but only in general. There is no Book laid to my charge, and shall I be condemned for a particular act, when no accusation of any particular act can be brought against me? This were most unjust and wicked. Here I tender my Answer to the Information upon my oath; my lord, you do impose impossibilities upon me, I could do no more than I did.

L. Keeper. Well, hold your peace, your Answer comes too late. What say you, Dr. Bastwick?

Dr. *Bastwick.* My honourable lords, methinks you look like an Assembly of Gods, and sit in the place of God: Ye are called the Sons of God; and since I have compared you to gods, give me leave a little to parallel the one with the other, to see whether the comparison between God and you doth hold in this noble and righteous cause. This was the carriage of Almighty God in the cause of Sodom, before he would pronounce Sentence, or execute Judgment, he would first come down, and see whether the crime was altogether according to the cry that was come up. And with whom doth the Lord consult, when he came down? With his servant Abraham, and he gives the reason; 'for I know,' (saith he) 'that Abraham will command his children and 'houshold after him, that they shall keep the 'way of the Lord to do justice and judgment.' My good lords, thus stands the case between your honours and us this day: there is a great cry come up into your ears against us from the king's Attorney; why now be you pleased to descend and see if the crime be according to the cry, and consult (with God) (not the Prelates, being in the adversary part; who, as it is apparent to all the world, do proudly set themselves against the ways of God, and from whom none can expect justice or judgment) but with righteous men, that will be impartial on either side, before you proceed to censure, which censure you cannot pass on us without great injustice before you hear our Answers read. Here is my Answer, which I here tender upon my oath: My good lords, give us leave to speak in our own defence. We are not conscious to ourselves, of any thing we have done that deserves a Censure this day in this honourable court, but that we have ever laboured to maintain the honour, dignity, and prerogative royal of our sovereign lord the king; let my lord the king live for ever. Had I a thousand lives, I should think them all too little to spend for the maintenance of his majesty's royal prerogative. My good lords, can you proceed to censure before you know my cause? I dare undertake, that scarce any one of your lordships have read my Books: and can you then censure me for what you know not, and before I have made my Defence? O my noble lords! is this righteous Judgment? This were against the law of God and man, to condemn a man before you know his crime: The Governor before whom St. Paul was carried, who was a very Heathen, would first hear his cause before he would pass any censure upon him; and doth it beseem so noble and Christian assembly to condemn me before my Answer be perused, and my cause known? Men, brethren, and fathers, into what an age are we fallen? I desire your honours to lay aside your Censure for this day, to enquire into my cause, and hear my Answer read; which if you refuse to do, I here profess, I will clothe it in Roman buff, and send it abroad unto the view of all the world, to clear mine innocency, and shew your great injustice in this cause.

L. Keeper. But this is not the business of the day; why brought you not in your Answer in due time?

Dr. *Bastw.* My lord, a long time since I tendered it to your honour, I failed not in any one particular: and if my counsel be so base and cowardly, that they dare not sign it for fear of the Prelates, as I can make it appear, therefore have I no Answer? My lord, here is my Answer, which though my counsel out of a base spirit dare not set their hands unto, yet I tender it upon my oath.

L. Keeper. But, Mr. Doctor, you should have been brief; you tendered in too large an Answer, which, as I heard, is as libellous as your Books.

Dr. *Bastw.* No, my lord, it is not libellous though large; I have none to answer for me but myself, and being left to myself, I must plead my conscience in answer to every circumstance of the information.

L. Keeper. What say you, Mr. Doctor, are you Guilty, or not Guilty? answer yea, or no: you needed not to have troubled yourself so much about so large an Answer.

Dr. *Bastw.* I know none of your honours have read my Book; and can you with the justice of the court, condemn me before you know what is written in my Books?

L. Keeper. What say you to that was read to you even now?

Dr. *Bastw.* My lord, he that read it did so murder the sense of it, that had I not known what I had written, I could not tell what to have made of it.

L. Keeper. What say you to the other Sentence read to you?

Dr. *Bastw.* That was none of mine, I will not father that which was none of my own.

L. Dorset. Did not you send that Book, as now it is, to a nobleman's house, together with a letter directed to him?

Dr. *Bastw.* Yea, my lord, I did so, but withal you may see in my Epistle set before the Book, I did at first disclaim what was not mine. I sent my Book over by a Dutch merchant, who it was that wrote the Addition I do not know, but my Epistle set to my Book made manifest what was mine, and what was not; and I cannot justly suffer for what was none of mine.

L. Arundel. My lord, you hear by his own Speech the cause is taken *pro confesso.*

L. Keeper. Yea, you say true, my lord.

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Dr. *Bastw.* My noble lord of Arundel, I know you are a noble prince in Israel, and a great peer of this realm; there are some honourable lords in this court, that have been forced out as combatants in a single duel; it is between the Prelates and us, at this time, as between two that have appointed the field. The one being a coward goes to the magistrate, and by virtue of his authority disarms the other of his weapons, and gives him a bullrush, and then challenges him to fight. If this be not base cowardice, I know not what belongs to a soldier. This is the case between the Prelates and us, they take away our weapons (our Answers) by virtue of your authority, by which we should defend ourselves, and yet they bid us fight. My lord, doth not this savour of a base cowardly spirit? I know, my lord, there is a decree gone forth (for my Sentence was passed long since) to cut off our ears.

L. Keeper. Who shall know our Censure, before the court pass it? Do you prophesy of yourselves?

Dr. *Bastw.* My lord, I am able to prove it, and that from the mouth of the Prelates own servants, that in August last it was decreed, that Dr. Bastwick should lose his ears. O my noble lords! is this righteous judgment? I may say, as the Apostle once said, What, whip a Roman! I have been a soldier able to lead an army into the field, to fight valiantly for the honour of their prince: Now I am a physician, able to cure nobles, kings, princes, and emperors; and to curtalize a Roman's ears like a cur, O my honourable lords! is it not too base an act for so noble an assembly, and for so righteous and honourable a cause? The cause, my lords, is great, it concerns the glory of God, the honour of our king, whose prerogative we labour to maintain and to set up in a high manner, in which your honours liberties are engaged: And doth not such a cause deserve your lordships consideration, before you proceed to censure? Your honours may be pleased to consider, that in the last cause heard and censured in this court, between sir James Bagg and the lord Mohun, wherein your lordships took a great deal of pains, with a great deal of patience, to hear the Bills on both sides, with all the Answers and Depositions largely laid open before you; which cause when you had fully heard, some of your honours now sitting in court, said, you could not in conscience proceed to censure, till you had taken some time to recollect yourselves. If in a cause of that nature, you could spend so much time, and afterwards recollect yourselves before you would pass censure; how much more should it move your honours to take some time in a cause wherein the glory of God, the prerogative of his majesty, your honours dignity, and the Subjects Liberty is so largely ingaged? My good lords, it may fall out to be any of your lordships cases to stand as delinquents at this bar, as we now do: It is not unknown to your honours, the next cause that is to succeed ours, is touching a person that sometimes hath been in greatest power in this court: And if the mutations and revolutions of persons and times be such, then I do most humbly beseech your honours to look on us, as it may befal yourselves. But if all this will not prevail with your honours to peruse my Books, and hear my Answer read, which here I tender upon the word and oath of a soldier, a gentleman, a scholar, and a physician, I will clothe them (as I said before) in Roman buff, and disperse them throughout the Christian world, that future generations may see the innocency of this cause, and your honours unjust proceedings in it; all which I will do, though it cost me my life.

L. Keeper. Mr. Doctor, I thought you would be angry.

Dr. *Bastw.* No, my lord, you are mistaken, I am not angry or passionate; all that I do press, is, that you would be pleased to peruse my Answer.

L. Keeper. Well, hold your peace. Mr. Burton, what say you?

Mr. *Burton.* My good lords, your honours (it should seem) do determine to censure us, and take our cause *pro confesso*, although we have laboured to give your honours satisfaction in all things. My lords, what you have to say against my Book, I confess I did write it, yet did I not any thing out of intent of Commotion, or Sedition: I delivered nothing but what my text led me to, being chosen to suit with the day, namely the 5th of November; the words were these, &c.

L. Keeper. Mr. Burton, I pray stand not naming texts of Scripture now; we do not send for you to preach, but to answer to those things that are objected against you.

Mr. *Burton.* My lord, I have drawn up my Answer to my great pains and charges, which Answer was signed with my counsel's hands, and received into the court, according to the rule and order thereof. And I did not think to have been called this day to a Censure, but have had a legal proceeding by way of Bill and Answer.

L. Keeper. Your Answer was impertinent.

Mr. *Burton.* My Answer (after it was entered into the court) was referred to the Judges, but by what means I do not know. Whether it be impertinent, and what cause your lordships had to cast it out, I know not; but after it was approved of, and received, it was cast out as an impertinent Answer.

L. Finch. The Judges did you a good turn to make it impertinent, for it was as libellous as your Book, so that your Answer deserved a censure alone.

L. Keeper. What say you, Mr. Burton, are you Guilty or not?

Mr. *Burton.* My lord, I desire you not only to peruse my Book here and there, but every passage of it.

L. Keeper. Mr. Burton, time is short, are you Guilty or not Guilty! What say you to that which was read? Doth it become a minister to deliver himself in such a railing and scandalous way?

Mr. *Burton.* In my judgment, and as I

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can prove it, it was neither railing nor scandalous; I conceive that a minister hath a larger liberty than always to go in a mild strain: I being the pastor of my people, whom I had in charge, and was to instruct, I supposed it was my duty to inform them of these Innovations that are crept into the Church, as likewise of the danger and ill consequence of them: as for my Answer, ye blotted out what ye would, and then the rest which made best for your own ends, you would have to stand; and now for me to tender only what will serve for your own turns, and renounce the rest, were to desert my cause, which before I will do, or desert my conscience, I will rather desert my body, and deliver it up to your lordships to do with it what you will.

L. Keeper. This is a place where you should crave mercy and favour, Mr. Burton, and not stand upon such terms as you do.

Mr. *Burton.* There wherein I have offended through human frailty, I crave of God and man pardon: and I pray God, that in your Sentence you may so censure us, that you may not sin against the Lord.

Thus the Prisoners desiring to speak a little more for themselves, were commanded to silence. And so the lords proceeded to Censure.

L. Cottington. I condemn these three men to lose their ears in the Palace-yard at Westminster; to be fined 5,000*l.* a man to his majesty; and to perpetual imprisonment in three remote places of the kingdom; namely, the castles of Carnarvon, Cornwall, and Lancaster.

L. Finch. I condemn Mr. Prynn to be stigmatized in the cheeks with two letters (S & L) for a Seditious Libeller. To which all the lords agreed. And so the Lord Keeper concluded the Censure.

Archbishop LAUD's Speech.*

My lords; I shall not need to speak of the infamous course of libelling in any kind: nor of the punishment of it, which in some cases was capital by the imperial laws. As appears: (Cod. l. 9. T. 36. In Jul. c. 75.)

Nor how patiently some great men, very great indeed, have borne 'animo civili' (that's Suetonius's word) 'laceratam existimationem,' the tearing and reuding of their credit and reputation, with a gentle, nay, a generous mind. But of all Libels, they are most odious which pretend Religion; as if that of all things did desire to be defended by a 'mouth that is like an open sepulchre,' or by a pen that is made of a sick and a loathsome quill.—There were times when Persecutions were great in the Church, even to exceed barbarity itself: did any Martyr or Confessor, in those times, libel the governours? Surely no; not one of them to my best remembrance: yet these complain of persecution without all shew of cause, and in the mean time libel and rail without all measure. So little of kin are they to those which suffer for Christ, or the least part of Christian Religion.

My lords, it is not every man's spirit to hold up against the venom which Libellers spit. For St. Ambrose, who was a stout and worthy prelate, tells us, (In 1. Apol. David. c. 6.) not that himself, but that a far greater man than he, that is, king David, had found out (so it seems in his judgment it was no matter of ordinary ability) *grande inventum*, a great and mighty invention, how to swallow and put off those bitter contumelies of the tongue; and those of the pen are no whit less, and spread farther. And it was a great one indeed, and well beseemed the greatness of David. But I think it will be far better for me to look upward, and practise it, than to look downward, and discourse upon it.

In the mean time I shall remember what an Antient under the name of St. Jerome tells me, 'indignum est et præposterum,' it is unworthy in itself and preposterous in demeanour, for a man to be ashamed for doing good, because other men glory in speaking ill. And I can say it clearly and truly, as in the presence of God, I have done nothing, as a Prelate, to the

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* The original of the following Letter from Bastwick to Laud, is among the MSS. in the library of Lambeth Palace, which the Archbishop of Canterbury obligingly permitted to be copied for this work, (A. D. 1809.)

'To Will. Canterburie, repentance and mercie 'from our Lord God.

'Sir; About three daies ago there came to me 'a messenger not unexpected, who cited me 'into the Star Chamber, to answeare to certaine 'crimes which there be objected against me. It 'is well, neither am I afraid, neither doe I seeke 'priuily to eschew the danger of the Triall, only 'let this bountie of yours (although you be a 'cruel man) be granted unto us. It shall egg 'forward us miserable men, not only in word 'but in deed; but one thing there is which 'troubleth me much, povertie and want of 'money, to which your most devouring prison 'hath brought mee. I beseach you therefore 'that you would take pittie upon mee poore man, 'and to grant some small parcell of moneyes 'out of your treasure, soe much as may suf- 'fice to paie the scriveners for coppieing out 'of briefes and artickles, for without coppies 'how shall the controversie be decided, and 'without fees the scribes hands growe faint, 'but yf you will not support the expences I 'will indeuour for this that I poore wretche 'being altogeather fallen to decaie may be ad- 'mitted (in forma pauperis); it troubleth me 'very much that I should interrupt you with 'my petition, you being at all times imployed 'with waightie affaires, but the necessitie of the 'times and of my fortunes is so urgent that I 'cannot comend my service unto you, without 'some molestacion unto your urgent occupa- 'tions.

'How thou farest in thy pallace demandeth 'in limbo patrum,'

March 10, 1636. JOHN BASTWICKE.

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uttermost of what I am conscious, but with a single heart, and with a sincere intention for the good government and honour of the Church, and the maintenance of the Orthodox-Truth and Religion of Christ professed, established, and maintained in this Church of England.

For my care of this Church, the reducing of it into order, the upholding of the external worship of God in it, and the settling of it to the rules of its first Reformation, are the causes (and the sole causes, whatever are pretended) of all this malicious storm, which hath loured so black upon me, and some of my brethren. And in the mean time, they which are the only, or the chief Innovators of the Christian world, having nothing to say, accuse us of Innovation; they themselves and their complices, in the mean time, being the greatest Innovators that the Christian world hath almost ever known. I deny not but others have spread more dangerous Errors in the Church of Christ; but no men, in any age of it, have been more guilty of Innovation than they, while themselves cry out against it: 'Quis tulerit Gracchos?'

And I said well, 'Quis tulerit Gracchos?' for it is most apparent to any man that will not wink, that the intention of these men, and their abettors, was, and is, to raise a Sedition; being as great incendiaries in the state (where they get power) as they have ever been in the Church; Novatian himself hardly greater.

Our main crime is (would they all speak out as some of them do) that we are Bishops; (Burton Apol. p. 110.) were we not so, some of us might be as passable as other men. And a great trouble it is to them, that we maintain that our Calling of Bishops is *Jure Divino*, by divine right; of this I have said enough, and in this place, in Leighton's Case; nor will I repeat. Only this I will say, and abide by it, that the Calling of Bishops is *Jure Divino*, by divine right, though not all adjuncts to their calling And this I say in as direct opposition to the Church of Rome, as to the puritan humour. And I say further: That from the apostles times, in all ages, in all places, the Church of Christ was governed by Bishops; and Lay Elders never heard of till Calvin's new-fangled device at Geneva.

Now this is made by these men, as if it were *contra regem*, against the king, in right or in power. But that's a mere ignorant shift; for our being Bishops *Jure Divino*, by divine right, takes nothing from the king's right or power over us. For though our office be from God and Christ immediately, yet may we not exercise that power, either of order or jurisdiction, but as God hath appointed us, that is, not in his majesty's, or any Christian king's kingdoms, but by and under the power of the king given us so to do.—And were this a good argument against us, as Bishops, it must needs be good against Priests and Ministers too; for themselves grant that their calling is *Jure Divino*, by divine right; and yet I hope they will not say, that to be priests and ministers is against the king, or any his royal prerogatives.

Next suppose our callings as Bishops, could not be made good *Jure Divino*, by divine right; yet *Jure Ecclesiastico*, by ecclesiastical right, it cannot be denied. And here in England the Bishops are confirmed, both in their power and means, by act of parliament. So that here we stand in as good case, as the present laws of the realm can make us. And so we must stand, till the laws shall be repealed by the same power that made them.

Now then, suppose we had no other string to hold by (I say suppose this, but I grant it not) yet no man can libel against our Calling (as these men do) be it in pulpit, print, or otherwise, but he libels against the king and the state, by whose laws we are established. Therefore, all these Libels, so far forth as they are against our calling, are against the king and the law, and can have no other purpose than to stir up Sedition among the people. If these men had any other intention, or if they had any Christian or charitable desire to reform any thing amiss; why did they not modestly petition his majesty about it, that in his princely wisdom he might set all things right, in a just and orderly manner? But this was neither their intention, nor way: for one clamours out of his pulpit, and all of them from the press, and in a most virulent and unchristian manner set themselves to make a heat among the people; and so by mutiny, to effect that, which by law they cannot; and by most false and unjust calumnies to defame both our callings and persons. But for my part, as I pity their rage, so I heartily pray God to forgive their malice.

No nation hath ever appeared more jealous of Religion, than the people of England have ever been. And their zeal to God's glory hath been, and at this day is a great honour to them. But this zeal of theirs, hath not been at all times and in all persons alike guided by knowledge. Now zeal, as it is of excellent use where it sees its way, it is so very dangerous company where it goes on in the dark:* and these men, knowing the disposition of the people, have laboured nothing more than to misinform their knowledge, and misguide their zeal, and so to fire that into a Sedition, in hope that they, whom they causelessly hate, might miscarry in it.

For the main scope of these Libels is, to kindle a jealousy in men's minds, that there are some great plots in hand, dangerous plots (so says Mr. Burton expressly p. 5.) to change the Orthodox Religion established in England; and to bring in I know not what, Romish Su-

* You may see it in the example of St. Paul himself, whose very zeal in the darkness of his understanding, which he then had, made him persecute Christ and his Church, Acts xxi. 3, 4. And he was very dangerous company then; for he breathed out threatenings against the disciples, Acts ix. 1. So true is that of St. Greg. Naz. Orat. 21. *Zelus iracundiam acuit*: all zeal puts an edge to anger itself. And that must needs be dangerous in the dark.

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perstition in the room of it. As if the external decent Worship of God could not be upheld in this kingdom, without bringing in of Popery.

Now by this art of theirs, give me leave to tell you that the King is most desperately abused and wounded in the minds of his people: and the Prelates shamefully.

The King most desperately: for there is not a more cunning trick in the world to withdraw the people's hearts from their Sovereign, than to persuade them that he is changing true Religion and about to bring in gross Superstition upon them.

And the Prelates shamefully: for they are charged to seduce, and lay the plot, and be the instruments.

For his Majesty first. This I know, and upon this occasion take it my duty to speak: there is no prince in Christendom more sincere in his religion, nor more constant to it, than the king. And he gave such a testimony of this at his being in Spain, as I much doubt whether the best of that faction durst have done half so much as his majesty did, in the face of that kingdom. And this, you, my lord, the earl of Holland, and other persons of honour, were eye and ear witnesses of, having the happiness to attend him there. And at this day, as his majesty (by God's great blessing both on him and us) knows more, so is he more settled and more confirmed, both in the truth of the religion here established, and in resolution to maintain it.

And for the Prelates: I assure myself, they cannot be so base as to live Prelates in the Church of England, and labour to bring in the Superstitions of the Church of Rome upon themselves and it. And if any should be so foul, I do not only leave him to God's judgment, but (if these Libellers, or any other, can discover that his base and irreligious falshood) to shame also, and severe punishment from the state: and in any just way, no man's hand shall be more, or sooner against him, than mine shall be.

And for Myself: To pass by all the scandalous reproaches which they have most injuriously cast upon me, I shall say this only; 1. I know of no Plot, nor purpose of altering the Religion established. 2. I have ever been far from attempting any thing that may truly be said to tend that way in the least degree: and to these two I here offer my oath. 3. If the king had a mind to change Religion, which I know he hath not (and God forbid he should ever have), he must seek for other instruments. For basely as these men conceive of me, yet I thank God, I know my duty well both to God and the king: and I know that all the duty I owe to the king, is under God. And my great happiness it is (though not mine alone, but your lordships and all his subjects with me) that we live under a gracious and religious king, that will ever give us leave to serve God first, and him next. But were the days otherwise, I thank Christ for it, I yet know not how to serve any man against the truth of God, and hope I shall never learn it.

But to return to the business: What is their art to make the world believe a Change of Religion is endeavoured? What? why forsooth, they say, there are great Innovations brought in by the Prelates; and such as tend to the advancing of Popery. Now that the vanity and falshood of this may appear, I shall humbly desire your lordships to give me leave to recite briefly all the Innovations charged upon us, be they of less or greater moment; and as briefly to answer them. And then you shall clearly see, whether any cause hath been given of these unsavoury Libels; and withal, whether there be any shew of cause to fear a Change of Religion. And I will take these great pretended Innovations in order as I meet with them.

First, I begin with the "News from Ipswich."

Where the first Innovation is, (p. 2), 'That 'the last year's Fast was enjoyned to be with-'out Sermons in London, the suburbs, and 'other infected places, contrary to the orders 'for other Fasts in former times: whereas Ser-'mons are the only means to humble men,' &c.

To this I say, 1. That an after-age may, without offence, learn to avoid any visible inconvenience observed in the former. And there was visible inconvenience observed in men's former flocking to Sermons in infected places. —2. This was no particular act of the Prelates; but the business was debated at the Council-Table, being a matter of state, as well as of religion. And it was concluded for no Sermons in those infected places, upon this reason; that infected persons or families, known in their own parishes, might not take occasion upon those by-days to run to other churches, where they were not known, as many use to do, to hear some humorous men preach: for on the Sundays, when they better kept their own churches, the danger is not so great altogether.—Nor, 3, is that true, that Sermons are the only means to humble men. For though the preaching of God's Word, where it is performed according to his ordinance, be a great means of many good effects in the souls of men; yet no Sermons are the only means to humble men. And some of their Sermons are fitter a great deal for other operations: namely, to stir up Sedition, as you may see by Mr. Burton's; for this his printed Libel was a Sermon first, and a libel too. And it is the best part of a Fast to abstain from such Sermons.

2. The second Innovation is, (p. 3.) 'That 'Wednesday was appointed for the Fast-day, 'and that this was done with this intention, by 'the example of this Fast without preaching, to 'suppress all the Wednesday-Lectures in Lon-'don.'

To this I answer, 1. That the appointing of Wednesday for the Fast-day, was no Innovation; for it was the day in the last Fast before

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this: and I myself remember it so, above forty years since, more than once. 2. If there had been any Innovation in it, the prelates named not the day: my Lord-Keeper, I must appeal to your lordship; the day was first named by your lordship, as the usual and fittest day: and yet I dare say, and swear too, that your lordship had no aim to bring in Popery; nor to suppress all, or any the Wednesday-Lectures in London. Besides, these men live to see the Fast ended, and no one Wednesday-Lecture suppressed.

3. The third Innovation is, (p. 3.) 'That 'the Prayer for seasonable weather was purged 'out of this last Fast-book, which was (say they) 'one cause of Shipwrecks and tempestuous 'weather.'

To this I say, 1. in the general; this Fast-book, and all that have formerly been made, have been both made and published by the command of the king, in whose sole power it is to call a Fast. And the Archbishop and Bishops to whom the ordering of the Book is committed, have power under the king to put in, or leave out, whatsoever they think fit for the present occasion; as their predecessors have ever done before them. Provided that nothing be in contrary to the doctrine or discipline of the Church of England. And this may serve in the general for all alterations, in that or any other Fast-book, or books of devotion upon any particular occasions, which may and ought to vary with several times; and we may, and do, and will justify, under his majesty's power, all such Alterations made therein. —2. For the particular. When this last Book was set out the weather was very seasonable; and it is not the custom of the Church, nor fit in itself, to pray for seasonable weather when we have it, but when we want it. When the former Book was set out the weather was extreme ill, and the harvest in danger; now the harvest was in, and the weather good.—3. It is most inconsequent to say, that the leaving that Prayer out of the Book of Devotions, caused the Shipwrecks and the Tempests which followed. And as bold as they are with God Almighty, in saying it was the cause, sure I am, God never told them that was the cause. And if God never revealed it, they cannot come to know it: yet had the Bishops been Prophets, and foreseen these accidents, they would certainly have prayed against them.—4. Had any minister found it necessary to use this Prayer at any one time during the Fast, he might with ease, and without danger, have supplied that want, by using that prayer to the same purpose which is in the ordinary Liturgy.—5. I humbly desire your lordships to weigh well the consequence of this great and dangerous Innovation. The Prayer for fair weather was left out of the Book for the Fast; therefore the prelates intend to bring in popery. An excellent consequence, were there any shew of reason in it.

4. The fourth Innovation is, (p. 3.) 'That 'there is one very useful Collect left out, and 'clause omitted in another.'

To this I answer, 1. as before: It was lawful for us to alter what we thought fit. And 2. Since that Collect made mention of preaching, and the Act of State forbad Sermons on the Fast-days in infected places; we thought it fit, in pursuance of that order, to leave out that collect. And 3. For the branch in the other, which is the first collect, though God did deliver our forefathers out of Romish Superstition, yet (God be blessed for it) we were never in. And therefore that Clause being unfittingly expressed, we thought fit to pass it over.

5. The fifth Innovation is, (p. 3.) 'That in 'the sixth Order for the Fast, there is a Pas-'sage left out concerning the Abuse of Fasting 'in relation to merit.'

To this I answer, That he to whom the ordering of that Book to the press was committed, did therefore leave it out, because in this age and kingdom there is little opinion of meriting by Fasting. Nay, on the contrary, the contempt and scorn of all Fasting (save what humourous men call for of themselves) is so rank, that it would grieve any Christian man to see the necessary orders of the Church concerning fasting, both in Lent, and at other set times, so vilified as they are.

6. The sixth Innovation is, (p. 3.) 'That the 'lady Elizabeth and her princely children are 'dashed' (that is their phrase) 'out of the 'new collect, whereas they were in the Collect 'of the former Book.'

For this, 1. The author of the News knows full well that they are left out of the Collect in the latter editions of the Common Prayer-book, as well as in the Book for the Fast. And this was done according to the course of the Church, which ordinarily names none in the Prayer, but the right line descending. Yet this was not done till the king himself commanded it; as I have to shew under his majesty's hand.—2. I beseech your lordships to consider what must be the consequence here: the queen of Bohemia and her children are left out of the Collect, therefore the Prelates intend to bring in Popery; for that (you know) they say is the end of all these Innovations. Now if this be the end and the consequence, truly the Libellers have done very dutifully to the king, to poison his people with this conceit, that the lady Elizabeth and her children would keep Popery out of this kingdom, but the king and his children will not. And many as good offices as these have they done the king quite thorow these Libels, and quite thorow his kingdoms. For my part, I honour the queen of Bohemia, and her line, as much as any man whatsoever, and shall be as ready to serve them; but I know not how to depart from my allegiance, as I doubt these men have done.

7. The seventh Innovation is, (p. 3.) 'That 'these Words' (who art the father of thine elect and of their seed) 'are changed in the preface 'of that collect, which is for the prince and the 'king's children.' And with a most spiteful inference, that 'this was done by the prelates

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'to exclude the king's children out of the num-'ber of God's Elect.' And they call it 'an 'intolerable impiety, and horrid treason.'

To this I answer, 1. That this Alteration was made in my predecessor's time before I had any authority to meddle with these things, farther that I was called upon by him. 2. This is not therefore to lay any aspersion upon my predecessor, for he did in that but his duty; for his majesty acknowledges it was done by his special direction, as having no children to pray for. And 3d, this Collect could not be very old, for it had no being in the Common-Prayer-book all queen Elizabeth's time, she having no issue.—The truth is, it was made at the coming in of king James; and must of necessity be changed over and over again, *pro ratione temporum*, as times and persons vary And this is the 'intolerable Impiety and horrid Treason' they charge upon us.

In this method the Innovations are set down in the 'News' from Ipswich. But then in Mr. Burton's 'News from Friday-street' (called his 'Apology)' they are in another order, and more are added. Therefore with your lordship's leave I will not repeat any of these, but go on to the rest, which Mr. Burton adds.

8. The eighth Innovation is, That in the Epistle the Sunday before Easter, we have put out 'In,' and made it, 'At the Name of Jesus' every knee shall bow: which alteration, he saith, is directly against the act of parliament. (Burton's Apology, p. 2.)

Here give me leave to tell you, it is 'At the 'Name of Jesus,' in the late learned Translation made in king James's time. About which many learned men of best note in the kingdom were imployed, besides some prelates. But to this I answer: 1. 'Tis true, the Common Prayer-book was confirmed by act of parliament, and so all things contained in it, at the passing of that act. But I hope if any thing were false printed then, the parliament did not intend to pass those slips for current. 2. I am not of opinion, that if one word be put in for another, so they bear both the same sense, that there is any great matter done against the act of Parliament. 3. This can make no Innovation. For 'In the Name,' and 'At the 'Name of Jesus,' can make no essential difference here. And Mr. Prynn (whose darling business it hath long been to cry down the honour due to the Son of God, at the mentioning of his saving name Jesus) knows the Grammar rule well, 'In a place, or at a place,' &c. 4. If there were any error in the change of 'In' into 'At,' I do here solemnly protest to you, I know not how it came: for authority from the Prelates, the printers had none; and such a word is easily changed in such a negligent press as we have in England Or if any altered it purposely, for ought I know, they did it to gratify the preciser sort; for therein they followed the Geneva translation, and printed at Geneva 1557, where the words are, 'At the 'Name of Jesus.' And that is eighty years ago; and therefore no Innovation made by us.

5. This I find in the queen's injunctions, (52.) without either word, In or At, 'Whensoever the Name of Jesus shall be in any lesson, sermon, or otherwise pronounced in the church ('tis enjoined) that due reverence be made of all persons, young and old, with lowliness of coursy, and uncovering of the heads of the menkind, as thereunto doth necessarily belong, and heretofore hath been accustomed.' So here is necessity laid upon it, and custom for it, and both expressed by authority in the very beginning of the Reformation; and is therefore no innovation now.

9. The ninth Innovation is, 'That two places are changed in the Prayer set forth for the fifth of November; and ordered to be read (they say) by act of parliament. The first place is changed thus, from, root out that Babylonish and antichristian sect which say of Jerusalem, &c.' Into this form of words; 'root out that Babylonish and antichristian sect, (of them) which say, &c.' The second place went thus in the old: 'Cut off those workers of iniquity, whose Religion is Rebellion. But in the book printed 1635, 'tis thus altered: Cut off those workers of iniquity, who turn Religion into Rebellion, &c.'

To this I say, 1. 'Tis a notorious untruth, that this Book was ordered to be read by act of parliament. The act of parliament indeed is printed before it: and therein is a command for Prayers and Thanksgivings every 5th of November, but not one word or syllable for the Form of Prayer. That's left to the Church, therefore here's no innovation against that act of parliament. 2. The Alteration first mentioned, that is, 'That sect,' or 'that sect of them;' is of so small consequence, as it is not worth the speaking of. Besides, if there be any thing of moment in it, it is answered in the next. 3. Both for that and the second place, which seems of more moment; and so for the rest not only in that Book, but that other also for his majesty's coronation; his majesty expressly commanded me to make the Alterations, and see them printed. And here are both the Books with his majesty's warrant to each of them. So that herein I conceive I did not offend, unless it were that I gave not these men notice of it, or asked them leave to obey the king.

Against this there can be but two Objections, should malice itself go to work. The one is, that I moved his majesty to command the change. And the other, that now, when I saw myself challenged for it, I procured his majesty's hand for my security.

To these I answer clearly; 1. That I did not move the king, directly, or indirectly, to make this change. And 2dly, That I had his majesty's hand to the Book, not now, but then, and before ever I caused them to be printed, as now they are. And that both these are true, I here again freely offer myself to my oath. And yet 3dly, That you may see his gracious majesty used not his power only in commanding this change, but his wisdom also;

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I shall adventure to give you my Reasons, such as they are, why this alteration was most fit, if not necessary.

My first Reason is, In the litany of Henry 8*, and also under Edward 6 †, there was this Clause; 'From the Tyranny of the bishop of Rome, and all his detestable enormities, from all false doctrine, &c. Good Lord deliver us.' But in the Litany in queen Elizabeth's time this Clause about the Pope was left out, and it seems of purpose, for avoiding of scandal: And yet the prelates for that were not accounted Innovators, or introducers of Popery. Now it is a far greater scandal to call their religion Rebellion, than it is to call their chief bishop tyrant. And this reason is drawn from scandal, which must ever be avoided as much as it may.

My second Reason is, That the Learned make but three religions to have been of old in the world, Paganism, Judaism, and Christianity. And now they have added a fourth, which is Turcism, and is an absurd mixture of the other three. Now if this ground of theirs be true, as it is generally received, perhaps it will be of dangerous consequence sadly to avow, that the Popish religion is rebellion. That some opinions of theirs teach rebellion, that's apparently true, the other would be thought on, to say no more. And this reason well weighed, is taken from the very foundations of religion itself.

My third Reason is, Because if you make their Religion to be Rebellion, then you make their Religion and Rebellion to be all one. And that is against the ground both of state, and the law. For when divers Romish priests and Jesuits have deservedly suffered death for Treason, is it not the constant and just profession of the state, that they never put any man to death for religion, but for rebellion and treason only? Doth not the state truly affirm, that there never was any law made against the life of a papist, *quatenus* a papist only? And is not all this stark false, if their very religion be rebellion? For if their religion be rebellion, it is not only false, but impossible, that the same man in the same act should suffer for his rebellion, and not for his religion.

And this king James of ever-blessed memory understood passing well, when, in his Præmonition to all Christian monarchs, (p. 336.) he saith, 'I do constantly maintain that no Papist either in my time, or in the time of the late queen, ever died for his conscience.' Therefore he did not think their very religion was rebellion. Though this Clause passed through inadvertency in his time: And this Reason is grounded both upon the practice and the justice of the law.—Which of these Reasons, or whether any other better, were in his majesty's thoughts when he commanded the Alteration of this Clause, I know not. But I took it my duty to lay it before you, that the king had not only power, but reason to command it.

10. The tenth Innovation is, (p. 3.) 'That the Prayer for the Navy is left out of the late Book for the Fast.'

To this I say, there is great reason it should. For the king had no declared enemy then, nor (God be thanked) hath he now. Nor had he then any Navy at sea; for almost all the ships were come in, before the Fast-book was set out.—But howsoever, an excellent consequence it is, if you mark it; the Prayer for the Navy was left out of the Book for the Fast, therefore by that, and such-like Innovations, the Prelates intend to bring in Popery. Indeed, if that were a piece of the prelates plots to bring in Popery from beyond sea, then they were mightily overseen that they left out the Prayer for the Navy. But else what reason or consequence is in it, I know not, unless perhaps Mr. Burton intended to befriend Dr. Bastwick, and in the Navy bring hither the Whore of Babylon to be ready for his christening, as he most profanely scoffs.—Well; I pray God the time come not upon this kingdom, in which it will be found, that no one thing hath advanced or ushered in Popery so fast, as the gross absurdities even in the Worship of God, which these men, and their like, maintain both in opinion and practice.

11. The 11th Innovation is, (p. 105.) 'The reading of the second Service at the Communion-Table, or the Altar.'

To this, 1st, I can truly say, That since my own memory, this was in use in very many places, as being most proper (for those Prayers are then read which both precede and follow the Communion) and by little and little this ancient custom was altered, and in those places first where the emissaries of this faction came to preach. And now if any in authority offer to reduce it; this ancient course of the Church is by-and-bye called an Innovation. 2. With this the Rubrics of the Common Prayer-Book agree; for the first Rubric after the Communion tells us, that upon Holy-days, though there be no Communion, yet all else that's appointed at the Communion shall be read. Shall be read? That's true, but where? Why, the last Rubric before the Communion tells us, that the priest, standing at the north side of the holy table, shall say the Lord's Prayer with that which follows. So that not only the Communion, but the Prayers which accompany the Communion, which are commonly called the second Service, are to be read at the Communion-Table. Therefore if this be an innovation, it is made by the Rubric, not by the Prelates; and Mr. Burton's scoff that this 'second Service must be served in for dainties,' savours too much of belly and profanation.

12. One thing sticks much in their stomachs,

* It was put into the litany of Henry 8, his time, as appears in his primer, with his Injunction before it.

† And it is in both the Service-Books of Edw. 6, both that which was printed, 1549; and in that which was after, an. 1552.

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and they call it an Innovation too. And that is, 'bowing, or doing reverence at our first 'coming into the church, or at our nearer ap-'proaches to the holy table, or the altar,' (call it whether you will) in which they will needs have it, that we worship the holy table, or God knows what. (P. 105).

To this I answer, 1st, That God forbid we should worship any thing but God himself. 2. That if to worship God when we enter into his house, or approach his Altar, be an innovation, it is a very old one. For Moses (Num. xx. 6.) did reverence at the very door of the Tabernacle; Hezekiah, and all that were present with him, when they had made an end of offering, bowed and worshipped (2 Chron. xxix. 29.); David calls the people to it with a Venite, 'O 'come let us worship and fall down, and kneel 'before the Lord our Maker (Psal. xcv. 6.): And in all these places, I pray mark it, it is bodily worship.—Nor can they say, that this was Judaical worship, and now not to be imitated. For long before Judaism began, Bethel, the House of God, was a place of reverence, therefore certainly, of, and to God. (Gen. xxviii. 17, &c.)

And after Judaical worship ended, *Venite, Adoremus*, as far upwards as there is any track of a Liturgy, was the *Introitus* of the priest all the Latin church over. And in the daily Prayers of the church of England, this was retained at the Reformation; and that Psalm, in which is *Venite, Adoremus*, is commanded to begin the Morning Service every day. And for aught I know, the priest may as well leave out the *Venite*, as the *Adoremus;* the calling the people to their duty, as the duty itself, when they are come.

Therefore even according to the Service-book of the Church of England, the priest and the people both are called upon, for external and bodily reverence and worship of God in his church. Therefore they which do it, do not innovate. And yet the government is so moderate, God grant it be not too loose there while, that no man is constrained, no man questioned, only religiously called upon, *Venite, Adoremus*, 'Come, let us worship.'

For my own part, I take myself bound to worship with body, as well as in soul, whenever I come where God is worshipped. And were this kingdom such as would allow no holy table standing in its proper place, and such places some there are, yet I would worship God when I came into his house. And were the times such as should beat down Churches, and all the curious carved work thereof, with axes, and hammers, and such times have been, Psal. lxxiv. 6, yet would I worship in what place soever I came to pray, though there were not so much as a stone laid for Bethel. But this is the misery; it is superstition now-a-days for any man to come with more reverence into a church, than a tinker and his bitch come into an ale-house; the comparison is too homely, but my just indignation at the profaneness of the times makes me speak it.

And you, my honourable Lords of the Garter, in your great solemnities, you do your reverence, and to Almighty God, I doubt not, but yet it is *versus altare*, towards his Altar, as the greatest place of God's residence upon earth. I say the greatest, yea greater than the pulpit; for there it is 'Hoc est Corpus meum.' This is my body; but in the pulpit, it is at most but, 'Hoc est Verbum meum,' This is my word. And a greater reverence, no doubt, is due to the Body than to the Word of our Lord. And so, in relation, answerably to the throne where his body is usually present, than to the seat, whence his word useth to be proclaimed. And God hold it there as his word; for as too many men use the matter, it is 'Hoc est ver-'bum diaboli,' This is the Word of the devil, in too many places (witness Sedition, and the like to it). And this reverence ye do when ye enter the Chapel, and when you approach nearer to offer. And this is no innovation, for you are bound to it by your Order, and that is not new.

And Idolatry it is not, to worship God towards his holy table; for if it had been idolatry, I presume queen Elizabeth and king James would not have practised it, no not in those solemnities. And being not idolatry, but true divine worship, you will, I hope, give a poor priest leave to worship God as yourselves do; for if it be God's worship, I ought to do it as well as you; and if it be idolatry, you ought not to do it more than I.

I say again, I hope a poor priest may worship God with as lowly reverence as you do, since you are bound by your order, and by your oath, according to a constitution of Henry the 5th (as appears In Libro Nigro Windesoriensi, p. 65.) to give due honour and reverence 'domino 'Deo, et altari ejus, in modum virorum eccle-'siasticorum;' that is, to the Lord your God, and to his altar (for there is a reverence due to that too, though such as comes far short of divine worship) and this in the manner as ecclesiastical persons both worship and do reverence.

The story which led in this Decree is this: King Henry the 5th, that noble and victorious prince, returning gloriously out of France, sat at this solemnity; and finding the Knights of the Order scarce bow to God, or but slightly, and then bow towards him and his seat, startled at it (being a prince then grown as religious as he was before victorious), and after asking the reason, (for till then the knights of the order never bowed toward the king or his seat) the duke of Bedford answered, It was settled by a Chapter Act three years before. Hereupon that great king replied, No; I will none of this, till you the knights do it *satis benè*, well enough, and with due performance to Almighty God. And hereupon the fore-named act proceeded, that they should do this duty to Almighty God, not slightly, but 'ad modum 'virorum ecclesiasticorum,' as low, as well as decently as clergymen used to do it.

Now if you will turn this off, and say, it was

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the superstition of that age so to do; Bishop Jewel will come in to help me there. For where Harding names divers ceremonies, and particularly bowing themselves, and adoring at the Sacrament, I say, 'Adoring at the Sacrament,' not 'adoring the Sacrament:' there bishop Jewel (that learned, painful, and reverend prelate) approves all, both the Kneeling and the Bowing, and the standing up at the Gospel (which as antient as it is in the church, and common custom, is yet fondly made another of their Innovations:) And further the bishop adds, 'That they are all commendable gestures, and tokens of devotion, so long as the people understand what they mean, and apply them unto God.' (Bishop Jewel's Reply to Harding's Answer, art. 3. div. 29). Now with us the people did ever understand them fully, and apply them to God, and to none but God, till these factious spirits, and their like, to the great disservice of God and his church, went about to persuade them that they are superstitious, if not idolatrous gestures; as they make every thing else to be, where God is not served slovenly.

13. The thirteenth Innovation is, The placing of the holy Table altar-wise, at the upper end of the chancel; that is, the setting of it North and South, and placing a rail before it, to keep it from profanation, which Mr. Burton (P. 4, 5, 105,) says, is done to advance and usher in Popery.

To this I answer, that it is no Popery to set a rail to keep Profanation from that holy Table: nor is it any Innovation to place it at the upper end of the chancel as the altar stood. And this appears both by the practice and by the command and canon of the church of England. First, By the Practice of the church of England. For in the king's royal chapels, and divers cathedrals, the holy Table hath ever since the Reformation stood at the upper end of the choir, with the large or full side towards the people. And though it stood in most parish churches the other way, yet whether there be not more reason, the parish churches should be made conformable to the Cathedral and mother Churches, than the Cathedrals to them, I leave to any reasonable man to judge. And yet here is nothing done either by violence or command, to take off the indifferency of the standing of the holy Table either way, but only by laying it fairly before men, how fit it is there should be order and uniformity: I say, still reserving the indifferency of the standing.

But howsoever I would fain know, how any discreet, moderate man dares say, that the placing of the holy Table altar-wise (since they will needs call it so) is done either to advance or usher in Popery? For did queen Elizabeth banish Popery, and yet did she all along her reign, from first to last, leave the Communion-Table so standing in her own chapel royal, in St. Paul's and Westminster, and other places; and all this of purpose to advance or usher in that Popery which she had driven out? And since her death have two gracious kings kept out Popery all their times, and yet left the holy Table standing as it did in the queen's time, and all of purpose to advance or usher in Popery, which they kept out?

Or what is the matter. May the holy Table stand this way in the king's chapel or cathedrals, or bishops chapels, and not elsewhere? Surely, if it be decent and fit for God's service, it may stand so (if authority please) in any church. But if it advance or usher in any superstition and Popery, it ought to stand so in none.

Nor hath any king's chapel any prerogative (if that may be called one) above any ordinary church to disserve God in by any superstitious rites. Where, give me leave to tell you, that the king and his chapel are most jeeringly and with scorn abused, in the last leaf of Mr. Burton's mutinous Appeal; for such it is.

Secondly, This appears by the Canon or Rule of the church of England too: for it is plain in the last Injunction of the queen, That the holy Table ought to stand at the upper end of the choir, North and South, or altar-wise. For the words of the queen's Injunctions are these: 'The holy Table in every church' (mark it I pray, not in the royal chapel or cathedrals only, but in every church) 'shall be 'decently made and set in the place where the 'altar stood.' Now the Altar stood at the upper end of the choir, North and South, as appears before by the practice of the church. And there to set it otherwise, is to set it cross the place, not in the place where the altar stood: and so 'Stulti dum vitant vitia'—weak men, as these Libellers are, run into one Superstition while they would avoid another; for they run upon the Superstition of the Cross, while they seek to avoid the Superstition of the Altar. So you see here's neither Popery nor Innovation in all the practice of queen Elizabeth, or since. These words of the Injunction are so plain, as that they can admit of no shift.

And give me leave to tell you, that a very learned prelate of this Church, and one whom, I think, these men will not accuse, as a man like to advance or usher in Popery, is of the same opinion: It is my lord the bishop of Salisbury. Some difference was lately rising about placing the Communion-Table in a parish church of his Diocese. The bishop carefully to prevent all disorder, sends his Injunction (May 17, 1637.) under his hand and seal to the curate and church wardens, to settle that business: In which he hath these two Passages remarkable. I have seen and read the order. The first passage is this: 'By the Injunction of queen Eli-'zabeth' (saith he) 'and by Can. 82, under 'king James, the Communion Table should or-'dinarily be set and stand with the side to the 'East-wall of the chancel.' Therefore this is no Innovation, since there is Injunction and Canon for it. The other passage is this: 'It 'is ignorance' (saith that learned bishop) 'to 'think that the standing of the holy Table there 'relishes of Popery.' Therefore, if it do not so

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much as relish of Popery, it can neither advance it, nor usher it in. And therefore this is a most odious slander and scandal cast upon us.

So here is enough both for the Practise and Rule of the Church of England since the Reformation. Now before that time, both in this and other churches of Christendom, in the East and West, ordinarily, the holy Table or Altar stood so: against this Mr. Burton says little.

But the Lincolnshire minister comes in to play the Puritan, for that. Concerning which Book (falling thus in my way) and the nameless Author of it, I shall only say these two things. The one is, That the Author prevaricates from the first word to the last in the Book; for he takes on him both for the name and for the placing of the holy Table, and the like, to prove that generally and universally, and ordinarily in the whole Catholic Church, both East and West, the holy Table did not stand at the upper end of the choir or chancel. And this he must prove, or he doth nothing.

Now when he comes to make his Proofs, they are almost all of them particular, few or none general and concludent; for he neither brings testimonies out of the general and received Rituals of the Eastern and Western Churches, nor of Fathers and Histories of the Church, which speak in general terms of all, but where they speak of particular churches only.—So that suppose the most that can be, that is, suppose his quotations be all truly alledged, and true too in the sense that the minister takes them (though in very truth, the places, most of them, are neither truly alledged, nor sensed) yet they are but Exceptions of, and Exemptions from, the general practice. And you know both in law and reason, 'Exceptio 'firmat regulam in non exceptis.' So that upon the sudden I am not able to resolve, whether this minister hath done more wrong to himself or his readers, for he hath abused both.

The other is, That in the Judgment of very many learned men, which have perused this Book, the Author is clearly conceived to want a great deal of that learning to which he pretends; or else to have written this Book wholly, and resolvedly against both his science and his conscience. And for my own part, I am fully of opinion, this Book was thrust now to the press, both to countenance these Libellers, and, as much as in him lay, to fire both church and state. And though I wonder not at the minister, yet I should wonder at the bishop of the diocese (a man of learning and experience,) that he should give testimony to such a business, and in such times as these.

And once more, before I leave the holy Table, name, and thing; give me leave to put you in mind, that there is no danger at all in the altar, name, or thing. For at the beginning of the Reformation, though there were a law for the taking down of the altars, and setting up of holy Tables in the room of them; yet in some places the altars were not suddenly removed. And what says the queen in her Injunction to this? Why, she says, 'That there 'seems no matter of great moment in this, 'saving for uniformity, and the better imitation 'of the law in that behalf.' Therefore for any danger or hurt that was in the altars, name, or thing, they might even then have been left standing, but for uniformity, and the imitation of the law.—But howsoever, it follows in the same Injunction, 'that when the altar is taken 'down, the holy table shall be set in,' (not cross) 'the place where the altar stood;' which (as is aforesaid) must needs be altar-wise.

14. The fourteenth and last Innovation comes with a mighty charge, and it is taken out of an Epistle to the temporal lords of his majesty's privy council. Of which Epistle we got one sheet, and so (for aught I yet know) that impression staid: In that sheet is this charge; the words are, 'The prelates, to justify their 'proceedings, have forged a new Article of 'Religion brought from Rome, which gives 'them full power to alter the doctrine and dis-'cipline of our church at a blow, (as they in-'terpret it) and have foisted it (such is their 'language) into the beginning of the twentieth 'article of our church.' And this is in the last edition of the Articles, anno 1628. in affront of his majesty's declaration before them, &c.

The clause (which they say is forged by us) is this: 'The church' (that is, the bishops, as they expound it) 'hath power to decree Rites 'and Ceremonies, and authority in matters of 'faith.' (The word is 'controversies of faith,' by their leave.) 'This clause (say they) is a 'forgery fit to be examined, and deeply cen-'sured in the Star-Chamber. For it is not to 'be found in the Latin or English articles of 'Edward 6. or queen Elizabeth, ratified by 'parliament.' And then in the margin thus, 'If to forge a will or writing be censurable in 'the Star-Chamber, which is but a wrong to a 'private man; how much more the Forgery of 'an Article of Religion, to wrong the whole 'church, and overturn religion, which concerns 'all our souls?' This is a heavy charge, my lords, but I thank God the Answer is easy.

And truly I grant, that to forge an Article of Religion in whole, or in part, and then to thrust it upon the church, is a most heinous crime far worse than the forging of a deed; and is certainly very deeply censurable in this court. And I would have humbly besought you, that a deep Censure might have been laid upon it, but that this sheet was found after, and so is not annexed to the Information, nor in Judgment at this present before you.

But then, my lords, I must tell you, I hope to make it as clear as the day, that this Forgery was not, that this clause mentioned was added by the prelates to the Article, to gain power to the church, and so to serve our turns. But that that clause in the beginning of the Article was by these men, or at least by some of their faction, rased out, and this to weaken the just power of the church, to serve their turns.

They say (to justify their charge) that this Clause is not to be found in the Articles, English or Latin, of either Edw. 6. or queen Eli-

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zabeth. I answer, The Articles of Edw. 6. and those made under queen Elizabeth, differ very much. And those of Edw. 6. are not now binding. So whether the clause be in or out of them, it is not much material.

But for the Articles of the Church of England, made in the queen's time, and now in force, that this Clause for the power of the church to decree ceremonies, and to have authority in controversies of faith, should not be found in English or Latin copies, till the year 1628, that it was set forth with the king's declaration before it, is to me a miracle; but your lordships shall see the falshood and boldness of these men.

What! Is this affirmative clause in no copy, English or Latin, till the year 1628? Strange! Why, my lords, I have a copy of the Articles in English, of the year 1612, and of the year 1605, and of the year 1593, and in Latin of the year 1563, which was one of the first printed copies, if not the first of all. For the Articles were agreed on but the 29th day of January, anno 1562-3. And in all these, this affirmative Clause for the church's power is in. And is not this strange boldness then to abuse the world, and falsly to say 'tis in no copy, when I myself, out of my own store, am able to shew it in so many, and so antiently?

But, my lords, I shall make it plainer yet: For it is not fit concerning an Article of Religion, and an Article of such consequence for the order, truth, and peace of this church, you should rely upon my copies, be they never so many, or never so ancient.

Therefore I sent to the public Records in my Office; and here under my officer's hand, who is a public notary, is returned me the twentieth Article with this affirmative clause in it. And there is also the whole body of the articles to be seen.

By this your lordships see how free the prelates are from forging this part of the Article. Now let these men quit themselves and their faction as they can, for their Index Expurgatorius and their foul rasure in leaving out this part of the Article. For to leave out of an Article is as great a crime as to put in; and a main rasure is as censurable in this court as a forgery.

Why, but then, my lords, what is this mystery of iniquity? Truly, I cannot certainly tell; but as far as I can, I'll tell you. The Articles you see were fully and fairly agreed to, and subscribed in the year 1562-3. But after this, in the year 1571, there were some that refused to subscribe; but why they did so, is not recorded. Whether it were about this Article or any other, I know not. But in fact this is manifest, that in that year 1571, the Articles were printed both in Latin and English, and this clause for the church left out of both. And certainly this could not be done, but by the malicious cunning of that opposite faction. And though I shall spare dead men's names where I have not certainty; yet if you be pleased to look back and consider who they were that governed businesses in 1571, and rid the church almost at their pleasure, and how potent the ancestors of these Libellers begun then to grow, you will think it no hard matter to have the Articles printed, and this clause left out.

And yet 'tis plain, That, after the stir about Subscription in the year 1571, the Articles were settled and subscribed unto at last, as in the year 1562, with this clause in them for the church: for looking farther into the Records which are in mine own hands, I have found the book of 1562-3, subscribed by all the lower house of convocation, in this very year of contradiction, 1571. Dr. John Elmar (who was after lord bishop of London) being then prolocutor: Alexander Nowel, dean of St. Paul's, having been prolocutor in 1562-3, and yet living, and present and subscribing in 1571. Therefore, I do here openly in Star Chamber charge upon that pure sect this foul corruption of falsifying the articles of the church of England, let them take it off as they can.

I have now done, and 'tis time I should, with the Innovations charged upon the prelates, and fit to be answered here. Some few more there are, but they belong to matter of doctrine, which shall presently be answered, *justo volumine*, at large, to satisfy all well minded people. But when Mr. Burton's Book, which is the main one, is answered, (I mean his Book, not his railing) neither Prynn, nor Bastwick, nor any attendants upon Rabshakeh, shall by me or my care be answered. If this court find not a way to stop these libellers mouths and pens, for me they shall rail on till they be weary.

Yet one thing more, I beseech you, give me leave to add. 'Tis Master Burton's Charge (p. 175.) upon the prelates, That the Censures formerly laid upon malefactors, are now put upon God's ministers for their virtue and piety. A heavy charge this too. But if he, or any man else, can shew that any man hath been punished in the High Commission, or elsewhere, by the prelates, for virtue and piety, there is all the reason in the world we should be severely punished ourselves. But the truth is, the virtue and piety for which these ministers are punished, is for preaching schism and sedition, many of their sermons being as bad as their libels; as Burton's libel was one of his sermons first. But whether this stuff have any affinity with virtue and piety, I submit to any Christian reader.

And yet Mr. Burton is so confident of his innocency, even in this cause wherein he hath so foully carried himself, that he breaks forth into these words, (p. 7): 'I never so much as 'once dreamed, that impiety and impudency 'itself, in such a Christian state as this is, and 'under such a gracious prince, durst ever thus 'publickly have called me in question, and that 'upon the open stage, &c.' You see the boldness of the man, and in as bad a cause, as, I think, in this kind ever any man had.

I shall end all with a passage out of St. Cyprian, (lib. 1, ep. 3); when he, then bishop of Carthage, was bitterly railed upon by a pack of

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schismaticks, his answer was, and it is now mine: They have railed both bitterly and falsly upon me, and yet 'non oportet me paria cum 'illis facere;' it becomes not me to answer them with the like, either levities or revilings, but to speak and write that only which becomes Sacerdotem Dei, a priest of God. Neither shall I in this give way (though I have been extremely vilified) to either grief or passion to speak, remembering that of the psalmist, 'Fret 'not thyself, else shall thou be moved to do 'evil.' Neither yet by God's grace shall the reproaches of such men as these, make me faint or start aside, either from the right way in matter of practice (they are St. Cyprian's words again) or 'à certâ regulâ,' from the certain rule of faith. And since in former times, some spared not to call the master of the house Beelzebub, how much more will they be bold with them of his household, as it is in St. Matthew. And so bold have these men been; but the next words of our Saviour are, 'Fear them 'not.' I humbly crave pardon of your lordships for this my necessary length, and give you all hearty thanks for your noble patience, and your just and honourable Censure upon these men, and your unanimous dislike of them, and defence of the Church. But because the business hath some reflection upon myself, I shall forbear to censure them, and leave them to God's mercy, and the king's justice.

On the 30th of June following, the SENTENCE was executed, when Dr. Bastwick, Mr. Prynn, and Mr. Burton, were conveyed to the pillory in the Palace-yard, Westminster.

Dr. Bastwick and Mr. Burton first meeting, they did close one in the other's arms three times, with as much expressions of love as might be, rejoicing that they met at such a place, upon such an occasion, and that God had so highly honoured them, as to call them forth to suffer for his glorious Truth.

Then immediately after, Mr. Prynn came, the doctor and he saluting each other, as Mr. Burton and he did before. The doctor then went up first on the scaffold, and his wife immediately following came up to him, and saluted each ear with a kiss, and then his mouth. Her husband desired her not to be in the least manner dismayed at his sufferings: and so for a while they parted, she using these words 'Farewel my dearest, be of good comfort, I am 'nothing dismayed.' And then the doctor began to speak these words:

Dr. *Bastwick.* There are many that are this day spectators of our standing here, as delinquents, though not delinquents, we bless God for it. I am not conscious to myself wherein I have committed the least trespass (to take this outward shame) either against my God, or my king. And I do the rather speak it, that you that are now beholders may take notice how far innocency will preserve you in such a day as this is; for we come here in the strength of our God, who hath mightily supported us, and filled our hearts with greater comfort than our shame or contempt can be. The first occasion of my trouble was by the prelates, for writing a Book against the Pope, and the pope of Canterbury said I wrote against him, and therefore questioned me: but if the presses were as open to us as formerly they have been, we would shatter his kingdom about his ears: but be ye not deterred by their power, neither be affrighted at our sufferings; let none determine to turn from the ways of the Lord, but go on, fight courageously against Gog and Magog. I know there be many here who have set many days apart for our behalf (let the prelates take notice of it) and they have sent up strong prayers to Heaven for us, we feel the strength and benefit of them at this time; I would have you to take notice of it, we have felt the strength and benefit of your prayers all along this cause. In a word, so far I am from base fear, or caring for any thing that they can do, or cast upon me, that had I as much blood as would swell the Thames, I would shed it every drop in this cause; therefore be not any of you discouraged, be not daunted at their power; ever labouring to preserve innocency, and keep peace within, go on in the strength of your God, and he will never fail you in such a day as this; as I said before, so I say again, had I as many lives as I have hairs on my head, or drops of blood in my veins, I would give them all up for this cause. This plot of sending us to those remote places, was first consulted and agitated by the Jesuits, as I can make it plainly appear. O see what times we are fallen into, that the lords must sit to act the Jesuits plots! For our own parts, we owe no malice to the persons of any of the prelates, but would lay our necks under their feet to do them good as they are men, but against the usurpation of their power, as they are bishops, we do profess ourselves enemies till dooms-day.

Mr. *Prynn* shaking the doctor by the hand, desired him that he might speak a word or two. With all my heart, said the doctor.—The cause (said Mr. Prynn) of my standing here, is for not bringing in my Answer, for which my cause is taken *pro confesso* against me. What endeavours I used for the bringing in thereof, that God and my own conscience, and my counsel knows, whose cowardice stands upon record to all ages. For rather than I will have my cause a leading cause, to deprive the subjects of that liberty which I seek to maintain, I rather expose my person to a leading example, to bear this punishment: and I beseech you all to take notice of their proceedings in this cause. When I was served with a subpœna into this court, I was shut up close prisoner, that I could have no access to counsel, nor admitted pen, ink or paper to draw up my Answer by my instructions, for which I fee'd them twice, though to no purpose, yet when all was done, my Answer would not be accepted into the court, though I tendered it upon my oath. I appeal to all the world, if this were a legal or just proceeding. Our accusation is in point of libel

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(but supposedly) against the prelates; to clear this now, I will give you a little light what the law is in point of libel, of which profession I have sometimes been, and still profess myself to have some knowledge in. You shall find in case of libel, two statutes: the one in the second of queen Mary, the other in the seventh of queen Elizabeth. That in the second of queen Mary, the extremity and height of it runs thus, That if a Libeller doth go so far and so high as to libel against king or queen by denomination, the height and extremity of the law is, that they lay no greater fine on him than an hundred pounds, with a month's imprisonment, and no corporal punishment, except he doth refuse to pay his fine; and then to inflict some punishment in lieu of that fine at the month's end. Neither was this censure to be passed on him, except it were fully proved by two witnesses, who were to produce a certificate of their good demeanor for the credit of their report, or else confessed by the libeller. You shall find in that statute 7 Eliz. some further addition to the former of 2 Mariæ, and that only in point of fine and punishment, and it must still reach as high as the person of the king or queen. Here this statute doth set a fine of 200*l.*; the other but 100*l.* This sets three months imprisonment, the former but one: so that therein only they differ. But in this they both agree, namely at the end of his imprisonment to pay his Fine, and so go free without any further question: but if he refuse to pay his fine, then the court is to inflict some punishment on him correspondent to his fine. Now see the disparity between those times of theirs and ours. A libeller in queen Mary's time was fined but 100*l.*; in queen Elizabeth's 200*l.*: in queen Mary's days but a month's imprisonment; in queen Elizabeth's three months, and not so great a fine if they libelled against king or queen. Formerly the greatest fine was 200*l.*, though against king or queen: now 5,000*l.*, though but against the prelates, and that but supposedly, which cannot be proved: Formerly, but three months imprisonment; now perpetual imprisonment: Then, upon paying the fine, no corporal punishment was to be inflicted; but now, infamous punishment with the loss of blood, and all other circumstances that may aggravate it. See now what times we are fallen into, when that libelling, if it were so, against prelates only, shall fall higher than if it touched kings and princes.

That which I have to speak of next, is this: The Prelates find themselves exceedingly aggrieved and vexed against what we have written concerning the usurpation of their Calling, where indeed we declare their call not to be *Jure Divino*. I make no doubt, but there are some intelligencers or abettors, within the hearing, whom I would have well to know and take notice of what I now say. I here in this place make this offer to them, That if I may be admitted a fair dispute, on fair terms, for my cause; that I will maintain, and do here make this challenge against all the prelates in the king's dominions, and against all the prelates in Christendom, (let them take in the pope, and all, to help them) that their Calling is not *Jure Divino*. I will speak it again, I make the challenge against all the prelates in the king's dominions, and all Christendom, to maintain, that their calling is not *Jure Divino*. If I make it not good, let me be hanged up at the Hall Gate.—Whereupon the people gave a great shout.

The next thing that I am to speak of, is this: The Prelates find themselves exceedingly aggrieved and vexed against what I have written in point of law, concerning their Writs and Process, That the sending forth of Writs and Process in their own name, is against all law and justice, and doth intrench on his majesty's prerogative royal, and the subject's liberties. And here now I make a second challenge against all the Lawyers in the kingdom, in way of fair dispute, that I will maintain, the prelates sending forth of Writs and Process in their own names, to be against all law and justice, and intrencheth on his majesty's prerogative royal, and subjects liberty. Lest it should be forgotten, I speak it again, I here challenge all the whole Society of the Law, upon a fair dispute, to maintain that the sending forth of Writs and Process in the prelates own names, to be against all law and justice, and intrencheth on the king's prerogative royal, and the subjects liberty. If I be not able to make it good, let me be put to the tormentingest death they can devise.

We praise the Lord, we fear none but God and the king: Had we respected our Liberties, we had not stood here at this time: it was for the general good and liberties of you all that we have now thus far engaged our own liberties in this cause. For did you know how deeply they have intrenched on your liberties in point of Popery; if you knew but into what times you are cast, it would make you look about you: and if you did but see what changes and revolutions of persons, causes and actions, have been made by one man, you would more narrowly look into your privileges, and see how far your liberty did lawfully extend, and so maintain it.

This is the second time that I have been brought to this place; who hath been the author of it, I think you all well know: For the first time, (7 Feb. 1633.) if I could have had leave given me, I could easily have cleared myself of that which was then laid to my Charge; as also I could have done now, if I might have been permitted to speak: that book (Histriomastix,*) for which I suffered formerly, especially for some particular words therein written, which I quoted out of God's Word and antient Fathers, for which notwithstanding they passed censure on me; that same Book was twice licensed by public authority, and the same words I then suffered for, they are again made use of, and applied in the same sense by Heylin, in his Book lately printed and dedicated to the king,

* See No. 142, p. 562.

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and no exceptions taken against them, but are very well taken.

Dr. *Bastwick.* And there is another Book of his licensed, wherein he rails against us three at his pleasure, and against the Martyrs that suffered in queen Mary's days, calling them Schismatical Hereticks; and there is another book of Pocklington's licensed (Altare Christianum.) they be as full of lies as dogs be full of fleas; but were the presses as open to us as they are to them, we would pay them, and their great master that upholds them, and charge them with notorious blasphemy.

Mr. *Prynn.* You all at this present see there be no degrees of men exempted from suffering: Here is a reverend Divine for the soul, a Physician for the body, and a Lawyer for the estate: I had thought they would have let alone their own Society, and not have meddled with any of them. And the next (for aught I know) may be a bishop. You see they spare none of what society or calling soever, none are exempted that cross their own ends. Gentlemen, look to yourselves; if all the Martyrs that suffered in queen Mary's days are accounted and called schismatical heretics and factious fellows*; what shall we look for! Yet so they are called in a Book lately come forth under authority. And such factious fellows are we, for discovering a Plot of Popery. Alas, poor England, what will become of thee, if thou look not the sooner into thine own privileges, and maintainest not thine own lawful liberty? Christian people, I beseech you all, stand firm, and be zealous for the cause of God, and his true religion, to the shedding of your dearest blood, otherwise you will bring yourselves, and all your posterities, into perpetual bondage and slavery.

Now the Executioner being come to sear him, and cut off his ears, Mr. Prynn spake these words to him: Come, friend, come, burn me, cut me, I fear not. I have learned to fear the Fire of Hell, and not what man can do unto me: come sear me, sear me, I shall bear in my body the marks of the Lord Jesus: Which the Executioner performed with extraordinary cruelty, heating his iron twice to burn one cheek: and cut one of his ears so close, that he cut off a piece of his cheek. He said, 'The 'more I am beaten down, the more am I lift 'up.'

Upon the day for Execution, Mr. *Burton* being brought into the Palace-yard, unto a chamber that looked into the yard, where he viewed three pillories there set up: Methinks (said he) I see Mount Calvary, where the three crosses (one for Christ, and the other two for the two Thieves) were pitched: and if Christ were numbered among thieves, shall a Christian (for Christ's cause) think much to be numbered among rogues, such as we are condemned to be? Surely, if I be a rogue, I am Christ's rogue, and no man's. And a little after, looking out at the casement towards the pillory, he said, I see no difference between looking out of this square window and yonder round hole. Pointing towards the pillory, he said, It is no matter of difference to an honest man. And a little after that, looking somewhat wishfully upon his wife, to see how she did take it, she seemed to him to be something sad; to whom he thus spake: Wife, why art thou so sad? To whom she made answer, Sweetheart, I am not sad. No, said he? See thou be not, for I would not have thee to dishonour the day, by shedding one tear, or fetching one sigh; for behold there, for thy comfort, my triumphant chariot, on which I must ride for the honour of my Lord and Master: and never was wedding day so welcome and joyful a day as this day is; and so much the more, because I have such a noble captain and leader, who hath gone before me with such undauntedness of spirit, that he saith of himself, I gave my back to the smiters, my cheeks to the nippers, they plucked off the hair, I hid not my face from shame and spitting, for the Lord God will help me, therefore shall I not be confounded: therefore have I set my face like a flint, and I know I shall not be ashamed. At length being carried toward the pillory, he met Dr. Bastwick at the foot of the pillory, where they lovingly saluted and embraced each other; and parting a little from him, he returned and most affectionately embraced him the second time, being heartily sorry he missed Mr. Prynn, who was not yet come, before he was gone up to his pillory, which stood alone next the Star Chamber, and about half a stone's cast from the other double pillory, wherein the other two stood; so as all their faces looked southward, the bright sun all the while, for the space of two hours, shining upon them. Being ready to be put into the pillory, standing upon the scaffold, he spied Mr. Prynn new come to the pillory, and Dr. Bastwick in the pillory, who then hasted off his band, and called for a handkerchief, saying, What! shall I be last, or shall I be ashamed of a pillory for Christ, who was not ashamed of a cross for me? Then being put into the pillory, he said, Good people, I am brought hither to be a spectacle to the world, to angels and men; and howsoever I stand here to undergo the punishment of a rogue, yet except to be a faithful servant to Christ, and a loyal subject to the king, be the property of a rogue, I am no rogue. But yet if to be Christ's faithful servant, and the king's loyal subject, deserve the punishment of a rogue, I glory in it, and I bless my God, my conscience is clear, and is not stained with the guilt of any such crime as I have been charged with, though otherwise I confess myself to be a man subject to many frailties and human infirmities. Indeed that Book intitled, "An Apology for an Appeal, with sundry Epistles and two Sermons, for God and the king," charged against me in the Information, I have

* The archbishop of Canterbury being informed by his spies what Mr. Prynn said, moved the lords then sitting in the Star-chamber, that he might be gagged, and have some further censure presently executed upon him; but that motion did not succeed.

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and do acknowledge (the misprinting excepted) to be mine, and will by God's grace never disclaim it whilst I have breath within me. After a while, he having a nosegay in his hand, a bee came and pitched on the nosegay, and began to suck the flowers, which he beholding, and well observing, said, Do ye not see this poor bee? she hath found out this very place to suck sweet from these flowers; and cannot I suck sweetness in this very place from Christ? the bee sucking all this while, and so took her flight. By and bye, he took occasion from the shining of the sun, to say, You see how the sun shines upon us, but that shines as well upon the evil as the good, upon the just and unjust, but that the Sun of Righteousness (Jesus Christ, who hath healing under his wings) shines upon the souls and consciences of every true believer only, and no cloud can hide him from us, to make him ashamed of us, no not of our most shameful sufferings for his sake: 'And why should we be ashamed to suffer for his sake who hath suffered for us? all our sufferings be but fleabitings to that he endured: he endured the cross and despised the shame, and is set on the right hand of God. He is a most excellent pattern for us to look upon, that treading his steps, and suffering with him, we may be glorified with him. And what can we suffer, whercin he hath not gone before us even in the same kind? Was he not degraded, when they scornfully put on him a purple robe, a reed into his hand, a thorny crown upon his head, saluting him with, 'Hail 'King of the Jews!' and so disrobed him again? Was not he deprived when they smote the shepherd, and the sheep was scattered? Was not violence offered to his sacred person, when he was buffetted and scourged, his hands and his feet pierced, his head pricked with thorns, his side gored with a spear, &c.? Was not the cross more shameful, yea and more painful than a pillory? Was not he stript of all he had, when he was left stark naked upon the cross, the soldiers dividing his garments, and casting lots upon his vesture? And was he not confined to perpetual close imprisonment in man's imagination, when his body was laid in a tomb, and the tomb sealed, lest he should break prison, or his disciples steal him away? and yet did he not rise again, and thereby brought deliverance and victory to us all, so as we are more than conquerors through him that loved us? Here then we have an excellent pattern indeed.

One said unto Mr. Burton, Christ will not be ashamed of you at the last day. He replied, He knew whom he had believed, and that Christ was able to keep that he had committed to him against that day. One asked him how he did? He said, Never better, I bless God, who hath accounted me worthy thus to suffer. The Keeper keeping off the people from pressing near the pillory; he said, Let them come and spare not, that they may learn to suffer. The same Keeper being weary, and sitting down, asked Mr. Burton if he were well, and bad him be of good comfort. To whom he replied, Are you well? If you be well, I am much more, and full of comfort, I bless God. Some asked him if the pillory were not uneasy for his neck and shoulders? He answered, How can Christ's yoke be uneasy? This is Christ's yoke, and he bears the heavier end of it, and I the lighter; and if mine were too heavy, he would bear that too. O good people, Christ is a good and sweet master, and worth the suffering for! And if the world did but know his goodness and had tasted of his sweetness, all would come and be his servants; and did they but know what a blessed thing it were to bear his yoke, O who would not bear it? The Keeper going about to ease the pillory by putting a stone or a brickbat between, Mr. Burton said, Trouble not yourself, I am at very good ease, and feel no weariness at all: And espying a young man at the foot of the pillory, and perceiving him to look pale on him, he said, Son, Son, what is the matter you look so pale? I have as much comfort as my heart can hold, and if I had need of more, I should have it. One asked him a while after if he would drink some *aqua vitæ*. To whom he replied, that he needed it not; for I have, said he, (laying his hand upon his breast) the true Water of Life, which like a well doth spring up to eternal life. Pausing a while he said with a most chearful and grave countenance, I was never in such a pulpit before, but little do ye know (speaking to them that stood about him) what fruits God is able to produce from this dry tree. They looking stedfastly upon him, he said, Mark my words, and remember them well: I say, Little do you know what fruits God is able to produce from this dry tree; I say, remember it well, for this day will never be forgotten; and through these holes (pointing to the pillory) God can bring light to his Church. The Keeper going about again to mend the pillory, he said, Do not trouble yourself so much: But indeed we are the troublers of the world. By and bye, some of them offering him a cup of wine; he thanked them, telling them he had the wine of consolation within him, and the joys of Christ in possession, which the world could not take away from him, neither could it give them unto him. Then he looked towards the other pillory, and making a sign with his hand, chearfully called to Dr. Bastwick, and Mr. Prynn, asking them how they did? Who answered, Very well. A woman said unto him, Sir, every Christian is not worthy of this honour, which the Lord hath cast upon you this day. Alas, (said he) who is worthy of the least mercy? But it is his gracious favour and free gift, to account us worthy in the behalf of Christ to suffer any thing for his sake? Another woman said, There are many hundreds which by God's assistance would willingly suffer for the cause you suffer for this day. To whom he said, Christ exalts all of us that are ready to suffer afflictions for his name with meekness and patience; but Christ's military discipline in the use of his spiritual warfare, in point of suffering, is quite forgotten,

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and we have in a manner lost the power of religion, in not denying ourselves, and following Christ as well in suffering as in doing. After a while Mr. Burton calling to one of his friends for a handkerchief, returned it again, saying, It is hot, but Christ bore the burden in the heat of the day; let us always labour to approve ourselves to God in all things, and unto Christ, for therein stands our happiness, come of it what will in this world.

One said to Mr. Burton, The Lord strengthen you. To whom he replied, I thank you, and I bless his name he strengthens me. For though I am a poor sinful wretch, yet I bless God for my innocent conscience in any such crime as is laid against me; and were not my cause good, and my conscience sound, I could not enjoy so much unspeakable comfort in this my suffering, as I do, I bless my God. Mrs. Burton sending commendation to him by a friend: He returned the like to her, saying, Commend my love to my wife, and tell her I am heartily chearful, and bid her remember what I said to her in the morning; namely, That she should not blemish the glory of this day with one tear, or so much as one sigh. She returned answer, That she was glad to hear him so chearful, and that she was more chearful of this day than of her wedding-day. This answer exceedingly rejoiced his heart, who thereupon blessed God for her, and said of her, she is but a young soldier of Christ's, but she hath already endured many a sharp brunt, but the Lord will strengthen her unto the end: And he having on a pair of new gloves, shewed them to his friends thereabout him, saying, My wife yesterday of her own accord bought me these wedding gloves, for this is my wedding-day.

One said to him, Sir, by this sermon (your suffering) God may convert many unto him. He answered, God is able to do it indeed. And then he called again to Dr. Bastwick and Mr. Prynn, asking them how they did; who answered as before. Some speaking to him concerning that suffering of shedding his blood: he answered, What is my blood to Christ's blood? Christ's blood is a purging blood, but mine is corrupted and polluted with sin. One friend asked another standing near Mr. Burton, if there should be any thing more done unto him? Mr. Burton over-hearing him answered, Why should there be no more done? For what God will have done must be accomplished. One desired Mr. Burton to be of good cheer: he thus replied, If you knew my cheer, you would be glad to be partaker with me; for I am not alone, neither hath God left me alone in all my sufferings and close imprisonment since first I was apprehended. The halberd-men standing round about, one of them had an old rusty halbert, the iron whereof was tacked to the staff with an old crooked nail; which one observing, and saying, What an old rusty halberd is that? Mr. Burton said, This seems to me to be one of those halberds which accompanied Judas when he went to betray and apprehend his master.

Mr. Burton said again, I am persuaded that Christ my Advocate is now pleading my cause at the Father's right-hand, and will judge my cause, though none be found here to plead it, and will bring forth my righteousness as the light at noon-day, and clear my innocency in due time. A friend asked Mr. Burton, if he would have been without this particular suffering? To whom he said, No, not for a world. Moreover, he said that his conscience in the discharge of his ministerial duty and function, in admonishing his people to beware of the creeping in of popery and superstition, exhorting them to stick close unto God and the king in duties of obedience, was that which first occasioned his sufferings; and he said, As for this truth I have preached, I am ready to seal it with my blood, for this is my crown both here and hereafter. I am jealous of God's honour, and the Lord keep us that we may do nothing that may dishonour him, either in doing or suffering; God can bring light out of darkness, and glory out of shame: and what shall I say more; I am, like a bottle which is so full of liquor, that it cannot run out freely; so I am so full of joy, that I am not able to express it.

In conclusion, some told him of the approach of the Executioner, and prayed God to strengthen him. He said, I trust he will, why should I fear to follow my master Christ, who said, 'I gave my back to the smiters, and my cheek to the nippers that plucked off my hair; I hid not my face from shame and spitting, for the Lord God will help me, therefore shall I not be confounded; therefore have I set my face like a flint, and I know that I shall not be ashamed.'

When the Executioner had cut off one ear, which he had cut deep and close to the head in an extraordinary cruel manner; yet he never once moved and stirred for it, though he had cut an artery, so as the blood ran streaming down upon the scaffold, which divers persons standing about the pillory seeing, dipped their handkerchiefs in, as a thing most precious, the people giving a mournful shout, and crying for the surgeon, whom the croud and other impediments for a time kept off, so that he could not come to stop the blood; he all the while held up his hands, said, Be content, it is well, blessed be God. The other ear being cut no less deep, he then was freed from the pillory, and came down, where the surgeon waiting for him, presently applied remedy for stopping the blood after a large effusion thereof, yet for all this he fainted not, in the least manner, though through expence of much blood he waxed pale. And one offering him a little wormwood-water, he said, It needs not; yet through importunity he only tasted of it, and no more, saying, His master, Christ, was not so well used, for they gave him gall and vinegar, but you give me good strong water to refresh me, blessed be God. His head being bound up, two friends led him away to an house provided him in King-street, where being set down, and bid to speak little, yet he said after a pause, This

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is too hot to hold long: Now lest they in the room, or his wife should mistake, and think he spake of himself concerning his pain, he said, I speak not this of myself; for that which I have suffered is nothing to that my Saviour suffered for me, who had his hands and feet nailed to the cross: and lying still a while, he took Mr. Prynn's sufferings much to heart, and asked the people how he did, for, said he, his sufferings have been great. He asked also how Dr. Bastwick did, with much compassion and grief, that himself (being the first that was executed) could not stay to see how they two fared after him.

Soon after the execution of the Sentence, they were severally sent prisoners to the respective castles of Carnarvon, Launceston in Cornwal, and Lancaster, and afterwards on the 27th of August following, it was ordered by the king and council, That Dr. Bastwick should be remitted to the castle or fort of the Isle of Scilly, Mr. Burton to the Isle of Guernsey, and Mr. Prynn to which of the two castles of the Isle of Jersey the governor should think fit; and that none be admitted to have conference with them, or to have access to them, but whom the captains of the said castles or their deputies should appoint; they not to be allowed pen, paper, or ink, nor any books, but the Bible and Common-Prayer book, and other books of devotion, consonant to the doctrine and discipline of the Church of England; no letters or writings to be brought them, but what shall be opened, nor any to be sent from them: that the wives of Bastwick and Burton should not land or abide in any of the said Islands, and if they did, they should be detained in prison till further order from the board; and the conductors of the said three prisoners, either by sea or land, to suffer none but themselves to speak to them in their passage. Accordingly they were sent to the said three Islands, where they remained till the beginning of the Long Parliament 1641, when upon their respective petitions they were sent for up, discharged and restored. Their Petitions were as follow:

To the Honourable the Knights, Citizens, and Burgesses of the Commons House of Parliament; the humble Petition of WILLIAM PRYNN, late Exile and close Prisoner in Jersey,

In all humbleness sheweth; That your petitioner, though not conscientious to himself of any voluntary or apparent offence against the laws of the realm, (to which he ever studied to conform himself) through the malicious practices and persecutions of some Prelates and Church-men, (especially the now archbishop of Canterbury, and Peter Heylin, doctor in divinity) whose Errors and Innovations, contrary to the doctrine and discipline of the Church of England, and extravagancies in the High Commission, and other ecclesiastical courts, your Petitioner for his own relief, being there unjustly prosecuted, (had to his weak power oppunged) hath within eight years last past, undergone two heavy Censures in the Star-Chamber Court.

The first upon an Information there exhibited against your Petitioner, by Mr. Ney deceased, then Attorney General, for some misconstrued passages, inoffensive in themselves, and in your petitioner's true intention, being for the most part the words of other approved authors, comprised in a book, styled *Histriomastix*, written by the petitioner, against common interludes, and licensed for the press by Mr. Thomas Buckner, household chaplain to the then archbishop of Canterbury, authorized by the state to license books, and by him exactly perused, and approved both in the written and printed copy, before its publication, and so confessed the Information; for which authorized Book and Passages, your petitioner, before the hearing of the cause, was not only imprisoned in the Tower of London, without bail or mainprize, for a whole year's space, denied access to his counsel, convenient time to examine Witnesses, and make Breviats to instruct his counsel (the information being general, and reciting no particular clauses of the Book excepted against) the only means of his Defence illegally suppressed, some of his counsel tampered with to make no justification, contrary to your petitioner's instructions and desire, whereby his cause was miscarried; but also at the hearing, by reason of those malicious and perverse glosses on the said Passages, which the said Heylin had collected and presented to his majesty's learned counsel, who repeated his instructions only, your petitioner was fined 3,000*l.* to his majesty, expelled the University of Oxford, and Lincoln's-Inn, degraded from his profession of the law, wherein he never offended, set in the pillory in the Palace-Yard at Westminster, where he lost one of his ears, and two days after on the pillory in Cheapside, where he lost the other ear: and had his said licensed Books there publicly burnt before his face, by the hangman, in a most disgraceful manner; and adjudged after to remain a prisoner during his life.

That after the said Censure, to defame and injure your petitioner the more, he was charged wrongfully in the Decree, as censured for perjury, (though not taxed for it by the court) and between his sufferings in the pillory, the books of his study (twice surveyed, and restored to him by order from the lords) before any fine estreated, by a warrant out of the high commission, signed by the said Archbishop and others, were seized on by Cross a messenger, who carried them to his house; with which warrant your petitioner charging the said archbishop upon occasion, in the open court of Star-Chamber; he there publicly disavowed the same (though your petitioner can yet produce it under his own hand) promising withal, that the books should be restored forthwith; which notwithstanding were all still detained by his means, till they were extended and sold for your petitioner's fine: who shortly after, by an

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order out of the said court sent to the Tower to be executed, was there shut up close prisoner, and Dr. Reeves sent thither to search his chamber for the pamphlet, which the said archbishop would wrongfully have fathered upon your petitioner, whose friends have been unjustly prosecuted in the exchequer, and elsewhere, sundry years, for his fine aforesaid.

And your Petitioner further saith, that about Easter was three years, during his imprisonment in the Tower, by means of the said archbishop, a new information was exhibited in the said court against your petitioner, and others, with certain Books thereto annexed; denying the prelates jurisdiction over other ministers, to be *Jure Divino*. Charging them with many errors and innovations in religion, usurpation upon his majesty's prerogative, and subjects liberty, abuses, and extortions, in the high commission, and other ecclesiastical courts, suppressing preaching, and painful ministers without a cause; licensing Popish, Arminian, and other erroneous books against the Sabbath; setting up Altars, Images, and Crucifixes; removing and railing-in Communion Tables, and bowing down to them, altering the Book of Common Prayer, the books for the Gunpowder-Treason, and late Fast, in some material passages in favour of Popery and Papists. Which things, (though very notorious, and oft complained against by this honourable house, in former and late parliaments) were yet reputed scandalous. And though neither of the said Books was particularly charged on your petitioner, in the said Information, nor any witness produced to prove him either author or disposer of any of them; yet by denying your petitioner liberty to draw up his own Answer, (though once a barrister at law) when as his assigned counsel refused to do it, by close imprisoning your petitioner, and his servant, by debarring him pen, ink, and paper, whereby to answer, or instruct his counsel; searching his chamber, and taking away part of his Answer there found; denying him access to his counsel, and conference with his co-defendants, even at counsel, though jointly charged with him; rejecting the Cross-bill exhibited by him for his defence; threatening master Holt, one of your petitioner's assigned counsel, sent by the then Lord Keeper to the Tower, to draw up your petitioner's Answer, and commanding him not to sign it, after it was engrossed, whereupon he refused to subscribe it, contrary to his promise to your petitioner; and by refusing to accept your petitioner's answers to the said information, signed with his own, and master Tomlins, the other of his counsel's hands, though tendered by your petitioner, both at the Star-Chamber Office, and in the open court at the hearing; the said information, for default of Answer (though two Answers were thereto tendered by your petitioner) was taken *pro confesso* against your petitioner, and he thereupon fined 5,000*l.* to his majesty, pilloried, stigmatized on both cheeks, mutilated and dismembered, in a most barbarous manner, and the small remainder of his ears, left after his first execution, cut off, to the hazard of his hearing, and life; and adjudged to perpetual close imprisonment in the gaol of Carnarvon castle in North-Wales, a nasty dog-hole, far remote from your petitioner's friends. Which Sentence was unduly drawn up and executed upon your Petitioner, as his Attorney's Clerk informed, before it was entered into the book, or your petitioner could get any copy of it, to except against the same, as he had just cause.

That immediately after the Execution of the same Sentence, your petitioner sent to the said Archbishop to desire him to release or bail his servant (who was detained close prisoner for ten weeks space in the messenger's hands, and oft examined and solicited, by fair promises and threatenings, causelessly to accuse your petitioner, against whom they wanted evidence) that so he might attend him during his sores, which the said Archbishop out of his grace and charity utterly refused; saying that he intended to proceed against his said servant in the High Commission, where he hath ever since vexed, censured, and banded him from prison to prison, only for refusing to accuse and betray your petitioner.

That after the said heavy Sentence, your petitioner by an order in the said court (by way of addition to the said Censure) was inhibited the use of pen, ink, and paper, and all books; except the Bible, and the Book of Common Prayer, and some few books for private devotion; and before his wounds were perfectly cured, he was by order removed from the Tower to Carnarvon; and some of his friends in Chester, who visited him there in his passage, in the presence of his conductors, who had no order to restrain any person from resorting to him, were for this very cause sent for by a messenger, to appear before the lords of the privy council, and likewise cited into the High Commission at York, where they were imprisoned and fined, to the ruin of their estates, and injoined to make a publick recantation in the cathedral church, and in the Town-hall of Chester: The said commissioners further decreeing, that three pictures of your Petitioner found in Chester, should be publickly burnt at the High Cross there, which was done accordingly.

That your Petitioner, since his said Sentence, hath been publickly reviled at, and libelled against, both by the High Commissioners at York, and in sundry churches, both at Chester and elsewhere, and in divers licensed printed books, compiled by the said Heylin, and published by the Archbishop's privity or command; and that sundry of his friends houses, studies, books, and writings have been violently broken up, ransacked and taken away, and themselves prosecuted in the High Commission, out of malice, for the relation they had to your Petitioner.

That after your Petitioner had continued some ten weeks space close prisoner in Carnarvon, he was, about three years since, by a warrant from the lords of the council, made in the summer vacation, (to which the said Archbishop's hand

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was first subscribed) ordered by way of exile, to be imbarked and transported with all privacy into one of the castles in the isle of Jersey, and his conductors thereby charged not to admit any person whatsoever, but themselves only, to speak with your Petitioner in his passage: Whereupon, after some injuries there received by Mr. Griffith, the king's attorney in those parts, who endeavoured to seize upon the furniture of his chamber for his own use, your Petitioner was imbarked among papists, in a bruised shipwrecked vessel, full of leaks, and after fourteen weeks voyage in the winter season, through dangerous storms and seas, which spoiled most of his stuff and bedding, and threatening often shipwreck to him, he arrived at the said isle, and was conveyed close prisoner into Mount Orgatile castle there, where the Lieutenant Governor, by another extra-judicial order, to which the said Archbishop's name was first, was ordered to keep your Petitioner close prisoner in a chamber, suffer none but his keepers to speak with him, to intercept all letters to him; to permit him neither pen, ink, nor paper, either to write to his friends for necessaries, or to petition for relief, and to permit him no book but the Bible, and those afore-named books, without giving any order for his diet there: so that being deprived of his calling and estate, exiled and shut up close prisoner among strangers, remote from all his friends, denied all address to him by person or letters, he had certainly perished in his almost three years close imprisonment there, had not the extraordinary providence and goodness of God, which he shall ever adore, and the noble charity of those under whose custody he did remain, furnished him with such diet and necessaries, as preserved him both in health and life, in this his close imprisonment and exile.

May it therefore please this honourable house, to take these your Petitioner's almost eight years tragical grievances, of new and dangerous example, into your most sad and just considerations, that so they may not become precedents to the prejudice of posterity; to grant him liberty to send for and examine all necessary witnesses; to order all clerks, registers, and other officers of the Star Chamber, or elsewhere, speedily and freely to grant him the copies of such Orders, Decrees, and Writings, as his cause shall require, to release him upon bail (being now but a prisoner only upon an extra-judicial order of the lords, and not by virtue of any Sentence or Decree in court) to grant him liberty to plead and prosecute his own cause, since counsel hath so often failed him, and to give him such satisfaction and relief as the justice and equity of his cause shall merit. And your Petitioner shall ever pray for your safeties,

WILLIAM PRYNN.

To the Honourable the Knights, Citizens, and Burgesses of the Commons House of Parliament; The humble Petition of JOHN BASTWICK, Doctor in Physick, lately retained close Prisoner and Exile, in the Island of Scilly;

Most humbly sheweth; That your Petitioner having about six years since set out a Book in Latin, called 'Elenchus Religionis Papisticæ,' with an addition thereunto, called 'Flagellum 'Pontificis, et Episcoporum Latialium;' being thereunto provoked by one Richard Short, a Papist that maintained the Pope's Supremacy, the mass, and papal Religion: In which book your Petitioner (for preventing all misinterpretation of his pious and good intentions therein) in his Epistle to the Reader, fully declared himself, That your Petitioner meant nothing against such bishops as acknowledged their authority from kings and emperors; yet, because your petitioner (the better to shew the papal usurpation over other princes) therein only maintained by way of argument (as other orthodox writers of that subject have done) a parity of the said bishop of Rome, or all other bishops or presbyters, by the word of God, denying his and their Supremacy over other ministers to be by the divine institution:

Thereupon a pursuivant, by authority from the High Commission Court, came into your Petitioner's house at Colchester in Essex, in his absence, and the said pursuivant, assisted with the then bailiffs and constables of Colchester, aforesaid, ransacked his said house, together with his chests and trunks, and with great violence broke open your petitioner's study, which was in his apothecary's house, and took and carried away divers of your petitioner's books, writing, letters, and what else the pursuivant pleased, without making of restitution of them to your petitioner.

And then your petitioner was prosecuted in the said High Commission court, principally for his said Book; where after a long and chargeable prosecution, he was the 12th of February 1634, fined 1,000*l.* to the king, excommunicated, debarred to practise physick, the chiefest means of his livelihood; his said Book ordered to be burnt; that he should pay costs of suit, and be imprisoned till he should make a Recantation. The which heavy Censure was only for the said book, wherein your petitioner maintained the prerogative of a king against the papacy. Whereas one Thomas Chawney, of Essex, lately wrote a Book in maintenance of the papal religion, and in defence of the church of Rome, and avers it to be a true church; the which book is dedicated to the archbishop of Canterbury, and was and is patronized and defended by the said archbishop, and the said Chawney never troubled for it. After which censure declared as aforesaid, all the bishops that were then present, denied openly that they held their jurisdiction from his majesty; and affirmed, that they had it from God only. And the archbishop of Canterbury, among other erroneous sayings uttered by him, maintained the said Chawney's book; and maintained that the church of Rome was a true church, and that it erred not in fundamentals: And he, and other the said bishops, there defamed the holy scriptures, and abused reverend Master Calvin. In regard whereof, and for

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the vindicating of your petitioner's innocency in the matters for which he was most unjustly censured, as aforesaid, your petitioner published in print another book in Latin, intitled, 'Apologeticus ad Præsules Anglicanos,' expressing the truth of his Proceedings, and speeches of his said Censure. For which last mentioned book, and his book called the 'Litany,' not then in print, an Information was exhibited against him and others in the Star-Chamber, to which your Petitioner's Answer being drawn and engrossed, was only subscribed by himself, because he could get no counsel to set their hands to it; your Petitioner tendered the said Answer, first at the Star-Chamber Office, and after in open court at the Star-Chamber bar, but it would not be accepted for want of counsellors hands to it: contrary to former precedents. But the court of Star-Chamber took the said Information *pro confesso*, and censured your Petitioner 5,000*l.* fine to the king, to stand in the pillory, and to lose both his ears, and to be close prisoner in Launceston Castle in Cornwal. All which hath been executed upon him with great extremity, to the peril of his life. After all which extremity, your Petitioner (by what order he knoweth not, it being no part of his Censure in Star-Chamber) was transported from the said Castle to the island of Scilly, a place so barren that it affords not ordinary necessaries: where he hath been in close durance for three years or more, and not suffered to have any of his friends come at him, his very wife being prohibited, by the lords of the council's order, under pain of imprisonment, not to set her foot upon any part of the said island to enquire of his welfare. So that your petitioner hath been exiled from his wife and divers small children three years and more; besides the great straits and miseries which he hath sustained during the said time. All which is contrary to the law of God and man, and the liberties of a free subject; and to the utter undoing of your petitioner, his wife, and children.

May it therefore please this honourable assembly, to take these pressing grievances of your Petitioner into your considerations, and to afford him such relief therein, as in your grave wisdoms shall seem consonant to justice and equity; and to assign him for counsel, Mr. Atkins, Mr. Ludbore, Mr. Tomlins, Mr. Gurdon, and Mr. Randal, to assist him in this his complaint; and to order that your petitioner may take out gratis such copies of the said Censures, Warrants, and Orders, and other the proceedings in the said several courts, as shall or may any way concern this his sad, yet most just complaint, with warrant, from this honourable house, to bring in his witness.

And your Petitioner, as in duty bound, shall ever pray for your prosperities. J. BASTWICK.

The humble Petition of HENRY BURTON, late Exile, and close Prisoner in Castle-Cornet, in the Isle of Guernsey,

In all humbleness sheweth; That whereas your petitioner, on the 5th Nov. 1636, did preach two Sermons in his own parish church in St. Matthew Friday-street, London, for the which he was, in December then next following, summoned to appear before Dr. Duck, one of the Commissioners for causes ecclesiastical, at Chiswick in the county of Middlesex: where (with the register of the High Commission court) the said Dr. Duck tendered to the petitioner the oath *ex officio*, to answer to certain articles there presented: Which oath the Petitioner refusing to take, did then and there appeal from the said court unto the king's majesty; which appeal the said Dr. Duck did admit, and the said register, by Dr. Duck's direction, did then and there enter in writing.

Notwithstanding which said Appeal, a special High Commission court was shortly after called at London, consisting of four or five doctors; where the said Commissioners proceeded illegally to suspend the petitioner in his absence; by means whereof, as of the threatenings of the said Commissioners, he was inforced to keep his house, until a serjeant at arms, with divers pursuivants, and other armed officers, assisted by alderman Abell, then sheriff of London, beset the petitioner's house at eleven o'clock at night, and violently broke open his doors with iron crows, and the like, and surprised him in his house; he making no resistance at all. Where having first searched his study, and taken away such books as they pleased, they carried your petitioner to prison; whence, the next day, being the 2nd of February, by a pretended order from the lords of the council, he was conveyed to the Fleet, and there kept close prisoner.

During which imprisonment, an Information was exhibited against the petitioner and others, in his majesty's court of Star-Chamber; whereby he was charged, *inter alia*, with the publishing of a certain Book, containing, "An Apology for an Appeal," with the said two sermons, intitled, "God and the king." Wherein he taught subjects to yield all manner of due obedience to their lawful king, and reproved all lawless innovations in religion, &c. Which Information the petitioner upon his oath under the hand of M. Holt being then of his counsel, assigned by special order from the said court, did put in his Answer wherein he alledged such things only as his said counsel conceived to be material, and pertinent to his just defence in publishing the said Book; but denied all other matters in the said information contained. Which said Answer being admitted and received in court, the petitioner (being then a close prisoner) not only attended the exhibiting of Interrogatories, according to the custom of that court, but withal, after some universal delay, did write unto the king's Attorney to hasten them; but before the Examiner came, the petitioner heard that his said Answer was referred to sir John Bramston, kt. L. C. Justice of the King's-Bench, sir John Finch, then chief Justice of the Common Pleas, and was by them wholly expunged as impertinent and scandalous, save only the not Guilty. And the petitioner understanding the Answer he was to

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make to the Interrogatories was to be reckoned as a part of his Answer admitted in court, but afterwards expunged as impertinent and scandalous, as aforesaid: so as, if he should then have answered the Interrogatories, he should thereby have assented to the said act of the said Judges, and so the condemnation of his cause before the hearing; whereby he should have contradicted his former oath, that his said Answer was a true Answer; and so should justly have brought himself under the guilt of wilful perjury, and his cause under just censure. For that very reason he held himself not bound, as he conceived, to answer the Interrogatories: for that his said answer was so expunged, and the (Not Guilty) as the foot so tied to the head without the main body, and in the judge's own words, as the petitioner could not in any sort take or acknowledge it now for other than the judge's own answer; as may appear upon record in the same court.

Nevertheless the Court taking the same Information *pro confesso*, and refusing to permit a copy of the petitioner's own true Answer, as also of his reasons of not answering the Interrogatories, both which at his censure he tendered to the court, desiring they might be then and there publickly read the 14th of June, 13 Caroli Regis, proceeded to censure: whereby your petitioner was censured in a fine of 5,000*l.* to his majesty, to be deprived of his ecclesiastical benefice, degraded from his ministerial function and degrees in the university, and ordered to be set on the pillory, where both his ears were to be cut off; confined to perpetual close imprisonment in Lancaster-castle: debarred the access of his wife or any other to come to him but his keeper; and denied the use of pen, ink, and paper. All which, except the fine, was executed accordingly. And after his close imprisonment for twelve weeks in the common jail in the said castle, he was, by what extrajudicial order he knows not, transported by the conduct of one Brian Burton, appointed by the high sheriff of Lancaster, who used your petitioner very basely and deceitfully, in that his transportation, which was in the winter season, through dangerous seas, to the apparent hazard both of his health and life, to the said castle of Guernsey, where he remained a close prisoner and exile almost three whole years; his wife utterly prohibited, upon pain of imprisonment, to set her foot upon any part of the island where she might but inquire how her husband did: contrary to the laws of God and the liberties of this kingdom.

May it therefore please this honourable house, to take the petitioner's sad cause into consideration; and for better manifestation of his grievance in this cause, to assign him for counsel Mr. Serjeant Atkins, Mr. Tomlins, and Mr. Gordon, to assist him in his cause, and to command that he may take out such copies gratis out of the said several courts as do or may concern his cause.

And your Petitioner, as in duty bound, shall daily pray for your prosperities. H. Burton.

These Petitions being read, they were referred to the Committee appointed for inquiring into the proceedings of the Star-Chamber and High Commission Court, and upon their Report the house came to the following Resolutions.

As to Dr. Bastwick, Feb. 22, 1640.

1. Resolved, "That the Precept made by the archbishop of Canterbury and others, high commissioners for causes ecclesiastical within the realm of England, for the apprehending the body of Dr. Bastwick and searching for and seizing his books; and the messengers actings thereupon in searching Dr. Bastwick's house, and seizing his Books and Papers, are against law and the liberty of the subject. 2. That the Sentence given against Dr. Bastwick by the High Commissioners, and the proceedings whereupon that sentence is grounded, and the execution of that sentence, are against law; and that the sentence is void, and that Dr. Bastwick ought to be restored to the exercise and practice of physick, and to have reparation and recompence for his damage and loss sustained by the said sentence and execution. 3. That all those several commissioners of the high commission court which voted against Dr. Bastwick, in the Sentence pronounced against him, ought to give satisfaction to Dr. Bastwick."

The house afterwards resumed the Debate concerning Dr. Bastwick, Whereupon it was farther,

4, Resolved, "That the proceedings against Dr. Bastwick are against the law and liberty of the subject, as also the Sentence against him ought to be reversed, the fine of 5,000*l.* discharged, and he have reparation for his losses and sufferings. 5. That the Orders and Warrants from the Council-Board for Dr. Bastwick's exile, and transferring him from the castle of Launceston to the isle of Scilly, and his imprisonment there, are against the law and liberty of the subject, and that he ought to have reparation for his losses and damages sustained by those orders, and that imprisonment.

"Present at the sentence in the Star-Chamber these lords and privy-counsellors following: The Lord Keeper, duke of Lenox, earl of Pembroke, earl of Holland, lord Cottington, sir Thomas Jermin, Lord Treasurer, marquis Hamilton, earl of Dorset, earl Moreton, lord Newburgh, Mr. Secretary Cooke, Lord Privy Seal, earl of Arundel and Surry, earl of Bridgwater, viscount Wimbleton, sir Henry Vane, Mr. Secret. Windebank."

As to Mr. Burton;

1. Resolved, "That the four Commissioners, Dr. Duck, Dr. Worrall, Dr. Sams, and Dr. Wood, proceeded unjustly and illegally in suspending Mr. Burton *ab officio et beneficio*, for not appearing upon the summons in the first process. 2. That the breaking open Mr. Burton's house, and arresting his person without any cause shewed, and before any suit depending against him in the Star-Chamber, and his close imprisonment thereupon, are against the

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law and liberty of the subject. 3. That John Wragg hath offended in searching and seizing the Books and Papers of Mr. Burton, by colour of a general warrant dormant from the High Commissioners, and that the said warrant is against Law and the Liberty of the Subject; and that serjeant Dendy and alderman Abell have offended in breaking open the house of Mr. Burton, and ought respectively to make him reparations for the same. 4. That Mr. Burton ought to have reparation and recompence for damages sustained by the aforesaid proceedings from Dr. Duck, &c. 5. That the Warrant from the Council-Board, dated at Whitehall, Feb. 2, 1636, for the committing Mr. Burton close prisoner, and the commitment thereupon, is illegal, and contrary to the liberty of the subject. 6. That the archbishop of Canterbury, bishop of London, and the earl of Arundel, the earl of Pembroke, sir Henry Vane, secretary Cooke, and secretary Windebank, do make reparation to Mr. Burton for his damages sustained by his imprisonment."

As to Mr. Prynn;

1. Resolved, "That the Sentence given against Mr. Prynn in the Star-Chamber, February 17, 9 Car. is illegal, and given without just cause, and ought to be reversed; and that Mr. Prynn ought to be discharged of the fine of 5,000*l.* imposed by the said Sentence, and of all extents thereupon, and of his imprisonment decreed by that Sentence. 2. That Mr. Prynn ought to be restored to his degrees in the University of Oxford, and to the society of Lincoln's-Inn, and to the exercise of his profession of an Utter Barrister at law, and to his chamber again at Lincoln's-Inn. 3. That Mr. Prynn ought to have reparation for such damages and prejudice as he hath sustained by the said Sentence and proceedings. 4. That the Sentence given against Mr. Prynn in the Star-Chamber, 14 Junii 1637, 13 Car. is illegal, and given without any just cause, and therefore ought to be reversed; and that he ought to be discharged of the fine and imprisonment thereby decreed, and that he ought to have reparation and recompence for the damages sustained by that Sentence, and the execution thereof.—That the Warrant dated 27 Aug. 13 Car. for the transportation of Mr. Prynn from Caernarvon-Castle to the isle of Jersey, and his imprisonment there, and other restraints therein mentioned, are against the law and liberty of the subject, and that he ought to be discharged of that imprisonment, and to have reparations for his damages sustained thereby. 5. That the Imprisonment of Mr. Prynn, by a warrant dated the 1st of Feb. 1632, under the hands of Thomas lord Coventry, Lord Keeper of the Great Seal of England, Richard lord archbishop of York, Henry earl of Manchester, Edward earl of Dorset, Henry lord viscount Falkland, William lord bishop of London, Edward lord Newburgh, and sir Thomas Jermin, is unjust and illegal, and that they ought to give Mr. Prynn satisfaction for the damages sustained by his imprisonment."

"The Sentence of the Court," says Kennet, "was a Fine of 5,000*l.* upon each delinquent to the king, with pillory and loss of ears, and the very remainder of ears: after which suffering, they were committed close prisoners, one to the castle of Lanceston in Cornwal, another to the castle of Lancaster, and a third to Carnarvon castle in Wales; from whence they were afterward removed to remote islands, and no access of friends allowed to them. And here, though the insolence of these men was very great, their punishment was thought extremely to exceed it. Some moderate penalties might have left them under the neglect of being bold and imprudent writers. But these terrible blows upon them, raised them in the eyes of the people into the reputation of sufferers and confessors for the best of causes, Religion, Liberty, and Property. The lord Clarendon delivers a wise and true opinion of these men, and their prosecution. 'They 'were three persons most notorious for their 'declared malice against the government of 'the church by bishops, in their several Books 'and Writings, which they had published to cor-'rupt the people, with circumstances very 'scandalous, and in language very scurrilous 'and impudent; which all men thought de-'served very exemplary punishment: they were 'of the three several professions which had the 'most influence upon the people, a divine, a 'common lawyer, and a doctor of physic; 'none of them of interest, or any esteem with 'the worthy part of their several professions, 'having been formerly all looked upon under 'characters of reproach: yet when they were 'all sentenced, and for the execution of that 'Sentence brought out to be punished as 'common and signal rogues, exposed upon 'scaffolds to have their ears cut off, and their 'faces and foreheads branded with hot irons '(as the poorest and most mechanic male-'factors used to be, when they were not able 'to redeem themselves by any fine for their 'trespasses, or to satisfy any damages for the 'scandals they had raised against the good 'name and reputation of others) men began no 'more to consider their manners, but the men; 'and each profession, with anger and indigna-'tion enough, thought their education, and de-'grees, and quality, would have secured them 'from such infamous judgments, and treasured 'up wrath for the time to come.'"

Lord Clarendon says, "There cannot be a better instance of the unruly and mutinous spirit of the city of London, which was then the sink of all the ill-humours of the kingdom, than the triumphant entry which some persons at that time made into London, who had been before seen upon pillories, and stigmatized as libellous and infamous offenders: of which classes of men scarce any age can afford the like. There had been three persons of several professions some years before censured in the

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Star-chamber, William Prynn a barrister of Lincoln's-inn, John Bastwick a doctor of physic, and Henry Burton a minister and lecturer of London.—The first, not unlearned in the profession of the law, as far as learning is acquired by the mere reading of books; but being a person of great industry, had spent more time in reading divinity; and which marred that divinity, in the conversation of factious and hot-headed divines: and so, by a mixture of all three, with the rudeness and arrogance of his own nature, had contracted a proud and venomous dislike to the discipline of the Church of England; and so by degrees, as the progress is very natural, an equal irreverence to the government of the state too; both which he vented in several absurd, petulant, and supercilious discourses in print.—The second, a half-witted, crack-brained fellow, unknown to either university, or the college of physicians; but one that had spent his time abroad, between the schools and the camp, for he had been in or passed through armies, and had gotten a doctorship, and Latin; with which, in a very flowing style, with some wit and much malice, he inveighed against the prelates of the church in a book which he printed in Holland, and industriously dispersed in London, and throughout the kingdom; having presumed, as their modesty is always equal to their obedience, to dedicate it 'to the sacred majesty of the king.' —The third had formerly a kind of relation by service to the king; having, before he took orders, waited as closet-keeper, and so attended at canonical hours with the books of devotion upon his majesty when he was prince of Wales; and a little before the death of king James took orders: and so his highness coming shortly to be king, the vapours of ambition fuming into his head that he was still to keep his place, he would not think of less than being clerk of the closet to the new king, which place his majesty conferred upon, or rather continued in, the bishop of Durham, Dr. Neyl, who had long served king James there. Mr. Burton thus disappointed, and, as he called it, despoiled of his right, would not, in the greatness of his heart, sit down by the affront; but committed two or three such weak, saucy indiscretions, as caused an inhibition to be sent him, 'that he 'should not presume to come any more to 'court:' and from that time he resolved to revenge himself of the bishop of Durham, upon the whole order; and so turned lecturer and preached against them; being endued with malice and boldness, instead of learning and any tolerable parts.

"These three persons having been for several follies and libelling humours, first gently reprehended; and after, for their incorrigibleness, more severely censured and imprisoned; found some means in prison of correspondence, which was not before known to be between them; and to combine themselves, in a more pestilent and seditious Libel than they had ever before vented; in which the honour of the king, queen, counsellors, and bishops, was with equal licence blasted and traduced; which was faithfully dispersed by their proselytes in the city. The authors were quickly and easily known, and had indeed too much ingenuity to deny it; and were thereupon brought together to the Star-Chamber *ore tenus;* where they behaved themselves with marvellous insolence; with full confidence demanding 'that the bishops who sate 'in the court, being only the archbishop of 'Canterbury, and the bishop of London, might 'not be present, because they were enemies, 'so parties:' which, how scandalous and ridiculous soever it seemed then there, was good logic and good law two years after in Scotland, and served to banish the bishops of that kingdom both from the Council-table and the assembly. Upon a very patient and solemn hearing, in as full a court as ever I saw in that place, without any difference in opinion or dissenting voice, they were all three censured as scandalous, seditious, and infamous persons, 'to lose their ears in the pillory, and to be im-'prisoned in several jails during the king's plea-'sure:' all which was executed with rigour and severity enough. But yet their itch of libelling still broke out, and their friends of the city found a line of communication with them. Hereupon the wisdom of the state thought fit, that those infectious sores should breath out their corruption in some air more remote from that catching city, and less liable to the contagion: and so, by an order of the lords of the council, Mr. Prynn was sent to a castle in the island of Jersey; Dr. Bastwick to Scilly; and Mr. Burton to Guernsey; where they remained unconsidered, and truly I think unpitied, for they were men of no virtue or merit, for the space of two years, till the beginning of this present parliament.

"Shortly upon that, Petitions were presented by their wives or friends, to the house of commons, expressing their heavy censures and long sufferings; and desiring, by way of appeal, 'that the justice and rigour of that 'sentence might be reviewed and considered; 'and that their persons might be brought from 'those remote and desolate places to London, 'that so they might be able to facilitate or 'attend their own business.' The sending for them out of prison (which was the main) took up much consideration: for though very many who had no kindness, had yet compassion for the men; thinking they had suffered enough; and that though they were scurvy fellows, they had been scurvily used: and others, had not only affection to their persons as having suffered for a common cause; but were concerned to revive and improve their useful faculties of libelling and reviling authority; and to make those ebullitions of their malice not thought noisom to the state: yet a Sentence of a supreme court, the Star-Chamber (of which they had not yet spoke with irreverence) was not lightly to be blown off: but, when they were informed, and had considered, that by that Sentence the petitioners were condemned to some prisons in London; and were afterward

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removed thence by an order of the lords of the council; they looked upon that order as a violation of the Sentence: and so made no scruple to order 'That the prisoners should be removed from those foreign prisons, to the 'places to which they were regularly first committed.' And to that purpose, warrants were signed by the Speaker, to the governors and captains of the several castles, 'to bring them in safe custody to London:' which were sent with all possible expedition.

"Prynn and Burton being neighbours (though in distinct islands) landed at the same time at Southampton; where they were received and entertained with extraordinary demonstrations of affection and esteem; attended by a marvellous conflux of company; and their charges not only borne with great magnificence, but liberal presents given to them. And this method and ceremony kept them company all their journey, great herds of people meeting them at their entrance into all towns, and waiting upon them out with wonderful acclamations of joy. When they came near to London, multitudes of people of several conditions, some on horseback, others on foot, met them some miles from the town; very many having been a day's journey; and they were brought, about two of the clock in the afternoon, in at Charing-cross, and carried into the city by above ten thousand persons, with boughs and flowers in their hands; the common people strewing flowers and herbs in the way as they passed, making great noise, and expressions of joy for their deliverance and return; and in those acclamations, mingling loud and virulent exclamations against the bishops, 'who had so 'cruelly prosecuted such godly men.' In the same manner, within five or six days after, and in like triumph, Dr. Bastwick returned from Scilly; landing at Dover; and from thence bringing the same testimonies of the affections and zeal of Kent, as the others had done from Hampshire and Surrey, was met before he came to Southwark by the good people of London, and so conducted to his lodging likewise in the city." 1 Clarendon, 199.

By the Habeas Corpus Act, 31 Car. 2, § 12, it is enacted, That no subject of the realm, inhabitant or resiant of England, Wales, or Berwick upon Tweed, shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, &c. or other place beyond the seas, under heavy penalties upon all persons concerned in contriving such commitment, or transportation.

146. Proceedings in the Star-Chamber against Dr. John Williams, Bishop of Lincoln, for publishing false News and Tales to the Scandal of his Majesty's Government; for revealing Counsels of State contrary to his Oath of a Privy Counsellor; and for tampering with the King's Witnesses: 13 & 14 Charles I. A. D. 1637. [2 Rushw. Coll. 416. 803.]

Sir John Banks knight, his Majesty's Attorney-General, Plaintiff, the right reverend Father in God, John Lord Bishop of Lincoln, Walter Walker, Tho. Lund, Cadwalader Powel, Richard Williams, William Catlin clerk, Ed. Lake, Jo. Mosteyn, and George Walker, Defendants.

Prigeon's credit coming in question, being a material Witness for the Bishop of Lincoln, the king's Attorney-General let fall the first Bill, fearing a defect of testimony, and preferred a second Bill against the bishop for 'tampering with the king's witnesses,' and upon that account the Cause came on the 11th of July, 1637, which held nine days debate in hearing; and great was the concourse of people every day to the court of Star-Chamber to hear this great Cause, the Bishop being at that time much pitied by the people, who then cast out speeches that that Bishop was prosecuted because the state wanted Money to go to war against the Scots, and that it was fit he should bleed in his purse by the Censure of the court of Star-Chamber to pay a round fine to the king of 10 or 12,000*l.*

The Information doth charge the said Bishop with a practice unduly to gain the sight and perusal of certain Examinations taken by the Lords of his majesty's Privy-Council, and commanded by them to be kept secret from the view of all men, to the end unlawfully and corruptly to procure Witnesses, directions and instructions for Witnesses to make Proofs to contradict and weaken the said Examinations: and for practising and corruptly tampering with Witnesses to retract their former Testimonies, and to vary from the same upon their second Examination: And for tampering with, and soliciting other Witnesses, produced, and to be examined for his majesty, not to depose against the said Lord Bishop, but to conceal their knowledge, and say they did not remember; and for Perjury in an Affidavit made by the Defendant Catlin in this Court, and subornation thereof: And for other offences, as by the said Complainant's Information more at large it doth and may appear.

Upon full and deliberate hearing whereof it plainly and evidently appeared to this honourable Court, that there being another Cause formerly depending in this court, between his majesty's Attorney-General Plaintiff, and the said Lord Bishop of Lincoln Defendant, for publishing false News and Tales, to the scandal of his majesty's Government, and for revealing of

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Counsels of State contrary to his oath of a privy-counsellor; one John Prigeon, gent. was in that cause examined as a Witness for the Defendant, and by an Order made in Hillary Term 10 Car. regis, liberty was given to the Plaintiff to examine the credit of the said Prigeon upon certain Exceptions, which were delivered into this court: And liberty given to the Defendant also to examine Witnesses to uphold and maintain his credit; in one of which Exceptions was, amongst other things, contained, That the said Prigeon being by one Elizabeth Hodgson, upon her oath, accused to have begotten a bastard child on her body: And being by the two next justices of the peace adjudged the reputed father; and appealing from them to the next Quarter-sessions held in the 9th year of his majesty's reign; to mislead the court of Quarter-sessions, and to free himself from that accusation, did at several times, and by several persons and means, after he was so accused, labour to corrupt the said Elizabeth Hodgson, and for money to procure her to lay the said bastard child on some other father, and to swear that some other, and not the said Prigeon, had begotten the said bastard; and that he did labour some Witnesses that could have testified against him, touching the said bastard, at the said Quarter-sessions, to suppress their Testimonies, and drew or endeavoured to draw others to equivocate upon their oaths, when they did appear.

Mr. Gardiner, Recorder of London, made a long and witty defence for the Bishop for several days together, much of which is repeated by some of the lords in their Speeches, which, for brevity sake, we omit; referring the reader to those repetitions which some of the lords do make of the Defence.

As to the first Bill depending against the bishop of Lincoln in the court of Star-Chamber, it was occasioned by the Examinations taken by some of the privy-council, of sir John Lamb, and Dr. Sibthorp, who, amongst divers other things, testified against the bishop of Lincoln, that the said bishop did give them great discouragement in their proceedings in the Ecclesiastical Courts against the Puritans; and that the Bishop asked sir John Lamb, what kind of people those Puritans were of whom he complained, and whether they did pay the Loan-Money? to which sir John replied, They did conform upon that account, and paid their money; but nevertheless they were Puritans, not conformable to the Church: to which the bishop replied, If they pay their monies so readily to the king, the Puritans are the king's best subjects, and I am sure, said the Bishop, the Puritans will carry all at last. These Examinations were sealed up, and Mr. Trumbel, clerk of the council, was required to keep them secret, and permit none to see them; but a discovery thereof was made to the Bishop, which, amongst other matters of state, was the occasion of the first Bill in this court against the Bishop, as the Information did set forth.

Sir John Banks knight, his Majesty's Attorney-General, his Reply in the Case against the Bishop of Lincoln.

May it please your lordships; Your lordships have heard a Defence made by the Defendant's counsel, that consists more of observation than of proof, and in examination of his Defence, I shall make it appear plainly, that they very much fail in their own observations. In their observations they have been curious in distinction of times, place, and other circumstances, to descant upon the particulars of witnesses, and men that were no parties to the suit; but for the main substantial parts of the Defence they have omitted. I shall desire to observe to your lordships, that, with a great scandal on his majesty's Proceedings in this Court, they have told you stories and tales that should be ground of this suit, viz. That it was through malice and hatred between sir John Mounson, Mr. Amcocks, and Prigeon; whereas it shall appear unto your lordships, that the suit was upon most just grounds, for the vindicating of public justice, and that sir John Mounson hath done nothing in this Cause, but according to the duty of his place, and clearing his own reputation. It will be necessary, since these things have been stirred, not for your lordships information, who knows it well, but for the satisfaction of the world, to clear and justify his majesty's proceedings, that I give you some information of the true ground of this suit, and of the necessity of it.

Michaelmas 4 Car. an Information was exhibited against my Lord Bishop by my predecessor, and that was for the contriving and publishing divers false Tales and News, to the scandal of his majesty's Government, and for revealing some things contrary to the duty of his place, and oath, as a Privy-Counsellor. This Cause came to issue, and in the examination of Witnesses, another issue happened, a collateral matter by itself touching the credit of Prigeon: Upon examination of this it fell out, (which we could not discover before publication in the first Cause) that there had been such tampering, seducing, and labouring of the king's Witnesses, as never was in any cause: There hath been such preparations, such instructions, such limitations to his own Witnesses, to direct them how far they should swear, to what to give answer, and to what not. My lords, these proceedings, if they might be suffered, tend totally to the subversion of all justice: for the proceedings in this Court, as in all other courts, is by examination of Witnesses returned in parchment, not *viva voce*; therefore if any be instructed what to swear to, and it so returned in writing, whether through threats, or for fear, or favour, or affection, it is impossible you should give a just Sentence, though you intend it never so clear. My lords, this appearing after publication in the first Cause, it was time, for example sake, to bring this Cause and these Misdemeanors to a public Sentence, to be a terror to all others for the

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like. So as, my lords, this Cause is not grounded upon the fabulous story between sir Jo. Mounson, Mr. Amcocks, and Prigeon, but upon these just grounds and proceedings; and herein we have great cause to bless God, and magnify his majesty's justice, that we live not under a cobweb-law, that taketh small flies, and lets great ones pass. This presence doth tell us, that honourable persons who do deserve well have his majesty's favour, and their own merits do receive a double honour; and this person, how great soever, if he deserve ill, he must receive a sentence according to his just demerit.

My lords, I shall come now to the particular Charges, and therein I shall begin with the first Charge, which is concerning the tampering with the four Witnesses, who deposed about this bastard-child; wherein the state of the question standeth thus. In February 10 Car. there was an Order for the examination of Prigeon's credit: among other things there fell out a question concerning a bastard-child, whether John Prigeon was the reputed father yea or no? There was for the proof of the fact produced before the justices Dr. Topham and Dr. Farmery; and before the justices at public sessions several witnesses, four of them, Lunn, Wetherel, Anne Smith, and Tub, deposed directly, that this Prigeon was the father of this child; some by confession from him, some by confession from herself being the mother of the child, who were present at the time of her delivery.

These Examinations thus taken for the truth of it that he was the father of the bastard-child, the justices did certify it in public sessions accordingly. But now my lord of Lincoln conceiveth with himself, that he cannot support the credit of Prigeon (which concerned him so much) unless he could get these four witnesses to vary from their former testimony, and by his agents hath laboured as you have heard. To this they have seemed to make some Answer: 1. The Order made 2 Maii 9 Car. and that was before sir John Bowles, serjeant Callis, and others; and that Order was to acquit Prigeon of the bastard-child, and to lay it upon one Booth. To that I shall give a clear answer: first of all, Dr. Topham and Farmery that were the men that took the Examinations concerning this bastard-child, were not present at the making of this Order. Secondly, The Witnesses, those four of them that should give the testimony for the Proof, no one of them were present: and it is proved that Wetherel was hired to be absent: and in the last place, this Order 2 Maii was contraried by the Order 3 Oct. when all the other justices save sir John Bowles were present at the sessions. And for the order that was confirmed by the court of King's-Bench, it was upon the regality of the order, but not in respect of the fact. And, my lords, there is another ground of it; for at that time Prigeon had submitted to keep the bastard-child, and given bond to discharge the parish, and maintain the child. This was proved by two witnesses: but the offence is not concerning this bastard-child; for suppose a man had a bastard-child, will that make his testimony wholly void? The Charge is, that after such time, as this was fully deposed by four witnesses, there must be a labouring with them, and giving of money to make a retractation. 1. For Wetherel's retractation, your lordships have heard he was examined at the sessions 1 Oct. that he did confess there John Prigeon intreated him not to appear at the sessions, and that he should answer to no more questions than the court asked him; this was his deposition at the sessions. Being examined in the second Cause, there he doth mince his Deposition, 160 Int. he saith Prigeon did not draw him by bribes or rewards to equivocate. And that it was for bribes and rewards it appeareth by George Walker's Examination; for he sweareth, that this money was to be paid to a butcher by 6*d.* in a joint; so it was not given as a bribe, but by 6*d.* in a joint of meat. George Walker sweareth, that Owen and Powel shewed Wetherel a Dictionary, and shewed him the meaning of the word Equivocation and Subornation, and this discourse was related to Elizabeth Smith. To which the Recorder replied, Mr. Attorney mistakes himself; I will not (saith the Attorney) touch upon any thing in my Reply that will not plainly appear in the Books.

To take off this Charge concerning Wetherel, they have read Wetherel's Deposition, (against whom all this proof is) to the 2, 3, 4, and 5 Int. to which Interrogatories his Deposition is a plain negative pregnant, made upon a leading Int. thus: Whether did Powel at the time and place aforesaid request you to write your name to any note at all? (to shew that it is leading) Wetherel answereth Int. 5, That the said Powel did not in January aforesaid, at the place aforesaid, request him to write his Answer to any note, or to any note to such effect; so he sweareth he did not at that time and place shew such a note. The Deposition of Walker is, That by the direction of Owen and Powel he tendered the note, as by the direction of the lord bishop. Another thing upon the examination of Wetherel, he was not examined till the 16th of May 13, and at that time he had copies of Walker's Examinations, and so prepared himself.

This is the answer I give to the Deposition of Wetherel.

They had next George Walker, a Defendant, who hath confessed against himself sufficient matter, for which I hope your lordships will Sentence him. It is proved he was imployed to tamper with Alice Smith, and he must be the man to give an account to my lord bishop of the proceedings. They say it was a lawful and justifiable thing to ask a witness a question, and that Wetherel was but asked the question, and nothing more: my lords, here is more than asking the question, it appeareth in the proof that there was a Note delivered by Powel to Walker to subscribe, there was shewing to Wetherel a Dictionary to expound the words Equivocation and Subornation; so it

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was not an asking for bare information, but a tendering of notes to avoid equivocation in the cause.

In the next place they have insisted upon the Deposition of Lunn and Alice Smith; wherein they say, that what they have said was but an explanation of what they had formerly sworn, and no retractation, and that it was lawful for a witness to explain himself: but it will appear to be a plain retractation. 1. Alice Smith did depose formerly, that Prigeon sent for her, desiring her to see if she could get the woman lay the child upon any other. That was her Deposition at the sessions. But in the second Cause she sweareth it was to get her to lay the child upon any other that she reputed to be the father of it, and not upon himself. And so for Anne Tub her Deposition at the sessions, that Prigeon had offered her 20*s.* to get her lay the child upon any other but upon him; but her Deposition in the second Cause to lay the child upon some that were the true father: so here is a Deposition that a bribe should be given to lay the child upon any other but upon Prigeon, and now to depose to lay the child upon the true father, is a crossing of the former deposition, and far from an explanation.

They have taken some Exceptions to George Walker, to shew how improbable a thing it was, that he should be a fit person to negociate in this business, and they told your lordships some reasons: George Walker and Prigeon were not kind, and therefore unlikely George Walker should be employed for supporting the credit of Prigeon. 1. In this particular they have not read that there was any difference between them two. 2. George Walker might be very well made choice of to be employed, for he was a proctor in my lord bishop's Court. 3. Suppose there were differences between them two, this was an employment for the bishop of Lincoln; for this was a service for my lord bishop, who was much engaged to maintain the credit of Prigeon, for it appears out of his own mouth by three witnesses, that it had cost him 1,200*l.*, and 1,000*l.* to maintain his credit; for Prigeon at this time had taken the child upon him, but the service that was to be done was for the bishop, and therefore George Walker a fit man for it. But they say here was only a question asked of Alice Smith, whether she had said so? here was no tampering with her to alter her Deposition: Look upon the Deposition of Alice Smith to Int. 29, 31, and there it will appear unto your lordships, it was not a bare asking of a question; did not he say it was to lay the child upon any other that was the true father? but the very question asked, they endeavoured to have proved in the second Cause. The question was, whether that Alice Smith could depose that Prigeon said unto her, Get the woman to lay the child upon the true father? George Walker brought word to the bishop they could get nothing from her as yet.

E. Smith Int. 29. saith, Alice Smith did then and there seriously affirm, that Prigeon offered her 5*l.* to lay the bastard child upon any other, and not upon him: and then this Deponent asked her, if she were not mistaken, for he meant it was to lay the child upon any other that was the right father; she answered again, no, she was not mistaken, the 5*l.* was to procure her to lay it upon any other, and not upon him; and said further, that the woman had acknowledged Prigeon had twice the use of her body against the church wall; that George Walker, in the presence of Powel and Owen, and others, related unto them the substance and effect of the whole discourse with Alice Smith at Morton; and one of them desired to write his Letter to the bishop to give him satisfaction, and told this Deponent it was desired by Owen and Powel to give his lordship an account of their journey; in which Letter was expressed, that they could gain nothing out of Alice Smith.—My lords, to confirm this we read George Walker Int. 17. who proveth the like pressing of Alice Smith; and in the end the consequence was, Alice Smith did vary from what she had formerly sworn.

Next place they have given some Answer unto Robert Richardson, to the 35 Int. (which being read was to this effect) saith, John Prigeon the elder did acquaint this Deponent to come and speak with the bishop of Lincoln before his Examination, and accordingly his lordship did in his little parlour speak with this Deponent, and did then and there acquaint him, that he had seen the copy of the Examinations taken at the Sessions, and did ask this Deponent who drew up the same; this Deponent answered his lordship, that he did it as clerk of the peace: the Bishop said, he was mistaken in the penning of the Deposition, for that he should have said, to lay the child upon the right father, and not otherwise. The Bishop asked how he would interpret the Record; he said he could think no otherwise of it than as the Witness had sworn. And this Deponent further saith he verily believeth his lordship would have had him to have altered the Record, that it might not trench upon Prigeon's credit, for he would have had him given it a right father.

My lords, your lordships may observe first of all, that my Lord Bishop sent for Richardson to come to him and speak with him, before he should be examined; then my lord asked who drew the Deposition of Anne Tub and Alice Smith; he told him they were drawn up in open court; he said he thought the Deponent was deceived, for it should be upon the right father; so here was a retractation, which was the point in issue. 3. He asketh him how he would interpret the Record, and wished him to be tender of Prigeon's credit.

My lords, this is of great consequence; for if my Lord Bishop could have gained the razing of this Record, to lay the bastard child upon any other that was the right father, then he had gained the cause; for the tampering with Witnesses was the ground of the cause.

The next Objection they made, was touching the fetching away of this same Alice Smith. They have told your lordships, that she was

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brought to Huntington, and not finding the commissioners there, they brought her up to London, and here she was examined, and if the king's Council would have examined her, they might have exhibited Interr'; and they have told your lordships, that the Charge was, that she was shifted from place to place, that she might not be examined as a witness for the king. They have utterly mistaken this Charge of the Information; for the Charge is, that they did shift her away from place to place, that she should not be examined as a witness at the commission. 2. Of purpose to cause her to vary and retract her testimony, by working with her during the time of the execution of the commission, that she should have been examined for the king: For this commission was executed at Bedford but 12 miles from Huntington, where they were with Alice Smith; and if they had not an end in it, they might as well have brought her to Bedford, being but 12 miles, as to London, being 50 miles. 9 Martij the commission was executed at Bedford: 13 Martij executed at Leicester: 21 Martij adjourned and executed at Lincoln: 7 Aprilis executed at Huntington; and the very day that she was examined at London, this Alice Smith they sent unto her, and proffered her money, told her she should never want; she went away in poor habit, glad to borrow her maid's cloaths, returneth again gentlewoman-like, and lendeth money.

They say, when she was at London, she continued there keeping an Ale-house at Whittington's Cat till the sickness in Michaelmas Term, and then was forced to go into the country; and all that time they might have examined her for the king, living in so open a manner. I agree, she might have lived openly at Whittington's Cat, and be known to the Justices of the Peace for keeping of an Ale-house, or perhaps for her good behaviour; but how the prosecutor of the Cause should come to find her, I know not: when she was with her husband, all his goods had like to have been taken in execution, and she had not 40*s.* to redeem them; yet she had means enough to furnish an Ale-house, and to live afterwards gentlewoman-like. But, my lords, they have pressed us how we bring these Charges home upon my Lord Bishop, nothing fixeth upon him they say; God forbid he should be charged, unless he be an actor or procurer.

1. Observe these retractations, and these variations in the Depositions, they were procured to maintain the credit of Prigeon: It appeareth by three Witnesses that have been read, out of my Lord Bishop's own mouth, that the maintaining of the credit of Prigeon hath cost my Lord Bishop 1,200*l.* and another speaketh of 1,000*l.* If this Charge come not home to my Lord Bishop, why should he conclude himself of expending 1,200*l.* to maintain his credit; for it did concern my Lord Bishop, for he was his principal Witness in the first Cause.

Owen and Powel were the servants of the Bishop; and when in their journey they could not prevail any thing with Alice Smith, then the account of this must be given to my Lord Bishop, and Walker must write a letter accordingly: *Cui bono*, say they, who should receive benefit but Prigeon? Prigeon was the principal witness in the first Cause, my Lord Bishop did maintain his credit; it was no advantage to Prigeon, for the bastard child was submitted unto. And then your lordships have heard what a tampering hath been with Richardson, and that by my lord himself, who sent for him to come and speak with him before he was examined; and if he had prevailed with Richardson upon this, there had been an end of the business, for the retractation of Anne Tub, and Alice Smith, and Wetherel, had been as he would have it; then for the leading Interr' exhibited by himself in this Cause; so as I say these things trench upon the Bishop, and upon Cadwallader Powel, and George Walker, that were employed about Alice Smith: he procured Wetherel to subscribe a note, would have the meaning of the words equivocation and subornation to be expounded; and this is the man must give an account of the proceedings with Alice Smith to the Bishop; and all this appeareth upon his own Examination.

These are the things upon the first Charge.

I shall proceed to the second Charge, my lord bishop of Lincoln's scandal of the public Justices of the sessions, in saying the Order 3 Oct. was a pocket-order, made in an inn or an ale-house, and before any witnesses were examined. Your lordships may remember, that upon this Charge we made Proof, 1. That the matter of the Order was resolved by the whole court. 2. That what sir Jo. Mounson did was at the open sessions, at the desire of the other justices. 3. That my lord bishop of Lincoln had notice of the due making of this Order, and was satisfied it was justly and duly made; yet when sir John Mounson was gone into the country, he questioned it, that it was not made legally, but was a pocket-Order made in an inn or an ale-house; proved by three witnesses.

That which hath been said against this Charge, That the bishop had reason to question this Order 3 Oct. for J. S. told him sir John Mounson pulled it out of his pocket upon the bench; it appeareth by Dr. Farmery, William Parkinson, and Mr. Dallison, that my lord bishop was informed the Order was duly made, yet he doth publish it to be made in an inn or an ale-house.

Next place they say Parkinson was a single witness; he was no single witness, neither for the Tampering, nor for the Scandal: for it appears by William Amcocks, the bishop would have had the Order 3 Oct. impeached; and that if he were examined, he should say nothing: Richardson said, that the bishop would have had him accuse sir John Mounson for the undue making of the order; so as I say for the scandal, and for the tampering in this kind, Parkinson was not a single witness; nor in the affirming that the bishop said it had cost him 1,000*l.* to maintain the credit of Prigeon, for

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sir Tho. Mounson and Smith both swear the bishop said it had cost him 1,200*l.* and Parkinson speaketh of 1,000*l.* and said further, that the Bishop threatened to bring him into the Star-Chamber, because he would not comply with the bishop; but they say against Parkinson he was prepared by an Affidavit. For that, I must remember unto your lordships that this Affidavit was made by Parkinson upon occasion of the abuse offered by my lord bishop at the execution of the Commission; at which time the second suit was not thought of, for it was doubted whether we should proceed upon the Affidavit according to many precedents, or by way of Information, which was the cause of this information. They say this report might be raised by Prigeon; besides, no time appears, when this scandal was raised; they are mistaken in this, for it appeareth by Parkinson 43 Int. that the bishop said 20 Martij. 10 Car. it was a Pocket-Order, and made before witnesses were examined; and then Richardson Int. 78, to the same purpose; and E. Smith Int. 78, that this scandalous report was published in March 10. They say here was only a breach of a promise; the bishop only made a promise to sir John Mounson, that his order should not be examined after he was gone into the country; and will your lordships punish a man for the breach of a promise: the breach of the promise was not the thing, as the betraying of the truth in the king's cause, and it was the policy of the bishop to send away sir John Mounson, and afterwards draw it into question in his absence.

I do not remember any more they have said concerning this charge. But now it appeareth upon this charge, 1. That the bishop hath published that this order was made in an inn or an ale-house, before any witnesses were examined, to the scandal of public justice. That is the first offence in this second charge. 2. It is scandalous against his own knowledge, proved by three witnesses. 3. His endeavour to subern Parkinson, 1. To send for him before he was examined, and would have had him say the order 3 Oct. was made in an inn or an ale-house. 2. To affirm to Parkinson, that some of the justices had confessed as much, and did threaten him, that if he did not agree with the justices, he should be questioned in the Star-Chamber; and when he could not prevail with him, then he did direct him, if he were examined he should answer only to the bare Interr'; so in these particulars my lord bishop is concerned in this charge. Lunn, he is concerned in this also, for he was employed to speak with Parkinson, and kept him from the church, lest he should meet with Kilvert who was an informer: And Int. 5, he wished Parkinson to answer to no more than to the bare Int. and he should be well paid for his pains. So as I shall leave this second charge, which doth reflect upon my lord bishop and Lunn. And whereas they have pretended, that sir John Mounson should be an enemy to Prigeon, there was no proof at all of that in the books; for in truth he was the best means to release Prigeon, to get the order in the King's-Bench.

The third Charge is concerning the Affidavit of Catlin 11 Maij. 11 Car. made a scandalous Affidavit, which was, that Parkinson told him, he came to swear against the bishop, and that sir John Mounson had promised him 100*l.* for it, and he would swear home, and feather his nest by swearing against my lord bishop. 1. Your lordships have observed what manner of person he was that made the Affidavit, he appeareth by the sentence in the high commission to be a common swearer, a common bail, &c. so infamous, as I shall not need to repeat the thing in the sentence; and for any thing said to support his credit, nothing will sway with your lordships judgments. That that Affidavit is false, appeareth by Parkinson's oath; and that it was contrived in an Inn in the presence of Walker and Mostein is plainly proved.

In this the Defendants Counsel first make objection against the Sentence, that this sentence was after such time as he was examined; and though he be convicted of a scandal subsequent, that doth no way blemish his testimony: 1. I say, by the sentence it doth appear it was for offences done three or four years before his deposition taken; so the sentence was for matter of offence done before his deposition, and the sentence is but declaratory of what he was then: But they have read five ministers, that Catlin is a man of good credit, and one that preacheth well, and maketh a conscience of an oath. 1. These witnesses are but such witnesses as we produce upon our law-wager, or for compurgators; they swear only as in common charity: every man is bound to think another man honest, unless they did know the contrary, and some of these witnesses live a great way off, some 40 miles. The main part of their defence hath been to discredit Parkinson, and that they have done two ways: 1. They say he was a disguised person, and came in a minister's habit, and called himself by the name of parson Watson, to entrap Catlin, and therefore a witness not to be believed. 2. They do pretend that Parkinson's deposition was taken to fortify his affidavit.

For the first, this great matter that he should be a disguised person, and forswear his name, and called himself by the name of Parson Watson, and Catlin not to know him, the matter was thus.

When Parkinson did see what an Affidavit Catlin made against him, he did say that this Catlin did not know him: to that end and purpose, going with Mr. Culverwell a gentleman of 400*l.* per annum, went purposely into Catlin's company to see if he did know him. We shall prove unto your lordships, that Parkinson did not come in any disguised habit; true, he was in a black suit, but in no minister's habit, nor coat upon it, but in a black suit proper for a justice of peace's clerk: Your lordships will rather believe that which is judicially sworn, than extrajudicially spoken. I shall desire to read two or three witnesses to prove, that Par-

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kinson did not come in any such disguised habit; which being read, Mr. Attorney proceeded, saying, 1. I shall observe, that the two witnesses, Booth and his wife, swear he did not come in any minister's habit. 2. It appeareth for half an hour together Catlin did not know Parkinson, till Mr. Culverwell's laughing at parson Watson's proffer to preach at Catlin's church next day.

In this third Charge I shall observe, how it trencheth upon these Defendants, (1.) You find Catlin guilty of perjury in making of a false Affidavit against Parkinson; and that he hath been formerly indicted of perjury, your lordships have heard by the sentence in the high commission. Walker and Mostein were present at the contriving of the affidavit. It was all one to Catlin whether to swear against sir Jo. Mounson, or Dr. Farmery.

My lord bishop of Lincoln (it should seem) did take this as a courtesy done unto him, for he did intend to give Catlin a living of 80*l.* per annum, but that he was advised by Walker to stay this living till this cause was heard. My lord bishop writ his letter unto Richardson on Catlin's behalf, that if any indictment were at sessions against Catlin for a common barrator, he should stay the same, and Powel his own servant carried the letter. Besides witnesses swear Catlin did boast of his favour from the bishop: he brought gold home with him, besides 3*l.* given him to bear his charges.

I shall now proceed unto the fourth Charge, which standeth thus: 20 Martii 10 Caroli, a Commission was executed at Lincoln, and this was to examine him touching the credit of Prigeon; divers Witnesses were there produced on the king's part. My lord bishop, and other the Defendants did draw from the king's witnesses what they had deposed, and threatened some of them after they were examined on the king's part; this is the charge.

Lancelot Harpham to the 94th Inter. saith, upon this deponent's relation my lord bishop willed Lunn to call for pen, ink and paper, and wished this deponent to write down the substance of what he had sworn, which this deponent by his lordship's persuasions did; but when his lordship had read the same he liked it not, but wished the said Lunn to write down the substance of this deponent's Relation, which he did accordingly, and then this deponent subscribed his name thereunto; then the Attorney-General said, here was the offence of the bishop to drawn from Harpham the substance of what he had sworn, the charge being for tampering with Harpham, and other the king's witnesses. Bates saith he was sent with a message from the bishop to Edward Smith. These things are laid as crimes upon my lord bishop in this fourth charge. (1.) In sending for Edward Smith before he was examined, and conveying him out at the back-door, that my lord bishop should instruct him what to depose, sending for him after examination, questioning him what he had deposed, and told him he had sworn maliciously. Next place was this message intended for Edward Smith. (3.) The threatening of Edward Smith the king's witness, that he would sit upon his skirts. (4.) My lord bishop's sending for Harpham after he was examined, making him set down the substance of his deposition. (5.) William Amcock sweareth that Powell shewed him an interrogatory ready drawn to swear unto, and wished him to be careful what he swore, when he was examined for the king; For Lunn, he said, he never played the knave but in this business.

As to the executing of the Commission at Lincoln in March, 10 Caroli, wherein Kilvert was employed to attend for the king: my lord bishop of Lincoln called him base fellow, saucy fellow, base rascal, proved by three witnesses. The charge is likewise against Lunn, who called him base fellow, and told him 'if the business 'were over, he should know he was a man.' These imperious speeches from the bishop must needs dishearten the witnesses that did come for the king.

Lastly, As to the Charge for undue getting of Copies, to the intent to make a Counter-proof of the King's Witnesses. Your lordships may remember how Allen gave information to the king against the bishop, for the contriving of false news and tales scandalous to the king's government. The referrees that took the examination of Dr. Jo. Lamb, Dr. Sibthorpe, and others, they did trust sir William Beecher in this examination; they gave him a charge that the examinations should be kept secret, accordingly he sealed them up, and when his waiting month was done, he delivered them over to Mr. Trumbell; yet by undue means my lord bishop got copies thereof. (1.) It appeareth by sir William Beecher, inter. 5, that he was moved by several persons at court, to let the lord bishop understand the effect of these examinations; and that my lord bishop made use of those examinations, it appeareth by the proof that hath been read; and that the seal was broken off, and copies delivered to his steward. Now whether these be not strong presumptions, that my lord bishop had the sight of them, I must leave to your lordships.

My lords, I have done with the particular Charges, and your lordships have heard in the prosecution of this Cause, and in the proof of it, a heap of Offences, all tending to the subversion of public justice; a labouring, tampering, suborning, seducing and sending away of the king's Witnesses to suppress the truth, to swear against the truth, and to cause Witnesses to make retractation; a scandal raised against the proceedings of the justices at the sessions, and in particular an aspersion cast on the person of sir John Mounson, as though he had made the order in an Inn or an Ale-house, before any witnesses were examined. I hope your lordships will clear him in his reputation, that he hath done nothing in this cause but what becometh a person in his place, and what at other times hath been done by him and other justices in a public manner. My lords, these Offences, if they were committed by an ordi-

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nary person, are great crimes in themselves, but being done by my lord bishop of Lincoln, who is *prælatus*, to be a guide, a light, a judge among the king's people, and to have a superintendent cure of souls within his diocess, these things considered in his person must needs aggravate his offences, for him that should be a light, to become darkness, and a guide to lead men into error, a judge to overturn the course of justice, in suborning of witnesses, &c. These things if they be not remedied will draw upon this nation, that infamy that was upon the people of Greece, that they would buy and sell testimony, *dare mutuum testimonium*: But what followed upon that, but the subversion and ruin of the common-wealth? For him that hath this superintendent cure of souls, to do any thing for the destroying of mens souls, it is an high offence. Fleta lib. 5. cap. who writ in the time of E. 2. Si Perjurus, &c. That the manslayer killeth the body, but the suborner killeth his own soul, and the soul of him that sweareth.

1. Against my lord bishop I pray Judgment, that he may be deeply fined, and receive a declaratory Sentence of this Court, as unworthy of any Ecclesiastical Dignity or Sacred Orders, and to be recommended to the High-Commission for that purpose; Pas. 34, Eliz. in a suit in the Star-Chamber against the bishop of St. Davids for contriving and publishing of a forged Will, he was here fined and referred to the High Commission for further proceedings.—10 Jac. John —— bishop of Down was convented before the High Commission, and was there degraded for suborning of Witnesses.

Third place, I desire not only a Reparation of the credit of sir Jo. Mounson, but damages for the scandal; and though he be neither party nor relator, yet damages have been given by this court to a third person.—Mich. 31 Eliz. Three gentlemen that were no parties had 300*l.* damages given them, as in the case of the king's attorney against Price, damages were given to a sheriff that was no party.

Mr. Attorney-General having ended his Reply, the court proceeded to pass their censure: and the lord Cottington first begun and spake to this effect:

The Lord *Cottington*. "My lords; The business we are now met about, to put a period unto which hath taken up so much time already in this Court, that I intend to be very short in what I have to say. If we go to the well-head, and look at the original, (from whence these foul streams have issued) it is very small, and the inconveniences my lord hath fallen into, are rather of his own seeking, than any ways properly offered unto him out of the former passages, which touched his reputation in this court: however that maxim stands true, 'Quisq. est fabricator suæ for-'tunæ.' I am sure in this, that through the whole passage and current of it, he hath sought and wrought his own overthrow; and I am sorry that so great a person, so wise, and so well-experienced a man, and one who hath sate here himself, should now come to be censured for so foul crimes, so far unbeseeming his function, and those dignities he hath been graced withal in this commonwealth. I find (all the way) several undue practices, many heinous attempts, and foul faults in his agents, countenanced (nay maintained and set on) by his instigation, for which I hold both him and them worthy the censure of this court.

"I promise brevity, therefore I omit the relating of any thing concerning the truth of the matter, which concerned Alice Smith and Elizabeth Hodgson. If that Prigeon had been free from the getting of the bastard, and that he had suffered that way innocently; it had been better for my lord of Lincoln to have advised him to a patient undergoing that affliction, and have stopt the public defamations, which might grow thereupon, with as little noise as he might, 'Quam queat minimo:' but these stirs which follow after, and the great expences which my lord bishop of Lincoln was at to preserve Prigeon's reputation, plainly shewed there was somewhat more in it than ordinary, when, rather than that should be tainted, my lord would absolutely overthrow his own.

"Prigeon was to be a witness for my lord bishop, and a main person he was, on whom he depended for the clearing himself of those charges, which your lordships know he was taxed withal, by the first bill. In the mean time a bastard is laid unto him by Elizabeth Hodgson, which in my lords estimation was much disabling to Prigeon's testimony; and therefore my lord bishop what doth he? He not only labours to suppress a truth, and to conceal a fault in his witness, but he will have him discharged of it, 'Quo jure quave injuria,' it matters not.

"Hereupon the proceedings of the justices of the peace must be either made none, or put out of order, so that they stand instead of none. A new father must be found, and because there was a commission to be sate upon, and witnesses to be examined, some must be absented till the commission was over: others are deterred and threatened, and sir John Mounson and Dr. Farmary must be held for to act nothing that must stand in this cause, (though in the public sessions) but their orders in that cause are pocket-orders.

"Owen and Powel, two servants to my lord bishop of Lincoln, they set their wits to work to convey Alice Smith out of the way, and that with rewards of no small value. Letters are written, and much ado there is; the several misdemeanors of Lunn and Walker are apparent enough; and Catlin he comes not behind the rest, nor must I let him pass, although he hath better luck in the carriage of his knavery than any of the rest; and for the procuring, gaining, and keeping of depositions from the custody of the council-table, and the clerks there, it is plain enough, I will make my word good, and go to Censure.

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"Cadwallader Powel I fine at 200*l.* Owen I fine at as much; George Walker and Catlin at 300*l.* a-piece.

"Lunn, (who is an agent in all the business) I hold him unfit for to be an officer any more, (he now being a Proctor-Register) I fine him at 300*l.* And for my lord bishop of Lincoln, I fine him at 10,000*l.* to the king, and to be imprisoned in the Tower during his majesty's pleasure, and to be suspended from all his ecclesiastical functions, both *ab officio et beneficio*; and I refer him over to the High Commission-Court to Censure him as they think fit concerning his degrees, and to repair sir John Mounson's reputation, to pay him for the injury done to him, in particular, 1,000 marks."

Sir *John Finch*. "My lords; This Cause hath held us already nine days. I find in it six Charges. 1. The first and main is for tampering with Witnesses, to retract their Testimonies, or to vary from the same. 2. For seducing them not to depose at all. 3. For undue practising to gain a sight of some Examinations kept in the Council-Chamber by the Clerks of the Council. 4. For preparing and instructing Witnesses by the said Examinations. 5. Perjury in Catlin in an Affidavit, and subornations thereof. 6. Other undue proceedings, whereby to cause witnesses to say, that they did not remember, or the like.

"I will only insist upon two things. 1. How this trenched upon my lord bishop of Lincoln. 2. How far, and in what manner he pursued it.

"I question not whether the child gotten upon the body of Elizabeth Hodgson be Prigeon's, yea or no; however the Justices of the Peace at the sessions, Dr. Topham and Dr. Farmary give up, that it is laid to him: yet legally Prigeon is free, for by a Statute 18 Eliz. though the Order be, yet an Appeal may be made. Now in the second place, what is this to my lord bishop of Lincoln, *utrum pater sit necne?*

"The Bishop is taxed for scandalous Words in matter of state, contrary to his duty as a subject to his sovereign, contrary to his Oath as a Privy-Counsellor. Now Prigeon being a Witness, must justify that no such fault slipt from my Lord Bishop, his testimony, which seems to be suspected, and why? not for the having a child fathered upon him, but for that he goes about in *publico* to suborn witnesses, and to wrest the truth by unlawful courses, and it is to be thought that he, who was of such an evil conscience, as that he would cause others, by any way of bribes, gifts, threats, or the like, to forswear themselves, and hazard their souls, might himself easily be tampered withal to do unjust acts, and to take that false oath also by himself, being led to it by hopes and rewards, which he by all means sought to procure in others, for his own safety.—Now if my Lord Bishop had used other means, and gone the right way to maintain the credit of his witnesses in a fair manner, it had been commendable; but whether he did so or no it is to be enquired after.

"By the way, my lord, give me leave to say what I think, it is not always necessary in this Court to have a truth proved by two or three Witnesses: men will be wary in Bribery, and Extortion, and the like, to do it in public, or to have many acquainted with those works of darkness. And *singularis Testis* many times shall move and induce me verily to believe an act done, when more Proofs are shunned.

"But to come to some of the particulars. I find here, that Wetherel hath been often tampered withal, by two of the bishop's servants, Owen and Powel, and there was a note shewed to George Walker to enquire of Wetherel, whether Prigeon had done any thing with him or no?—But to take off this, (Mr. Recorder saith) George Walker is *singularis Testis*. Now it's plain Wetherel swears punctually, that he met with Prigeon, and was advised to speak sparingly, and no more than he needs must.

"For Alice Smith, she deposeth that Prigeon wished her to win Eliz. Hodgson to lay it to somebody else, and he would give her 20*s.* and so doth Anne Dove; now Alice must afterwards equivocate, and say, she was proffered money to get her to lay it on the right father, which to induce her to is no hurt.—And I find, that Alice Smith is carried away on horse-back by Powel, and absented till the commission was set, and was past, at Lincoln, and then brought back again by Powel. And I find she went out poor and needy, she returns well clad, gentlewoman-like, and able to lend 8*l.* at a time, who was, before Owen and Powel tampered with her, so poor, that her goods were distrained upon for rent.

"George Walker, he saith he could do no good with them, and so writes to the bishop. Now for Richardson, the Bishop told him, that he knew the orders that were made at the sessions, and Richardson is tampered withal to suppress that order, and told, that if he would, he might do the bishop good service.

"Now for Lunn, I find him run through with the bishop in all the case, he teacheth to smother and to equivocate; so that I find Powel, Owen and Walker, guilty of the first charge; Lunn I shall sentence, but not for that charge.

"Now my lord himself, out of his own mouth, professed to two witnesses, viz. to sir John Mounson, and one Edward Smith, that to defend Prigeon's credit it had cost him 1,000*l.* if not 1,200*l.*—My Lord Bishop excepts against some Witnesses, as Bates I hold him faulty, and for Mr. Kilvert's misdemeanors, though he did provoke my lord, yet he should have forborn. It was not so much to affront my Lord Bishop, as to animate his witnesses for the king, which the presence of so great a person might have daunted.

"And your lordships know, that in the circuit, if a great man have a cause at the bar, he is not to sit on the bench, his nod or frown, nay his bare presence, (by way of observation) may do much with inferior persons. I discommend my lord for his passion, and commend Kilvert

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for the zealous prosecution of his cause. I must clear sir John Mounson, and for Pattison disguising of himself in the habit of a minister, (true it is, a shift they had to find out what might be;) But the matter was apparent to all they know he was a counterfeit.

"And for Catlin's testimony, I weigh it not; but I find my lord tampering with Smith, with Edward Smith. He must be brought in by Mr. Mostein, and at the back door too, and after that he had taken his oath, was told he had sworn maliciously, and was advised beforehand what to say, and the bishop chid him, and asked why he would be sworn, and not acquaint him, and let him know before; and there is many proofs of my Lord Bishop's deborting and terrifying others.—For Walker, I shall not Censure him, being not the manner of this court to censure, when he is not charged with any particular, but in general.—For Lunn, I find him threatening Mr. Kilvert, and I find him tampering divers ways, and getting the writings from the clerks.—I agree with my lord Cottington, and fine him 1,000 marks. I clear Mostein. Catlin I leave with a *non liquet*; and do censure Lunn to be disabled, by way of his profession, either to be register or proctor any more.—For Cadwallader Powel and Owen, I agree with my lord Cottington.—And for my Lord Bishop, I censure him 10,000*l.* Fine to the king's majesty, to be suspended *ab omni officio et beneficio*, during his majesty's pleasure, and likewise to be imprisoned in the Tower during the king's pleasure, as my lord Cottington said before; also for to repair the credit of sir John Mounson, I fine him 1,000 marks to him; and sure, my lords, his person doth not diminish, but rather aggravate his faults: for to be faulty in scandalizing his master, and then suborningly to bolster up his fault, by such gross and unbeseeming manner, is worse in him than it had been in another man.

"For as Mr. Attorney well noted, for him that is set to have a care of souls, to be corrupter of them; for him that is set as a light on a hill, to hide the truth; I call to mind his greatness, his place and his dignity: but had he lived a private ignorant man, I should have gone very deep with him; but he that hath knowledge to rectify himself, and hath sat in the place to direct consciences, to wrest and wrong consciences, I must go as deep full in every thing as my lord Cottington, and I shall here crave your excuse, and end."

Sir *John Bamston.* "I believe, my lords, that the Lord Bishop is guilty of three of the Charges, and I conceive he had a sight of the Writings, from the Council-Chamber.—I find him procuring some to absent, to deter others, and all to support Prigeon's credit. Alice Smith first deposeth, that Prigeon offered her 5*l.* to prevail with Eliz. Hodgson to lay the child to any other man.—Now my Lord Bishop he must intermeddle to support his credit. I disallow of his tampering with Wetherel; to wish a witness to keep away, or to wish him to say less than he knows, is not justifiable; it not so much concerned him, but it seems he thought it did, and therefore he must spend 1,000*l.* or 1,200*l.* to make that good: So sir John Mounson and Alice Smith deposeth, Alice Smith is fetched, and carried, and maintained, enriched by the bishop's servants. I find many shifts in my Lord Bishop to effect his desire; it's plain she went away poor, returns rich. Wetherel must be tampered withal, is also plain by several confessions.

"Now to the second Charge, the slander is laid on the justices: Sir John Mounson sat openly in court, the order apparently made, yet the bishop strives to suppress it. He useth all the ways he can, either by fair enticements, or by foul menaces and threats, to have them in the Star-Chamber, &c.—Now, my lords, however he prevailed not, yet he attempted, he endeavoured subornation of perjury: And wisely did Mr. Attorney to lay the charge in that manner he did, for undue and unjust undertaking to suborn witnesses, it's a crime equal, though he effect it not, yet it's *maleficium condemnationis*, and is censurable.—I find my lord bishop of Lincoln much to blame in tampering, persuading, threatening, and directing of Witnesses. A foul fault in any, but in him most gross, who hath *curam animarum*, throughout all his diocese. To destroy souls is most odious, and to be severely punished.

"To proceed therefore to Censure, I meddle not with Bates his testimony, but I shall fine Powel 300*l.* I clear Mostein: And for Lunn I shall fine him 1,000 marks, and to be disabled also from his function. And for my lord of Lincoln, I hold him not fit to have the cure of souls, and therefore I do censure him to be suspended 'tam ab Officio, quam a Beneficio,' and agree for the Fine of 10,000*l.* and imprisonment during the king's pleasure. And for sir John Mounson, I find he hath done nothing but as he ought, and therefore I hold it fit his credit should be repaired, and to that end I shall agree with my lord Cottington to give him 1,000 marks."

Mr. Secretary *Windebanke.* "It is needless for me to relate the business, or to declare the name of the crime for which this great person is censured here in this court. To free your lordships from any further trouble, having seriously considered the matter, I do find not only my Lord Bishop himself, but also his agents faulty; and therefore for the fines, punishments, and imprisonments both to him and them, I agree in all with my lord Cottington; and for sir John Mounson also."

Sir *Thomas Germine.* "I agree with my lord Cottington."

The Earl of *Lindsey.* "I do agree with my lord Cottington *in omnibus.*"

The Earl of *Arundel.* "My lords, the cause is great, the person eminent, the prosecutors, as in relation to the king, to be respected. The person that now is on the stage to be censured,

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one of the grave bishops of the realm, one who himself hath born sway, and hath sat in a high office under two famous kings, and now comes to be censured for undue proceedings in matter of justice. He who had the protection of equity, now hath turned to be a subverter of right, and an oppressor of the truth, by concealing her from that she delights in, the light: unduly menacing, deterring, and debarring witnesses in a cause of such a nature, as concerned so great a person as the greatest we have to do withal, under God, on earth. I protest I speak it with grief, I am sorry for his person, much more for his profession, no child being more reverend to a mother, than I am tender of the church, and of that coat: But upon such blemishes to forbear censure, were to allow of them: I do therefore agree with my lord Cottington in the fine, imprisonment, and in all the rest."

The Earl of *Manchester*. "My Lords; I cannot but admire to see, that a man of that eminency for parts and fortune to overshoot himself so far, and to be transported in so ignoble a way, as my lord bishop of Lincoln hath been, that he would undo his own to maintain the credit of another man. Give me leave a little to unfold the occurrences, that it may appear how this came about, and what occasioned this his so gross an error. About the fourth year of his now majesty's reign, a bill was exhibited into this court against my lord bishop of Lincoln, the complaint was about matter of state: now Prigeon was a main witness for the clearing my lord from being held guilty of what was thus alledged. The Bill was slow-paced, and slept from 4 till almost 8 Car. Regis, and now a provocation begets an Information Nov. 8th; and in February following the bastard is born, here is a touch upon Prigeon's credit, this matters not to the bishop for ought we see; but in May following it must be laid on another father, and one Boone is found out for the same purpose, and it must be fathered on him. The justices of assize publicly ordered, and set it down, that it is laid upon Prigeon, and hereupon he is thought to be disabled of his testimony for the bishop of Lincoln, if he have occasion to use him, for his clearing in case of those accusations and informations laid against him.—Whereupon this Prigeon must be set upright, and made an honest man, and be rectified, though it be by indirect and unlawful means; nay, most unconscionable courses, by wresting the consciences, and falsifying oaths for the same.

"Now, my lords, your lordships well know, that every man's state, every man's credit, his possessions and livelihood, much depends upon oaths; for if not upon the jurors, yet the witnesses in any case of evidence, be it for matter of title, or matter of fact, if they be by sinister courses, and by bribes and threats, be it for fear or for love, if they be caused to swear against their consciences, and that tye be taken away whereby they stand obliged before God and men to give right to the truth, no man is sure of any thing he enjoys, nor can expect to get any thing that is unjustly detained and withheld from him in the proceeding of any court whatsoever.—And I find my lord bishop much to blame, and indeed no more than an abetter in many passages of this cause tending this way.

"There be six faults he is charged withal, and I find him faulty in three great ones.—For his tampering with Witnesses, it is plain enough, and I am sorry it breaks out so in all the way as the cause goes. 1. In withdrawing Witnesses, and absenting them out of the way. 2. In preparing, fitting, and disposing Witnesses to his own ends. 3. In deterring them before they are to take Oath, and threatening them after. 4. In sifting out unlawfully, by indirect and sinister courses, what Evidence and Proof was given, so to be better enabled to have cross Oaths and Proofs against the Evidence that was before. 5. To cause witnesses to speak less than they know, and to conceal the truth, or at least to vary from that which they had formerly sworn. 6. Getting the copies out from the Clerks of the Star-Chamber, and keeping them a long time from that place, where they ought to be and reside.

"Now for a man of art, of a prompt and ingenious wit, a well experienced man, who hath been a Judge, and well knew the inconveniences of these defaults, and the grossness of them, to run into them so violently, and so foul, I cannot but admire, and much pity him.—Nay, he doth take upon him to defend, and to patronize Catlin too, although it be absolutely to overthrow and undo himself. But as it is said, 'Nemo læditur nisi a seipso,' if my lordship had not been over-busy for to do those men good, he had never done himself this harm.

"Now for Kilvert's affront to him, I must needs say it may seem over-much in the place where it was done, being in the chief place of the diocese, and to his own person: but being it was in such a cause, where witnesses were to be heard and examined for the king, and my lord being a great man in that place, I pass it by, as his zeal and earnestness in prosecution of the cause, which might else have suffered, had he not used the better courage, and put the better face upon it.

"For the getting the Writings from the Council-Chamber, it is plain enough, and they were absent long enough, and whether he had used or perused them it matters not; surely he would not have them gotten from their due station, and place of abode, only to lie by him, but that he would make use of them. And I must needs commend sir William Beecher's discretion and ingenuity for his courage in that particular.

"Your lordships have heard already by the two Lord Chief Justices, what the nature of these crimes are, though it be not subornation of perjury, yet it is manifest injury to the witnessing of a truth; and I suppose both they that do prevail, and they that are over-ruled

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and won to such dishonest courses, are much faulty; and therefore I shall agree with my lord Cottington for the Fine upon the two servants of my lord bishop, Owen and Powel. And also I fine Lunn in 1,000 marks; I clear Mostein, and I must not let Catlin escape, if I can legally do it, but he hath better fortune than the rest, though I think not a whit less culpable.—And for my Lord Bishop, I must, for his fine, imprisonment, and suspension from his dignities, offices, and benefices, agree with my lord Cottington, and so in all the rest."

The *Lord Treasurer.* "My Lords; This Cause hath held a great time, your lordships have had much patience and great attention, and applied yourselves to give ear to the defences that have been made therein, which have been very well performed by the counsel on my Lord Bishop's behalf.—The cause is great, a great man that is this day sentenced, and in a matter of very high nature for me, my lords, to run over the several charges, and to explain how and wherein I find my Lord Bishop and his agents culpable, and very well deserving the censure of this court for their crimes, it were bootless, nay altogether needless to insist upon the tampering with Alice Smith, and Wetherel, with the undue practices of Lunn, Owen and Powel, these things have been copiously set out before, and for me to repeat, or to make any relation of my observations in the occurrences and passages of the cause, it were but *actum agere.* The business falls out very unhappily, and all the way carries with it a relish. My Lord Bishop's encouraging and setting on the several agents, that were used for the clearing and justifying Prigeon's reputation; so that in the prosecution of the matter, probable surmises come to be violent and forcible instigations; and whereas my Lord Bishop strives to suppress a fault, which is like to redound to Prigeon's disesteem; my lord utterly overthrows his own credit, and labouring to take a stain out of another's face, opens several scars and ulcers in his own.—My Lord Bishop might better have let the truth have been bolted out, than so smother it, as to injure his own reputation, and cause himself to undergo far heavier and fouler aspersions, than the crimes in his witnesses could ever have brought upon them or him.—I much pity him, and I am heartily sorry that he was so over led with desire, as so hotly to pursue a thing that might with a great deal of more discretion have been let alone.—And truly I conceive it is now apparent to him, and he himself is sorry for his own intemperate prosecutions; and I hold no censure can be so heavy to him, as that your lordships should hold him censurable, and that he should now incur the dislike and condemnation of this court, wherein he hath sat as eminent in place and dignity, as the rest that now are to pass Sentence upon him.—What Censure therefore my lord Cottington before me hath given, both for Lunn, Owen, and Powel, both in number, rate, and weight, I agree unto; and so I do also for the fine upon my Lord Bishop of Lincoln, his imprisonment during the king's pleasure, and the rest."

The Lord Archbishop of *Canterbury.* "Sorry I am, my lords, that such a man as my Lord Bishop of Lincoln for profession; and sorry that he, being so wise, so discreet and understanding a man every way, should come to stand culpable of such faults as should deserve the censure of this court, and in this nature, that it should fall out that by being over-active and over-doing businesses of other mens, to do his own, nay even thereby also to undo himself.—We have adversaries too too many amongst ourselves, but this day's work opens a way for the Romanists to take advantage by it, to see so eminent a person as a bishop, and so eminent a bishop as he, to become thus censurable in a thing of so high a nature in this high court, it opens way I say to them of rejoicing, which I would to God had not been at all, or at least not by him.

"When I look upon and consider his excellent parts, both of nature, and atchieved unto by study and art; when I think upon his wisdom, learning, agility of memory, and the experience that accompanies him with all those endowments, it puts me to stand; that after he had been overtaken in one error in the first cause, he should not have recalled himself, and made a stand, but that he hath now run into a far worse, and more desperate a one in this cause, by obnoxious and criminal ways, even to a very precipitation and downfall of himself and his credit. What though there was some question made, and some proofs on foot, whereby his loyalty to the king his master seemed to be in dispute, and his discretion might have some ways come to trial in matter of words, discovering his affection in some matter of state? must he seek unlawful means to procure his actions and words to be lawful, and leave the course of a good conscience to bolster up a fancy of innocency in another man, and make himself plainly faulty, for to make another man seem free from shame? I could wish heartily from my heart (however this cause be, let it be as it is) that his deportment in passion had been like to that of St. Cecilia. I read it in a very good author, and it is not impertinent, nor unworthy whatsoever patience, when a great stir there was, and all the stream and current run quite against her to bear her down in a most furious and violent manner, she mildly in the heat of these storms, and when those billows seemed to overwhelm her, and hide her from all hopes of being admitted hearing her to plead her innocency, much less to gain success to her desires, it being told her there were many witnesses against her, but none that did, or would be, or seen to appear for her, or in her behalf. She used the saying of holy Job, 'Testis meus est in Cœlis,' My witness is above: and so it fell out, for as the story saith) when the matter came to be scanned, the witnesses that were against her, (by what means, or from whence, or how, I know not) but they

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were so daunted and struck with such an amazement, that it was their general vote, 'Nos 'nihil habemus contra Ciceliam.' I have it in St. Augustine, a Father of the Church, whose authority there is no doubt of, he being held learned amongst the best of that time, lib. 1. 'Con-'tra hæreticum donatum.' It had been better with my Lord Bishop if he had had such a cause: I am sure if the circumstances of his behaviour had been more temperate and mixed with more patience, the event could not have been so unlucky, and his Censure so sharp, as it is now like to be.

"I may be bold to say it, my lords, for it's no untruth; I have been five several times upon my knees to the king my master in his behalf, I delivered for him several petitions myself into the king's own hand, and I then did that (which had I known what now I do) I should not have done. I sent him under my own hand the king's answer upon every petition. And after all those five several services, I must tell you, my lords, I was but coarsely dealt withal, nay very ill requited; yet was I overcome to move again at Christmas last, and I have it under his own hand, or (if his secretary writ the letter) his own hand and name is underscribed, that he had better and more hopes by my once moving the king, than he had formerly had, by the solicitation and means of all the friends he had at court.—And no longer ago than at Christmas last I moved the king my master again in his behalf; and then (had he solicited that which was intended for his good, and prosecuted the same with submission) it had in all likelihood gone better with him than he could have expected, nay, I think, as the case stood, better than he then desired.—But a cross business came just in the way at the very time, (of which your lordships, or the most part of you, I am sure, are privy to) and had not I then interposed myself, (the king being then so exasperated against him) he had fallen. But to let pass my desires, and the earnestness I used, and the tenderness I had, lest my public aspersion should have been opened, and such as could not have been wiped away, but needs must have left a stain to my coat.

"I must needs say thus much for his majesty, he was very inclinable to have had a fair reconcilement, as may appear by his often asking what Lincoln did, 'doth he seek to re-'pair my credit? Hath he any shew of sorrow-'fulness for his fault?' And, my lords, I may safely say, because I truly speak it, who ever penned his petitions, howsoever they seemed to be his friends, or whosoever advised him to let them pass in that form, they did him, though questionless he is able to pen them himself, an injury, yet if he did it by advice they were not therein his friends, for in them all there is not one word tending to submission and confession, or so much as an acknowledgment of a fault, whereby any shew of recantation in that nature might be made to his majesty, as both in duty he ought, and in wisdom might have made proffer of, and with more safety and assurance have performed, insomuch as that by his stiff and stubborn behaviour, there was no way but to have the business fully ript up, heard, and decided.

"Yet there were not wanting divers ill disposed persons, who bruited it forth, and very boldly gave out, that my lord bishop of Lincoln had not made any fault, or done or spoken ought, but that which he could stand unto, and needed not to be ashamed of, only that he was rich and must be let blood, he might well spare it, and the king wanted 10,000*l.* or 12,000*l.* and so he should have little said to him, if it was once condescended unto, and either given by him, or gotten from him. But howsoever these reports go, the king is just as he is honourable; and though he was inclined to mercy (for so the bishop of Lincoln had found it, if he had sought it seasonably) yet now you see, there is cause, and just cause of censure, and in a very high nature of desert in him to be sentenced by this court.

"Now for the nature of the cause, the several Charges of the proofs, and the defences also that have been by the lord bishop's council, hath fully and amply been opened by the two lords chief justices, and if I should attempt any thing this way, it were but needless labour to myself, and would breed a tedious troublesomeness to your lordships, *dictum dicere* would be all, when I had said all.

"I leave to meddle with the manner of the proceedings, and must give Mr. Attorney a great and large commendation, and Mr. Solicitor also for their wise stating of the cause, and for their wisdom, wit, temper, and patience in the prosecuting of the same.—The matter is ill, and howsoever it perhaps be not subornation of perjury, yet to tamper with witnesses, to threaten, deter, affright, corrupt, or to silence, or absent those that are to witness a truth, and to give evidence in a court of justice, are *ejusdem naturæ*, a very foul crime and a most odious and detestable fault, in any man of what condition soever he be: and if these things be suffered and may go unpunishable, no state can stand, and it destroys the interest of *meum et tuum*, and no man is sure of what he holds, or can say whether he hath an estate or no.

"It is a point that ruins all right, and is the utter enemy and subverter of all justice, and must needs overthrow any state, where it is not weeded out and prevented by severe animadversion and corrections when it happens to be found out. First, It destroys *maximum mandatum*, the great Commandment given by the great Lawgiver, God himself, 'Thou shalt not bear false witness;' In the 5th of Leviticus, if a man know a truth he is not to conceal it; nay, he is to witness it. In the 23d of Exodus, a man is not in any case to bear unjust witness, and so in the ninth of Deuteronomy, it is *in criminalibus*, and he that did bear false witness was to suffer *per legem talionis* that same punishment and loss, which by his false testimony the other party had undergone.

"In all the time that passes from the crea-

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tion of the world until the law, I do not find that the Holy Ghost once made mention of any, that attempted in this way. I find no shadow nor overture of any such crime; the corruption of nature had not then grown to the height, and so over-flowed the banks, as to break out so outrageously, and produce any such ill disposed persons.

"Insomuch as I find not any tract, no *vestigium* of the like precedent for above 3,000 years, and the fathers of the church upon that place, where it is said, 'out of the mouth of 'two or three witnesses shall every thing be 'justified;' they descant upon it, why two or three witnesses in matters of consequence? Because, say they, so many should not be subject to be tampered withal, being they might be of several tempers, several conditions, and so the truth might be had by some of them, if not by all.

"And for a long time I read of none, but of the devilish practice and leading piece of impiety set on foot by Jezebel, for what cause, and how prosecuted, you all well know, and what she was, how she sped, and what end she made is recorded to posterity. Yet, my lords, I pray you observe and note with me, how warily the Holy Ghost goeth about in the setting out of this fact, and the passages therein in the 21st verse, as if the Spirit of God was unwilling to display and discover the heinousness of this monster hatched by this vile woman; as if he would not have it seen, he shadows it forth in a low stream, that there came in two sons of Belial and said, &c. As if the original of this odious practice was not rooted in human nature, but took his birth from hell, it came in with two sons of Belial in the devil's name.

"Well, afterwards such a tutor could not want apt scholars, and, as Saint Paul saith in another case, 'when I come to speak of it 'after the manner of men,' I find it then practised, and that, with a witness, 'it out-'faced the God of truth,' though truth itself must not be trodden underfoot; but this engine fetched from hell, must be planted to defeat the counsels of God Almighty. They found out and hired false witnesses against Christ himself, who they were you know, Mark 14, 55. 'The chief 'priests and the elders, and all the whole council 'sought false witness against Jesus to put him to 'death;' and after Christ Stephen had the same measure, Acts 6, 11. 'Then they su-'borned men, who said, we have heard him 'speak blasphemous words against God and 'against Moses.'

"Thus amongst those stiff-necked and hard-hearted Jews, the fault was in use when sin and iniquity grew ripe, and, as the Prophet saith, 'Faith and truth could scarce be found 'amongst mortal men;' but the subversion and destruction of their city follows, and there comes in the government of a warlike nation and people, the Romans; amongst whom I find some laws made against false witnesses, and those very severe ones.

"Besides other laws, in the law of the twelve Tables there is a strict law confirmed against it; and these twelve tables were not made by any mean advice or persons, but by the persons of a powerful council and the *decemviri*: that he that was found faulty in this notorious crime, he was to be thrown down a steep high rock, to have his bones shivered all to pieces, *e monte Tarpeio*, or *e saxo Tarpeio*; afterwards the law-givers pursued this fault with banishment and confiscation of goods, 'Confiscatio bono-'rum fiat et puniatur uti pro crimine falsi.' Within those times was a heavy and most severe punishment, whereby their posterity also was branded with the fault of them that went before them. In the ninety-fifth Council I find a course set down for the prevention of this crime, and a punishment set for the offenders therein. And in later times Bartolus often meets with it, and goes very precisely and exactly in the case, that if so be it be found in any man, so much as an overture of tampering with witnesses, it is censurable; *reus est*, he is guilty, though he effect not his purpose, if he menace, threaten, or deter a witness. And so, my lords, shall I do, though he but barely attempt to smother, deter, or hinder any witness, when he is to give his testimony; be it by words, looks or actions, promises or threats, it comes much to one in my opinion upon the matter.

"Now, my lords, to come unto the laws of the church, if we peruse the Canon and Ecclesiastical Law, there we shall often in every age, have somewhat or other still established against it. In the Canon Law the second part of the Decretals, if any man shall be a suborner of witnesses, 'Etiamsi instigatus aut compulsus a 'domino,' if he bring a false testimony (though he be even enforced to it by his superior lord, governor or his master) deliver him over to excommunication, 'et sic maneat usque ad 'exitum vitæ,' and so he must stand and remain in that state and case during term of life. A grievous thing, and a most heavy burthen, the sentence of excommunication is to an offender, though now in these looser times it be slighted and little set by; yet in cases of this nature when the offence is so high and transcendent, and of condition tending to the ruin and condemnation of the soul, the party at that time, and for that present, even dallying, mocking and abusing of God to his very face, to be left void of the Communion of Saints, to be bereaved of the benefit of being a member of Christ's flock, and cut off from that holy body the church, I think that no man is in a worse and a more miserable estate, and more to be pitied, if he be insensible of it himself.

"To come to the first council of Macedon, the seventeenth canon, 'Si sit ille inter falsos 'juratores, reus esto.' And what is he guilty of? Of no small matter. Ranked and ranged in the degree and place of a murtherer *et cum homicidis*.—Nay, he is worse than a manslayer, for he that kills a man destroys but one, and that but the body neither, for he cannot any

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ways infringe the union of his soul that it had with his Maker. But he that goes about to suborn and procure false witnesses; he at one time destroys two souls, both his own, and the soul of him that he so in that kind intermeddles withal; and unless he be rejoined again by the renewing of faith and serious and hearty repentance, he sets both their souls and God at odds.

"Afterwards you find it in the western parts of England, and in France, in the 17th council of Agatha, you have a tamperer with witnesses adjudged to death (even in the time of Alexicus, who was no better than a barbarous Goth) this crime was disallowed, made horrid, and held severely to be punished. You may find it in St. Augustin, who lived about some 400 years after Christ; and indeed he most excellently sets it out in his 28th Sermon, 'De Nativitate Domini,' either he had it out of that council, or the council out of him, being much what both at one time and in one age. Some parts of Greece I find did affect and patronize lying, but Tully wittily guirds them for it, saying, they were not wise to countenance folly; yet I find that Aristotle in his rhetoricks concerning the Interrogatories to witnesses, gives admirable rules, and such as (though short) comprehends the most what of the most settled and the wittiest, and the safest ways used now adays in that kind, lib. 2. Rhet. you may read the ways of prevention herein by him set down.

"And to come into our own country about the year 1224, in the reign of king Hen. 3, and your lordships know, that it was a troublesome time; yet I read that Stephen Langley, my predecessor (then archbishop of Canterbury) called a council to be held at Oxford: the main business was for the reformation of two points; the one was concerning Marriage, the other concerning Exheriditation, &c. where I find a foul penance inflicted and set out for him, that shall either bear false witness by himself, or procure it in another.

"For he that is a tamperer this way, he is guilty of no small crime doing, doing (at the same time) wrong to three of the greatest persons in the world, viz. 1. To God. 2. To the king. 3. To the innocents.—First, He manifestly wrongs God by a notorious contempt, by a very slighting and vilifying his omniscience, omnipresence and omnipotency. He robs God of that which is his very essence, for God is truth, (and who dare thus out-face God's truth!) and wittingly deviseth and practiseth to lay it aside and keep it from the light; I find him in very nature to be abhorred and held unfit for human society. Aristotle himself in that glimmering he had of divine learning, deciphers such a one, and sets him out by these very characters: he must be one 'qui pietatem non curat,' a man that matters not at all for piety; he must either deny the Deity, or else think he can escape the reach of the celestial powers, such a one 'qui putat se latere Deo,' he is able to skulk on the one side, and absent himself from the hand of God at his pleasure.—Secondly, In the next place, another great person (unto whom he doth injury) is the king, whom he plainly cheateth to his face, and wrongs in the very seat of justice, even forcing his officers, the grave and learned judges, will they nill they, to do injustice: for if the witnesses be suborned and give in false evidence, the jurors cannot come near the truth, and the judges must needs enact, order, and sentence what otherwise they neither would, nor ought to have done.—Last of all, the third person that is wronged *in conspectu Dei*, is a person of no small esteem, the innocent (one many times little enough esteemed, God knows, in the eye of the world, but gracious and great in the sight of God,) and he is also most shamefully wronged and abused; nay, perhaps undone by the indirect practices of those false witnesses. Sometimes his person is traduced, his fame and credit either stained or else quite taken away, or so shaken that it's a shy matter to deal with him; another while his estate, his birth-right, is wrested from him, or else withdrawn, and for a time withheld from him: one while his goods, another while his lands, a third time himself, is at stake; so life, lands, goods, and all are in danger: well though such witnesses be against him, his plea is never a whit the worse in *Foro Cæli*, his inheritance is laid up amongst the saints, 'Testimonium ejus est 'in cœlis,' 'doubtless there is a reward for the 'righteous, verily there is a God that judgeth 'the earth, for there is nothing hid which shall 'not be revealed.'

"And thus, my lords, have I said what I thought fit, though not so much as the crimes deserve, for my time being scanted, I have laid it out (though roughly) yet so as it may easily be seen of what a vile nature this cankered and pestilent weed is, and from whence it had its original, and how odious and detestable it hath been to all ages, how dangerous the effects be that proceed from it, and therefore how carefully it ought to be looked unto and supprest in all common-wealths.

"I shall make my word good in my brevity concerning the last thing I am to perform, and shall pass over the sentence very speedily; to make any repetitions were but *actum agere* (as my lord of London said) therefore I will be short. I find much tampering and striving by my lord bishop's agents for to suppress and decline a truth. I wonder that Lake should be sent to the university of Cambridge presently to take the degree of doctor, and that they would let him pass. I cannot commend Mostein (though otherwise a very civil and deserving man, and I think very true and trusty to his master) yet to be present when a blank is put up, and an Affidavit to be made to a blank by his privity and in his presence, this is not honest; he might have done well to have disallowed the proceedings, or at least not been present, and have countenanced the same. And Walter Walker, though he be a solicitor, and must and ought to follow the causes he undertakes, with as much skill, industry, and advice as he may, yet he might have been

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ashamed of this blank Affidavit, and he ought indeed to have suppress it.

"If Walker had been a good servant it had gone better with the bishop, than now it is like to do: and if Walker do escape sentencing it's more by hap than skill, more by luck than honesty. I find him to be a very arrant honest man in all the business, and my lord bishop is a very miserable man, thus to defend Prigeon's good name with the loss of his own.

"Catlin, he must have a living given him, and well he deserved it, but as yet he had not played his part to the full, and therefore stay your hand (my lord saith Walker) till the business be done. A manifest plain proof that there was some use to be made of this cunning and crafty fellow, to countenance the business in hand. And I can say no less, than that I find Catlin to be a very lewd man, a very incendiary, and truly to be paralleled with that Catlin of Rome, against whom so many learned and eloquent orations were writ, by Cicero that famous orator.

"For Lunn, let him go on in God's name, to be put off from the place and offices that he hath; and for Powel, I could go deeper than any before me hath yet done, who prosecutes an unjust act so long, so oft, and never repents of it.

"For Kelvert's affronting of my lord bishop in that manner he did, I must set that, and the bishop's offering to be present at the examination of the witnesses, both in one distance, and they may very well the one of them quit the other; and I must commend Kelvert, or any man else that shall go on in the king's business, and concerning so great a matter; for if he had gone on piningly, faintly, and cowardly have put his head in a hole: if he had, by my lord's presence, and by the terms he used, gone sheepishly on in his business, the matter might have failed. Some of your lordships have condemned him for his bold carriage toward a bishop in his own diocess, but I cannot, for my lord and his passions were more to be condemned. A temper would better have befitted him, and indeed he ought not to have given any such occasion, and therefore it may be said, 'Etiam si ego dignus sum hac contumelia, indig-'nus tamen qui fecerit,' I pass that by as to be excused by reason of the weightiness of the matter.

"For the gaining of Papers from the Council Table, I find my Lord Bishop had them long enough in his custody, and they were returned unsealed; and I do find that he proceeds to counter-proofs directly, according as he was informed by these papers, which in my mind shews apparently that he both had them and perused them.

"For sir John Mounson, the king is wounded through his sides, I have known him a long time, and I never knew nor heard any thing of him but good, and therefore do hold 1,000 marks little enough for reparation of his credit, who did nothing but that which was his duty, and belonged to his place.

"Now for my lord bishop of Lincoln, truly I am heartily sorry to do that which I must do, both by reason he is of my own coat, and also by reason of the place he hath in former time sustained in this court amongst your lordships, and in this commonwealth, but I must not forbear to do that which my conscience leads me unto, and less I must not do than for to discharge that as I ought to do.

"Wherefore I shall agree with my lord Cottington and the rest that have gone before me in the fine of 10,000*l.* to his majesty; and likewise for his imprisonment in the Tower during the king's pleasure, as also to be suspended from the exercising of his ecclesiastical function, 'tam a Beneficiis, quam Officiis,' and to be referred over to be proceeded against in the High Commission Court, as the merit of his offence shall deserve."

The *Lord Keeper.* "This Cause, my lords, is a cause of great consequence, and it is a very foul matter, though I must needs say the defences that hath been made in it, hath been very fair by Mr. Recorder, and the counsel on my lord of Lincoln's behalf.

"Mostein I must acquit, for Catlin I came resolved to Censure him for perjury; but seeing the court lets him pass, I shall not sentence him, though he is a very notorious actor, and had a hand in that Blank Affidavit, and helped Smith, and countenanced and directed him what to swear, and what to let alone.

"All my lord's actions, for which he is much to be blamed, are subsequent to that Affidavit; I must do my duty, and discharge my conscience, and shew my love to the common good, whatever my private wishes are, that things had not fallen out thus with my lord as they do.

"I shall divide all into two parts, some things I hold faulty, and some I shall not censure; I shall not censure Mr. Kilvert for his unmannerliness, though the affront was great to a man of his place in the country, where he was bishop of the diocese, and in the chief seat of his jurisdiction. Mr. Kilvert might have forborn him somewhat in that respect; but the cause being of that high nature, and concerning them it did, he had somewhat the more reason to be the more confident and bolder in the prosecution thereof than ordinary, and for that concerning sir William Beecher I find no proof of it.—I find that Lunn, Tubb, and Wetherel, were tampered withal, but I cannot find my Lord Bishop faulty with them: For George Walker, I find him censurable; and so is my lord also himself in other matters, as will appear when I shall come at them.—I find by the proof of two Witnesses, that my lord confessed himself, that it cost him 1,000*l.* or 1,200*l.* to bolster up Prigeon's reputation, and to do this he falls into error concerning the order made by sir John Mounson; that must be suppress, and I know not how so much money should be expended, but upon such courses as were used with Smith and Catlin.—Catlin told Smith he should be made by it; so that the

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order must be to undermine the witnesses, and get them to vary from what they had formerly sworn before the justices at the public sessions. I know that men in cases of this nature do not bluntly promise this or that; but I find Walker goes about by questions at first a-far off, and then comes close to instruct Smith what to swear; and rewards are not behind, neither do I conceive in such cases, that there are ever two witnesses to be expected, but as my Lord Chief-Justice of the Common-Pleas explained it, *singularis Testis* shall induce me to believe a truth in some cases, and it must of necessity, when circumstances concur with the same.

"So that whatsoever Mr. Recorder said, the return of that order made by the justices was *coram non Judice*, it matters not with me. The witnesses knew nothing of the questionableness of the proceedings, but went on the way their consciences at that time led them: Now for my lord bishop of Lincoln to seek to dishearten them, to terrify them by threats, and seek otherwise after by rewards and promises to subvert, or at least, to divert the current of justice, I know not how to excuse them, but that he is much to blame to give such ill names and disgraceful titles to an order made in court, as to call it a Pocket Order, thereby bringing an odium and defamation upon the justices, who proceeded as they ought, and in open court, as appears by Dr. Farmary, and by Ascot, who had both of them a hand in it, as I take it, as well as sir John Mounson, and therefore their credits must be repaired also.

"For Alice Smith, she was tampered withal by Owen and Powel to salve up Prigeon's credit; and after that she had taken one oath before the justices, then, for the present the commission to be sat at Lincoln, she is taken and withdrawn out of the way, and hath rewards given her, as is apparent, either to deny, or alter, and vary from what she had sworn before. She had 5*l.* offered her to persuade Eliz. Hodgson to lay the child to another father; and then afterwards it was given her to persuade her to lay it to the right father; and yet here is no false oath, but may be true, as I can instance that a deposition may be made by a party that may swear two things that are contrary, and yet the depositions of both of them may be true.

"And yet an Attainder hath been upon the like; now upon an attainder the punishment is great, he loseth his freehold, and goods, all are forfeited to the king, his houses are to be razed down, meadows plowed up, and woods to be felled, and he himself to be imprisoned or banished, his wife and children to be turned out of all.

"So in another Case, (Fitz-Herb. Natura brevium, lib. 19.) one hath a hold from an abbot, and a rent is due, as Foster in fee he holds *jure rectoriæ*, and it is sworn he had common, time out of mind: And if the words *jure rectoriæ*, be not exprest, all may be true.

"In this case of Alice Smith it may be questioned what money was promised, 5*l.* to what end? to swear that she was moved to get the child laid to another: Well, afterwards she must swear that it was to lay the child to the right father, Mr. Valentine and Mr. Powel shewed her the interrogatories, she must swear against the first order, and Mr. Valentine said his heart trembled at the questions.—There is much cunning in this way of tampering with a witness, for my Lord Bishop asks them leading questions, by which they have instructions what, and how far to swear.—And Prigeon tells Richardson, that if he could get the order altered, he might do the bishop special service.

"Now it may be, said he, may not a man meddle, nor question with a witness? yes, but with certain limitations, for else, if the witnesses be made and corrupted, the jurors and judges both of them may be abused; and if that witnesses may be led and instructed by questions, or the like, it comes all to one as subornation.—A solicitor may warn Witnesses to come in, he may incite them, and enforce them, and one as well as the other: but for a stranger to labour a juror or a witness, is not so allowable.—But a solicitor must not instruct a witness, nor threaten him, nor carry letters to him, to induce him this way, or that; yet he may discourse with him, and ask him what he can say to this or that point, and so he may know whether he be fit to be used in the cause or no: by which means this court is freed from the labour of asking many idle questions of the witnesses to no end, if they can say nothing to them, and so spend good time to no end nor purpose; yet he may not persuade him, or threaten him to say more or less, than he of himself was inclined unto, and was by his conscience before-hand bound to deliver as truth.

"The term in law is called *embracery* of a Jury, *amplexus*, to curry favour, when one hugs them, and houses them in their arms to procure respect unduly to their own ends; you have it mentioned 13 H. 4, & 16, when there is a lending of a Jury 22 H. 6, whereupon it hath been ordered, that in cases which have any relation to great persons, who usually are on the bench, they are upon trials to absent themselves, and not to be in presence of the bar.

"And as my Lord Chief Justice of the Common-Pleas well insisted upon in this case, the countenance of a great man, and one that is powerful in the country to do a poor witness harm in another way upon any other occasion, when it shall come to his turn, and occasion be offered for him to do it; the very looks I say of such a man is able to put the witness off from what he was resolved to speak, and dash him out of countenance, that he will either, for fear that such a man shall take dislike at him, or for hopes of much favour with him, and to gain his good will, speak sparingly of the matter in hand, at least, if he do not altogether decline another way in his words to that which he in his conscience knows to be the very truth.—So that in the point it is plain, that when a man shall alter the testimony of a witness, and cause him to decline from the truth, whether it be by

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threats, promises, or rewards, it hath ever been much disallowed, and he that attempts the same is censurable, though perhaps he effects it not.

"Now, my lord, to come to the Censure, for I have been somewhat the more bold upon your patience, than I would otherwise, because I would have it appear how far one may, and wherein one may not tamper, or meddle with witnesses, which thing is the main matter in this case we have had so long in hand; for had not my lord bishop moved this way, I should not have found matter in this bill to have sentenced him at all.

"But for to justify Prigeon's credit, and to make him stand upright, and to clear the reputation of him, and others, so much money is spent, and these unjust and undue undertakings have been made by my lord of Lincoln's servants, and his agents, to tamper, seduce, and withdraw the witnesses aside against the laws of God and man, and to the very overthrow of my lord himself.

"For Cadwallader Powell it is plain all the way what he did, and in what undue courses he sought to suppress the truth; I shall agree with your lordships for him in his fine, and do censure him at 300*l.* fine; and for Owen, I shall also agree with you in his fine of 300*l.* Also for Lunn, I could go deeper, and set him a greater punishment than your lordships have, but do agree with you in his fine of 1,000 marks, and to be disabled from being in any office or practice hereafter in his profession, or in any other court.

"Now for my lord bishop of Lincoln, truly I am heartily sorry for him; but *ex se cadit*, he is the cause of his own overthrow, 'Et ruit 'Roma viribus suis,' no man hurts him but himself. I think of him as a great person, and more to be pitied for that he is a church-man, and in so eminent a rank as a bishop, and none of the meanest of that dignity: and as my lord of Canterbury spoke, that it was the more grief to him to pass sentence in so deep a manner upon him, by reason he was of the same coat: so, my lords, I cannot but be sensible of his precedency to me in that place I now undergo by the favour, and at the pleasure of the king's majesty, my honoured master.—For a man of his wisdom, of that experience, and having seen the various changes of times, and of several mens fortunes, lived in that eminency, and so well-literated, to seek his own overthrow, to support and maintain the reputation of another, is a thing not to be so much as dreamed on, or could be once thought upon, that such weakness should ever fasten and take place in a person so well-guarded and accompanied with virtues and commendable qualities, as my lord bishop was ever esteemed to have.—And for a Church-man, whose profession is to support mens consciences in the right way, and for to reduce them into it when they shall chance to err, for him to be a seducer of the conscience, is a fouler and worse stain in him than in another.

"But when to that sacred calling (the professors whereof are ever to be had in respect) shall be added another Charge, and care by the favour of the king, to become a judge, and a judge of that great court of Chancery, where equity and conscience give the very denomination of the court; to be advanced to this eminency is a thing of great consequence, and to be admitted to this place is a sign of great trust reposed and placed in that servant by his master. Now I cannot, my lords, but be heartily sorry, and very much pity, that a Church-man, and bishop, and one that hath been a prelate, and eminently dignified for the space of this 16 or 17 years at least together, should so grossly be overseen in the countenancing and cherishing such foul crimes; Nay, a man that had born the great seal of England before two such great kings, and been highly graced with so many large testimonies, and remarkable favours from them both, to uncase himself of all these, and that at once, and for so small a matter, so little really in itself concerning him, I cannot but wonder how he should fall into such an error, and more pity his misfortunes to see him so much his own enemy.—But as it hath been observed by you all, he hath overthrown himself. And therefore I must do my duty, and proceed to his censure also, as I have in the rest; 'vincat veritas et fiat justitia.'

"I shall agree with my lord Cottington for his Fine to the king in 10,000*l.* and so I do also with my lord Cottington for his imprisonment in the Tower during his majesty's pleasure. And withal to be suspended from all his Ecclesiastical Dignities, offices, and functions, and in all with my lord Cottington, 'ab officiis et be-'neficiis,' and to be referred to the High Commission for the rest."*

Proceedings against the Bishop of Lincoln and Lambert Osbaldston.

February 14, 1638-9.

The Bishop of Lincoln, together with Lambert Osbaldston, Schoolmaster of the Grammar School at Westminster, was charged by Information in this court of Star-Chamber, to have plotted together to divulge false News and Lies, to breed a disturbance in the State, and difference between two great persons, and peers of the realm, viz. the late lord treasurer Weston, and the present archbishop of Canterbury. The Charge was grounded upon these following Passages written by Mr. Osbaldston to the bishop of Lincoln:

"My dear Lord; I find for certain, which I

* "This bishop of Lincoln, (once a great minister of state) wrestled through these difficulties and close imprisonments; was at last set at liberty out of the Tower, and called by the king's writ to sit in the house of peers, and after that was advanced by the king, and restored to all his ecclesiastical dignities and functions." Rushworth.

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report *sub sigillo*, that the great Leviathan, and the little Urchin, are a great storm in Christmas weather, and are at a very great distance one with another, insomuch that your lordship hath been inquired of more than once, if you were come, and when you will? And the great man was heard to justify the words which you were questioned for, namely, 'That you had as good 'a right to the Deanery of Westminster, as 'the king to his crown.' And he was heard to say, 'That they were no more than he himself 'would say.' The jealousy grows great and sharp between the Leviathan, and the little meddling Hocus-Pocus; and if it increase, there is hopes your lordship will enjoy the blessing of the king's grace. Your lordship will hear, that the lord's grace of Canterbury is come to lodge in court, so is the lord treasurer: your lordship, I hope, will pick out my meaning. Westminster-College, Jan. 9, 1633."

In another Letter.

"My dear Lord; I cannot be quiet but I must write to your lordship. The sport is grown tragical, any thing would be given for a sound and thorough charge to push at and confound the little Urchin. The Spaniards and the Hollanders are both approvedly and firmly joined to effect the same, if your lordship lend your assistance, which I am bound to implore and require. Let them in the mean time scratch one another to the bones. I use freedom of heart, it is something of revenge that a brave soul, as your lordship is, hath some hopes of support in the midst of a flood of destruction. Westminster-School, Jan. 30, 1633."

Likewise, there was produced the Bishop's Letter of the 2nd of February, to a friend, to this purpose:

"Mr. Osbaldston reported to me by letters, That it was desired that I should contribute my endeavours to be useful to the Lord-Treasurer against the little great man, and assured me that they were mortal enemies. But for my part I refuse to meddle with any such thing; yet I pray you learn whether it be so or no, lest some have gulled Mr. Osbaldston in his three last letters. If the Lord Treasurer would be served by me, he must free me from the bonds of the Star-Chamber, otherwise let them fight it out for me."

It was answered in the behalf of Mr. Osbaldston, That what was done by him, was done in private letters, sealed to an honourable friend. And it was confessed to be error in him to use such familiarity in some passages therein expressed. That he doth deny, That by the appellations therein mentioned, he did mean the Archbishop's Grace, or the Lord-Treasurer. But he meant thereby one Spicer, which took upon him to be a doctor and was none; that he had divers times used, between jest and earnest, to call him 'little Urchin,' 'Vermin,' 'little Hocus Pocus in the Velvet 'Jerkin,' and that there were some differences between him and the bishop of Lincoln; and by 'Leviathan,' he meant, Chief Justice Richardson, who had formerly committed Spicer, in Westminster-hall; and he confessed he did merrily use that name, the person being apt to take a jest in good part.

On the bishop of Lincoln's part it was offered, That if any such Letters were sent by Mr. Osbaldston, yet he denied the receipt of them; and for the interpretation of those Appellations, he conceived the writer was the best interpreter; that he had many times heard Mr. Osbaldston call Spicer by the name of 'Hocus 'Pocus,' and he used to call Richardson by the name of 'Leviathan,' and denieth the publishing of any such Letters, or so much as the speaking of any such at his table.

The Attorney General urged, That the Interpretation given by the Defendants would not serve their turn. That those Letters of Mr. Osbaldston were found in a box in the bishop's house at Bugden; and when the bishop heard they were found, he said, 'Osbaldston was un-'done.' That the Bishop's secretary Walker, and the clerk of his kitchen, had heard their master discourse of the subject matter of these Letters, and that these names of appellation were frequent, between the Bishop and Osbaldston, and that by them was meant the Archbishop and the Treasurer.

But it was further offered, in the behalf of Mr. Osbaldston, That the Interpretation made by others, should not be the ruin and destruction of the defendants. That the bishop's said secretary and clerk of his kitchen, witnesses against him, were lately censured in this court for tampering with Witnesses, and were persons expecting the mercy of the court; and witnesses were heard on the behalf of Osbaldston, that he frequently called Dr. Spicer the 'little Hocus Pocus,' and the 'little Urchin;' and the reason was, because Spicer had made many promises to give a Library worth 40*l.* to the School at Westminster, but failed in the performance. And it was further proved, that he frequently called the L. C. J. Richardson, 'Leviathan,' who had committed Dr. Spicer in Westminster-hall.

And in the Defence of the bishop of Lincoln it was further urged, That his said secretary, Walter Walker, did frequently receive, and had commission to open his Letters in his absence; and what letters he received he could not tell; and if those letters were found at his house, they were laid up and concealed by his Secretary.

And further the Bishop petitions the court, informing them how unable he was to make his defence, being his majesty's close prisoner in the Tower. After which, Mr. Attorney General replied.

Sir JOHN BANKS's REPLY about the Censure of my Lord Bishop of Lincoln, and Mr. Osbaldston, the 14th of Feb. 1638, in the Star-Chamber.

"My Lords; The Defendants' Counsel in their Defence, does except against the charge

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of the Information, and they laboured much to tie the matters charged in the Information to the very day of the month, seeking thereby to escape the Charge, contrary to their judgments and the common course of justice.—Also they made question where those Letters should be found: but if they will, they may know that they were found at my lord bishop of Lincoln's house at Bugden, as is manifest by their own witnesses Interrogatories, 1 and 71.—In the Answer to which Interrogatories, three Witnesses do all say, That they heard they were found in a band-box in my lord of Lincoln's wardrobe.

Mr. *Recorder.* "My Lords; We have examined four Winesses, which do all depose, That there were no Letters found in the band-box, and that his lordship did never leave any letters to be kept there."

Mr. *Herbert.* "It appears by their own Witnesses, that there were such Letters found; but this is not to the purpose where they were found, but now they are found, the heinousness of them is the point in hand."

Lord Keeper. "It may be that some of the lords may find some things in the Depositions that may serve one way or other, therefore I think it good they should be read; but for my own part, I am satisfied in my judgment."

Mr. *Attorney General* further proceeded, saying; "My lords, the Defendants counsel have made two Defences, one for Mr. Osbaldston and the other for the bishop of Lincoln. The counsel for Mr. Osbaldston except against the Witnesses that prove the interpretation of the Letters, and would have Mr. Osbaldston to expound his own meaning, and if this should be allowed, every libeller would thereby escape the censure of the court.—First, They except against Cadwallader Powel, because he was before sentenced in the Star-Chamber; but, my lords, his Censure in the Star-Chamber was not for any matter of perjury, or crime that should take away his testimony; and the same thing for which he was sentenced was my lord bishop himself sentenced at the very same time.—Secondly, The second Exception was, that Mr. Powel and Mr. Walker were made Defendants in this court to take away their testimony in this cause, and the reason why they were not proceeded against (said the King's Attorney) was, my lords, because my lord bishop of Lincoln would not perfect his Examination, by which we should have the better proceeded against them, and when my lord bishop hath perfected his examination, they shall be proceeded against.

"Again, they except and say, that Walker being secretary to my lord bishop of Lincoln, he ought not to be witness against my lord of Lincoln.—My lords, when a Secretary is called and examined upon oath, he ought to discover the truth of what he is examined upon, and not to perjure himself.

"Again, they say, that there are no express words in the Letters, whereby it doth certainly appear, that these words were not meant of my lord's grace of Canterbury. My lords, this sticks at all causes of justice: for if they shall be suffered to interpret their own words, by this means all Libellers would escape punishment.

"The third part of the Defence is this: that Mr. Osbaldston should call Dr. Spicer, 'Vermin, Hocus Pocus, Urchin,' and the like: therefore say they, those terms in these letters are not to be applied to the archbishop of Canterbury, but to Dr. Spicer. This is no exclusion, for I shall shew that those words must needs be intended and spoken against the archbishop of Canterbury, and not of Dr. Spicer.

"In the Letter of the 9th of Jan. the words cannot be applied to be spoken of so mean a man as Dr. Spicer: and so likewise in the Letter of the 30th of Jan. wherein he desires, that it should be kept secret: and if these words had been spoken of Dr. Spicer, they needed not be kept so secret. For 'Hocus Pocus' and 'Vermin' being spoken of Dr. Spicer, were published in Westminster Hall, and other places thereabouts, and therefore needed no secrecy.

"And that by the 'great Leviathan,' it should be understood to be meant of the lord Richardson, there is no colour for it, my lords.

"As for Osbaldston, he hath long been a turbulent meddler, and a false intelligencer of the affairs of state; I may say he is 'Hocus Pocus,' and a juggler in the affairs of state; and yet I am sorry that I shall charge him with that which is worse than the charge laid against him in the information, for he is guilty of gross and wilful perjury, for he hath denied upon oath that which was plainly proved against him.

"Another argument is, This Osbaldston is now run away, which in our sense doth shew a guiltiness of the offence. 25 H. 5. 'One being 'indicted for felony if he runs away, he then 'forfeits his goods.'

"As for my lord bishop of Lincoln, he stands upon three things. 1. That he received not the letters. 2. That he did not publish them. 3. That he did not entertain them.—For the first, it is proved by witnesses, That two days after Twelve-tide he gave order that his Letters should be opened that concerned his law suits, so that thereby he might colour the matter, that they might not come into his own hands. Again he doth not say, that he did not receive the letter of the 9th of January; besides his own Letter of the 2d of January, makes mention of three Letters which he received from Mr. Osbaldston: in one of which he should contribute money to the use of the Lord Treasurer for the ruin of the 'little great man:' so that it is confessed by his own writings that he did receive them. And the Letter of the 30th Jan. was sent by a special messenger to Lincoln, therefore it is most probable that he received it, and your lordships have heard Cadwallader Powel say, That my lord of Lincoln

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demanding of him, Whether any of Osbaldston's letters were found? And he answering that they were. Then said the bishop, Osbaldston is undone: so that I conceive your lordships will not think, but that his lordship received the letters.

"But it is objected, That this is no offence: for, say they, it is no offence to receive libellous letters, and to keep them private. And as for my lord of Lincoln, he did never publish any of them: and there is difference betwixt Osbaldston's Case and my lord bishop of Lincoln's, for they were only sent to my lord of Lincoln, but he did never contrive nor publish any of them.—It is evident that he did publish these, for they were spoken of by Powel and Walker, and the women did talk of them in the market.

"But they say, That some of his attendants never heard him publish any such Speeches at his own table. It is like he did not make it his table-talk: but, my lord, under favour, my lord of Lincoln hath been too forward to entertain and publish libellous letters. If any receive libellous letters, the receiving is not a publishing of them, as it is in 9 Report fol. 59. In the 5th Report, there is difference betwixt Words and Letters, which concern a private man and a public officer. If they do concern a private man, it is no offence in him that conceals them: but if they concern a public officer, he that doth conceal them, is guilty, and shall be punished for a libeller. And I conceive my lord of Lincoln to be guilty of perjury in this cause: and, my lords, that perjuries are punishable in this court, (though they are not charged in the information) doth appear. Hill. 2 Eliz. & Hill. 4 Eliz.

"My lords, I do wish that this age that is so much infected with devising and divulging scandalous Letters and Words, that some exemplary example might be made, that we might hear no more of such scandalous matters.

"My lords, before the Conquest they had very strict laws against Libellers, (as to have their tongues slit); and in the time of Ed. 1. and Ed. 2. there were special commissioners appointed to enquire after libellers, as in the close Roll. Parliament, and so I humbly leave them to your lordships."

The Court proceeding to Sentence, declared in general, "That they had received satisfaction that Mr. Osbaldston was the contriver, writer, and publisher of those odious Appellations of those two great persons. That his Defence was ridiculous, and that his end was the ruin of the archbishop of Canterbury.—As for the bishop of Lincoln, they said, he was a person of quality, parts, and abilities, and one that once sat as judge in this court: that he shewed himself very indiscreet in concealing those letters, and had thereby made himself guilty of a high crime."

But for further satisfaction, take these Speeches following made in Court at the said Censure.

Sir *John Finch*, Lord Chief Justice of the Common Pleas, spake first, the Lord Cottington being absent.

"My Lords; There are two Defendants, so there are two Charges in the Information against them. 1. They are charged with giving nicknames unto two honourable persons of this realm. 2. They are charged to plot, and contrive to work an utter ruin and overthrow to my lord archbishop of Canterbury. And in those Charges, I shall observe several steps and degrees. 1. An endeavour and agreement between Osbaldston and my lord bishop of Lincoln, to reproach and scandalize these two noble persons. 2. A publishing and divulging of the same.—In the second Charge I observe these steps. 1. A false rumour raised by them. 2. A publishing of the same. 3. An endeavour to work the ruin of the lord archbishop of Canterbury, by contributing charges to effect the same.

"And how far Osbaldston and the bishop of Lincoln are guilty, I appeal to your lordships. I shall now shew the extent of the Information, the Charge being laid to be in or about the 10th Feb. M. 9 Car. Which Charge doth comprehend all libellous letters, either before or since 9 Car.

"But it's true, if in the Letters will not appear that sense which is contained in the Charge, then they shall not be within the charge of the Information, and therefore the Information admits of as much favour to the Defendants as may be: for this court doth rather desire to find men innocent than guilty.

"I shall now come to the particulars, and shall herein observe the course of the Defendant's counsel, who have distinguished my lord of Lincoln's Case from Osbaldston's, and so shall put a difference between them: for though Osbaldston be guilty, yet it's possible that my lord of Lincoln may not be guilty.

"And as for Osbaldston, I hold him as clearly guilty of the Charges in the Information, as any have been sentenced in this court. For first, Osbaldston was the contriver and publisher of those scandalous Letters; and I think there is no doubt at all, but that they were meant of the late Lord Treasurer, and the now lord bishop of Canterbury. Secondly, your lordships may observe, what interpretation the lord bishop of Lincoln would make of them: How that my lord of Lincoln himself did conceive that he meant the archbishop of Canterbury.—The third is by Witnesses: 1. Walker said, That he saw divers letters wherein Osbaldston explained his meaning, That he meant my Lord Treasurer, and my lord's grace of Canterbury. Again he saith, he saw some letters wherein Osbaldston used by-words, which my lord of Lincoln did not understand until Osbaldston had explained them. Again he saith, His lordship did explain many of these dark words that Osbaldston wrote unto him, shewing that he meant my lord's grace of Canterbury. Again he saith, That Osbaldston spoke base words of

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the archbishop. And these be his Reasons why he conceives, that by the words in the letters he means the archbishop of Canterbury; which I conceive be very good and sufficient reasons.

"The second witness is Cadwallader Powel, who saith, He used these words in a letter, 'The little vermin, the false mediator, the Ho-'cus Pocus.' And the bishop of Lincoln being in the Tower, demanded of Powel, Whether any of Mr. Osbaldston's letters were found? who answered, That they were found; Then, said the bishop, Osbaldston is undone.

"Thus I have thought good to make a difference betwixt my lord of Lincoln and Mr. Osbaldston; for it is confessed by my lord of Lincoln, that by one of those is meant my Lord Treasurer; but that shall not convict Mr. Osbaldston, but it is plain by his own words what he meant. And that by those words should be meant Dr. Spicer, I hold it so ridiculous a defence, that I think he could not have deceived his school boys with it. And that by 'Levia-'than' should be meant my lord Richardson, there is no colour for that; though for Dr. Spicer were confounded, what would the king or state suffer by his ruin or confusion? so that certainly it is meant of the archbishop of Canterbury. —For Mr. Osbaldston's going away, it is not judicially known unto me, and therefore leave it to your lordships.

"And as for the second Charge, That he did plot and contrive for the ruin of the lord archbishop of Canterbury, I hold that he is guilty, and that he did stir my lord of Lincoln, to contribute money for that purpose.

"For my lord of Lincoln, I shall only say this, That the Letter of the 9th of January is such a turbulent and scandalous Libel, that a man of place and quality should not give any way thereunto; but that he should receive it, entertain it, and publish it, this shews that he had long a rancor and hatred towards my lord archbishop. And for the nick-names, I shall find my lord of Lincoln guilty as far forth as Mr. Osbaldston, for he did entertain these letters, and did publish them, and it was an agreement and confederacy so to do.

"By way of Defence my lord bishop of Lincoln's counsel did allege; 1. That there was an agreement between Osbaldston and my lord of Lincoln. Again, they said, That there was no certain appellation of my lord archbishop of Canterbury. 2. There was proof that my lord of Lincoln did not speak any such words at his table. 3. They endeavoured to prove, That my lord of Lincoln never wrote any Letters containing any libellous matter; when as there was a letter under his own hand, which he would not confess, although he was brought like a bear to the stake, and three times examined about it.

"Again they said, That he did not receive them, and yet he wrote an answer to them. Again, admit he did receive them, yet he did not publish them, but only delivered them to Mr. Walker his secretary. Mr. Attorney well remembered the law, That if a libellous letter concerning a private person, then he may conceal it; but if it concern a public officer, then the concealing of it makes him guilty thereof: and that the letters were published is most certain, for they were openly spoken of by women in the market.

"Another thing of Mr. Recorder's was this; That if my lord bishop of Lincoln did understand Osbaldston's meaning, yet he did not understand that he meant my Lord Treasurer, and my lord's grace of Canterbury.—Then, I say, he hath scandalized my Lord Treasurer, and my lord archbishop of Canterbury; for by his own writing he saith, That it was meant of these persons.

"The next is, the charge of a Plot laid for the ruin of my lord archbishop of Canterbury, but I will not condemn my lord bishop of Lincoln for that.

"The next Defence of Mr. Recorder was from this, That Mr. Osbaldston wrote to the bishop of Lincoln, saying, 'I hope you will 'pick out the meaning,' &c. so that there was no confederacy and agreement between them. 1. I say, he received the letters, and published them. 2. He was so far from nipping these scandals in the buds, that he enquired further after them. 3. That he was ready and willing to contribute money towards the ruin of my lord archbishop of Canterbury.

"I am sorry that a man of his rank and condition, should make himself companion with a school-master. And as for the aspersion which they cast upon Mr. Walker, to take away his testimony, I see no just cause thereof. For they said, Either his Deposition is impossible and beyond his knowledge, or else that his reasons that moved him thereunto, are insufficient. But for my part I know not how a better reason can be given.

"Another objection against Walker is this, That it was long before these Letters were brought forth; and that these are not all, but there should be a third letter. I say, It is a wonder that so many were brought forth now. But that they had been lost, or that my lord of Lincoln had burnt them: for had I a friend that I professed so much kindness to, as he did to Osbaldston, I should be very sorry that he should suffer for his letters.

"For the testimony of Cadwallader Powel, I hold his testimony as fit to be taken as my lord bishop of Lincoln.—And for the Charge of the Defendants counsel, for the subtil prosecution by the solicitor Kilvert, I shall say little, I know him to be of a good carriage in other businesses, therefore if any fault be, I shall only desire that it may be amended for the time to come. I hold that these Witnesses stand upright; and as for the other witnesses, I submit unto your lordships, for in sentence I must consider the nature of the cause, and the persons. First, I shall not acquit my lord bishop of Lincoln, nor condemn him so much as Osbaldston. I must consider the persons offending, and the persons against whom they have offended. For the persons offended, the first is the lord treasurer of England, one of his majesty's privy-council

And the second is the metropolitan of England, who hath ever carried himself with great trust and fidelity towards his majesty and the public good. And I verily think, that none can accuse him of the least corruption. In a court where most causes of the clergy are tried, I did never receive any private message from his lordship in the behalf of any clergyman, which is a thing to be much observed in him.

"For Mr. Osbaldston, he hath been a parson, a prebend, and a schoolmaster. My lords, I will not suffer him, he is so turbulent a person, and scandalous libeller, to teach and instruct others. I would have him therefore deprived of all his spiritual dignities and promotions, that he never have any place in the church; neither hold I it fit that he should teach scholars, (should I do him justice, I should adjudge him some severe corporal punishment:) I would have him deprived in the high-commission court, and then to be set on the Pillory in this Palace-Yard. And that he may be an example to his boys, I would have him also to stand in the pillory in the Dean's-Yard, and one ear to be nailed in the Palace, and the other ear to be nailed in the Dean's-Yard. I do fine him 5,000*l.* and imprisonment during the king's pleasure.—And I do fine my lord bishop of Lincoln 5,000*l.* And I give to my lord archbishop of Canterbury, 5,000*l.* a-piece for damages."

My Lord Chief Justice *Bramston*. "My lords; There are two Defendants, and they have made two defences. I find my lord bishop of Lincoln to be guilty, though not so full and in so high a nature as Mr. Osbaldston. They are charged to plot and confederate together, to scandalize two honourable persons, and to raise discord in the state, and to seek the ruin and overthrow of my lord archbishop of Canterbury. Osbaldston wrote a letter of the 9th of January, and other letters, which my lord bishop of Lincoln is charged with to receive and publish. That Osbaldston is guilty of every part of the Charge, I shall not need to make any question; neither shall I much stand upon the validity of the witnesses, for I see nothing but that he is guilty of all the charge.

"I will begin with the first letter of the 9th Jan. in which he would have two other persons meant there, and not my lord treasurer, and my lord's grace of Canterbury; but the one to be meant my lord Richardson, and the other doctor Spicer.

"Now what comparison was there between those two persons? The one was Lord Chief Justice, and as for the other, every one knows what he is; so that it cannot be meant of these two persons, for there is no comparison between them. And for these words, the 'little 'meddling Hocus Pocus works his own confu-'sion,' &c. How would this be meant of Dr. Spicer? For how did Dr. Spicer work his own confusion? And who would give so much to confound Dr. Spicer? He is no such eminent person, that any should give so much to confound him. So that this letter is very clear against Osbaldston.—And it shews a petulant spirit, and an inveterate hatred and malice, that he did long bear against my lord of Canterbury, without any reason or cause at all, for he doth not shew that he had ever received any wrong or injury from his grace.

"I come now to the other letter, wherein Osbaldston writ to the bishop of Lincoln to contribute charges to my Lord Treasurer, for 'the 'ruin of the little great man;' by which must needs be meant the archbishop of Canterbury: so that I shall not stand longer upon Mr. Osbaldston; for if there were no witnesses against him, yet I find matter enough in his own letters to prove him guilty of the whole charge, and therefore I sentence him with my lord Finch.

"For my lord of Lincoln, I cannot sentence him as a Libeller, for there must be either a contriving or a publishing to make a man a libeller, as Mr. Recorder well observed. But I find him guilty of this charge, That he received the libellous letters; and of this charge, That he assented to contribute money for the ruin of my lord archbishop of Canterbury.

"But it is objected, That he concealed the libel, and therefore he is not guilty. The concealing of it doth not clear my lord bishop of Lincoln. For (as Mr. Attorney well observed) there is a difference between a Letter that concerns a private person, and a public officer. If a libellous Letter concern a private person, he that receives it may conceal it in his pocket, or burn it; but if it concern a public person, he ought to reveal it to some public officer or magistrate. But it is true, if he divulge it to any but to a magistrate, he is a libeller; and why should my lord of Lincoln keep these letters by him, but to the end to publish them, and to have them at all times in a readiness to publish upon every occasion?

"For his being degraded, I leave it to those of the Ecclesiastical court, to whom it doth belong. And for the other part of his Sentence of the Pillory, I am very sorry and unwilling to give such a Sentence upon any man of his calling and degree. But when I consider the quality of the person, and how much it doth aggravate the offence, I cannot tell how to spare him: for these considerations that should mitigate, makes the offence the greater, which makes me join with my lord Finch in that part also.

"For my lord of Lincoln, I do fine him 3,000*l.* and imprisonment. And seeing the Offence is against so honourable a person as my lord's grace of Canterbury, and there is not the least cause of any aggrievance or wrong that he hath done to my lord of Lincoln, therefore in damage I join with my lord Finch."

Secretary *Windebanck*, and Secretary *Cook*, did both join with my lord Brampston for the bishop of Lincoln, and with my lord Finch for Mr. Osbaldston.

Mr. *Comptroller*. "My lords; For Osbaldston, considering his place, I cannot but condemn him very much, for by what hath been alledged, I verily believe that he did mean my

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Lord Treasurer, and my lord archbishop of Canterbury: And my lord bishop of Lincoln, and Mr. Osbaldston, are both guilty of crimes in a high nature; one would have thought that my lord bishop of Lincoln, being a person of that place and quality, should not have run himself into such danger as to have meddled with such matters; for had he not met with good counsel, I conceive that he had plunged himself in as deep as Osbaldston in these practices. And as for Osbaldston's Sentence, I agree with my lord Finch. And for my lord bishop of Lincoln, I hold with my lord Bramstone. As for my lord of Canterbury his carriage, it is well known to be upright, and therefore I leave it."

Lord *Newburgh*. "My lords; For Osbaldston, I find him guilty of every part of the charge; for the other I cannot sentence so deep; for I think my lord of Lincoln is not guilty of the plotting and confederating, for the scandalizing of those two honourable persons; I leave it to your lordships judgment, and lay all the charge upon Osbaldston."

The Earl of *Dorset's* Speech at the Sentence of Mr. Osbaldston:

"Aristotle in his politicks, admits not in the government, of any school-master to the exercise of civil duties, school-masters commonly proving the apes of tyranny; and being used to imperiousness over scholars, if you put a sword of justice into his hand, you may easily guess how he will lay about him in the state and city. I know not with what spirit of vanity this school-master was possessed, but we see the monstrous birth of it; if the pedant had kept within his rules, he might have been taught not to have disturbed government. Look upon this pragmatical person, and behold the fact, and what were the motives, what the reasons to bring himself upon the stage. His ill thoughts exprest in ink as black as his crime; his pen was steeped in vinegar and gall. What was it that stained the bishop of Lincoln's ear with the poison of ignominious titles? It was the pedant. Who was it, that as a thief that had stolen another's good name away, cries, burn my letters, on purpose to go in darkness of the night? It was a parson. Who was it that endeavoured to stain the purity of my lord archbishop's honour with foul aspersions of titles, 'little grace, little urchin, vermin,' &c.? It was Mr. Osbaldston.

"Well, I will speak what I think, I fear none but God and the king, and I speak in truth, I am sure I shall offend neither of them, I have enquired of them who are learned in the laws, who say, That the plainest sense is to be taken. The divines will tell you, that the easy places shall explain the more obscure. And if any man would examine those letters, and with judicious comparing the title of 'little grace' with the other, he will be forced to confess the sense of the other, or else be blind at noon-day. But as truth may be cleared by strong and solid reason, so it may be darkened and shadowed by the colours of probability of appearances.

"But, my lords, I think the school-master alleges his services to the Commonwealth, and his being slighted for it; that he hath been these many years, and dedicated his pains and time for the good of the flowers of the kingdom, *generosa debentur*. But I will consider him as a man subject to his passion, (which to take away, were to take the man himself:) I will allow him his infirmities, but observe a little his envy, see his merits and deserts, which he hath so foully abused, with the height of insolency and bold access, to the very secrets of empire and government; to the disgrace of those men of which the Commonwealth consists. I know not, (my lords) the fault of the man may transport my Speech that I abuse your patience; but I shall give my censure of him; I learned in the university, how that a syllogism doth ever follow the worst part, 'sequitur deteriorem ad partem,' I am sure his letter doth: he might have found a better medium to make up a syllogism of a libel, for he hath concluded in the worst body of all the figures, viz. in Bocardo: So I must concur with my lord Finch in censure.

"As for my lord of Lincoln, linked in this cause, I honour the man for many causes, in many relations, but for his secretary Walker, and the clerk of his kitchen, and the rest (where-ever the letters were found); they have dealt like Acteon's hound, that turned against and devoured his master; the false secretary, the unjust steward, and unlawful clerk of the kitchen, who were fed at my lord bishop of Lincoln's table in his prosperity, and now in his adversity they fall upon their master to devour him. I must say of him, he hath forgotten himself, and agree to the censure which the lord chief justice Bramstone hath given against him. He did not as Peter did, when he had denied his master, gone out and weep bitterly for his offence; but he justifies himself, and therefore he is fallen into the lime-twigs of his adversary."

The Earl of *Arundel*. "My lords; For Osbaldston, I find him guilty of every part of the charge; and that he is not sentenced in a higher nature is, 'causa de bona fortuna,' for had he been suffered to have persisted in his course, he had surely fallen into most dangerous error. And therefore I join in sentence for him with my lord Finch. I am sorry for my lord bishop of Lincoln, he hath shewed himself very indiscreet, being a person of place and quality, he now falls low in his estate and dignity; and these things will make his spirit fall lower than his body; and therefore I agree in all things with my lord Finch."

Marquis *Hamilton*. "My lords; For Osbaldston, I find him guilty of the whole Charge. For my lord bishop of Lincoln, I cannot find him so deeply guilty as Osbaldston. But certainly my lord's grace of Canterbury hath been exceedingly wronged. Therefore I give da-

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mages with my lord Finch. And for Osbaldston, I sentence him with my lord Finch. And as for my lord bishop of Lincoln, I join with my lord Brampston."

The Earl of *Manchester*, Lord Privy-Seal. "My lords; For Osbaldston, if you take his words, his meaning, and the end, they will appear to be very heinous. 1. His words, to bring contempt and disgrace upon my lord bishop of Canterbury. 2. His meaning is expressed in the words themselves, to be against two honourable persons. 3. And for the end, that was most dangerous and pernicious. It was to overthrow and work the confusion and ruin of my lord's grace of Canterbury.

"Setting aside all the witnesses, I will condemn my lord Bishop of Lincoln out of his own mouth, for he denies all. 1. He denies the receiving of the letter. 2. The entertaining of them. 3. The publishing of them. Not as Peter did when he had denied his Master, to go out and weep bitterly for his offence, but to justify himself: Yet how can my lord of Lincoln deny the letter that he wrote with his own hand, and yet he will not confess it to be his own letter.

"And after he was prisoner in the Tower, he called to Mr. Cadwallader Powel, and demanded if any of Mr. Osbaldston's letters were found? Who answered, That they were found. Then said the bishop, Osbaldston is undone. 2. He desired that they should be kept close and secret. 3. Though they were kept close, and only put into the pocket, if they concern a public person, he is a libeller.

"For Osbaldston, besides all the corporal punishment, I hold fit that he should acknowledge his offence in writing to my lord's grace of Canterbury.

"And as for the bishop of Lincoln, I hold that he should also make an acknowledgment in writing to the archbishop, for he is a person of great place and quality. And my lord of Lincoln is under canonical obedience to the archbishop by his oath, and disobedience is a breach of his oath; therefore he should acknowledge his offence under his own hand.

"For my lord's grace of Canterbury, he hath ever carried himself with much gravity in his place, and piety towards God and the king, and the public good; therefore I leave him in honour as I found him, and sentence the bishop of Lincoln with my lord Bramstone: and Osbaldston with my lord Finch."

The Earl of *Holland* joined in sentence with my lord Finch for Osbaldston, and with my lord Bramstone for the bishop of Lincoln.

The *Lord Keeper*. "My lords; If I be not mistaken, it is misspending of time in opening the cause, therefore I shall use as much brevity as may be. And, first, I shall begin with the first letter, and think it fit that this letter, and all the copies thereof, should be suppressed. Yet I may make this use of it, That Osbaldston and my lord bishop had a long time continued intercourse of writing scandalous letters, and false news.—Again, I make this use of it, That my lord of Lincoln having received such a letter so scandalous against the king and state, did conceal the same.

"My lords, for the letter of the 9th of Jan. my lord bishop of Lincoln doth deny that he received it; and therefore I think that he conceived it to be a scandalous letter, which made him to deny it. Again, he kept the letters by him, that he might have the words ready to tell unto every one at his pleasure. And as for the letter of the 30th of Jan. he denieth to make a perfect answer to it.

"It was the saying of one that was late Lord Chancellor, 'That he never liked a cause, 'where there were divers Answers in it;' neither can I like this, when my lord bishop of Lincoln hath been so often examined, and will not make a perfect answer, for he hath thrice been examined upon this letter, which is a shrewd argument unto me, that he knew well that there was scandalous matter contained in it.

"Next, my lords, is the publishing of these libellous letters, and I think it very fit that my lord of Lincoln should be charged with the publishing of them. If they were in the band-box, then that was a publishing of them; and he delivered a letter to his secretary, which was a publishing thereof.—But it is true, if a man deliver a letter to his secretary, and command that he should keep it secret, I conceive that is not a publishing of it. If there were no other proof but this, I should think my lord bishop of Lincoln and Mr. Osbaldston to be guilty, not only of contriving, but also of publishing and divulging scandalous Libels against the lord archbishop of Canterbury, and the state.—As for Witnesses, although there is no need, for it is plain without witnesses, yet there be divers witnesses that prove it.

"Now it remains that I should proceed to Censure. It concerns the late Lord Treasurer, one of his majesty's privy-council, and my lord archbishop of Canterbury, two honourable persons: And my lord archbishop had not only been a friend to the bishop of Lincoln, but a faithful mediator for him to his majesty, and was always very faithful in returning his majesty's answer unto him; and yet notwithstanding all this, my lord of Lincoln hath done many heinous offences against the said archbishop of Canterbury. For Osbaldston his Censure, I agree with my lord Finch, and do add thereunto, confession of the offence, and submission. And for my lord bishop of Lincoln, I agree with my lord Bramstone."

The SENTENCE of the Court was,

"That Mr. Osbaldston should be fined 5,000*l.* to the king, and pay 5,000*l.* damages to the archbishop; be deprived of all spiritual dignities and promotions; imprisoned during the king's pleasure, and make submission.—That the bishop of Lincoln be fined in 5,000*l.* to the king, and 3,000*l.* to the archbishop; to be imprisoned during the king's pleasure, and

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to make submission.—And Osbaldston was sentenced to stand in the pillory in the Dean's-yard, before his own school, and his ears to be only nailed to the pillory."

It so happened, though the report was that Osbaldston was run away, that he was in Court standing in the croud at the Censure; and when he heard the said censure of some of the lords, he guessed the cause would go against him, and knowing the rule of the court, That if the warden should espy him in court, he might command his tipstaff to apprehend him; as soon as the major part of the court had past Censure upon him, although the Lord Keeper had not then given his sense; therefore he got out of court, went to his study at the school, burnt some papers, and writ on a paper, which he left on his desk, 'That if the archbishop enquire after me, tell him, I am gone beyond 'Canterbury.' Whereupon messengers were sent to the port-towns to apprehend him; but he lay hid in a private house in Drury-Lane, till the parliament met in November, 1640.*

Concerning this Bishop and this Case lord Clarendon writes thus: "Dr. Williams, as is said, was a man of a very imperious and fiery temper; he had been Keeper of the Great Seal of England in the time of king James. After his removal from that charge, he had lived splendidly in his diocess, and made himself very popular amongst those who had no reverence for the court; of which he would frequently, and in the presence of many, speak with too much freedom, and tell many stories of things and persons upon his own former experience; in which, being a man of great pride and vanity, he did not always confine himself to a precise veracity, and did often presume in those unwary discourses, to mention the person of the king with too little reverence. He did affect to be thought an enemy to the archbishop of Canterbury; whose person he seemed exceedingly to contemn, and to be much displeased with those Ceremonies and Innovations, as they were then called, which were countenanced by the other; and had himself published, by his own authority, a Book against the using those Ceremonies, in which there was much good learning, and too little gravity for a bishop. His passion and his levity, gave every day great advantages to those who did not love him, and he provoked too many, not to have those advantages made use of: so that, after several Informations against him in the Star-Chamber, he was sentenced, and fined in a great sum of money to the king, and committed prisoner to the Tower, without the pity, or compassion of any, but those, who, out of hatred to the government, were sorry that they were without so useful a champion; for he appeared to be a man of a very corrupt nature, whose passions could have transported him into the most unjustifiable actions. He had a faculty of making relations of things done in his own presence, and discourses made to himself, or in his own hearing, with all the circumstances of answers, and replies, and upon arguments of great moment; all which, upon examination, were still found to have nothing in them that was real, but to be the pure effect of his own invention. After he was sentenced in the Star-Chamber, some of his friends resorted to him, to lament, and condole with him for his misfortune, and some of them seemed to wonder that in an affair of such a nature, he had not found means to have made some Submission, and Composition, that might have prevented the public hearing, which proved so much to his prejudice in point of reputation, as well as profit. He answered them with all the formality imaginable, 'That they had reason in-'deed to wonder at him upon the event; but 'when they should know how he had governed 'himself, he believed they would cease to think 'him worthy of blame.' And then related to them, 'That as soon as publication had passed 'in his cause, and the books were taken out, he 'had desired his council, who were all able 'men, and some of them very eminent, in the 'vacation time, and they at most leisure, to 'meet together, and carefully to look over, and 'peruse all the Evidence that was taken on both 'sides; and that then they would attend him 'such a morning, which he appointed upon 'their consent, at his own house at Westmin-'ster: That they came at the time appointed; 'and being then shut up in a room together, he 'asked them, whether they had sufficiently pe-'rused all the Books, and were throughly in-'formed of his Case? To which they all an-'swered, that they had not only read them all 'over together, but had severally every man by 'himself perused them again, and they be-'lieved they were all well informed of the 'whole. That he then told them he had de-'sired this conference with them, not only as 'his council, by whose opinion he meant to 'govern himself, but as his particular friends, 'who, he was sure, would give him their best 'advice, and persuade him to do every thing 'as they would do themselves, if they were in 'his condition. That he was now offered to 'make his peace at court, by such an humble 'Submission to the king, as he was most in-'clined, and ready to make; and which he 'would make the next day after his cause was 'heard, though he should be declared to be in-'nocent, of which he could make no doubt; 'but that which troubled him for the present, 'was, that the infamousness of the Charge 'against him, which had been often exposed, 'and inlarged upon in several motions, had 'been so much taken notice of through the 'kingdom, that it could not consist with his 'honour to divert the hearing, which would be 'imputed to his want of confidence in his inno-'cence, since men did not suspect his courage, 'if he durst rely upon the other; but that he

* Some curious particulars, respecting this Case, are collected by Mrs. Macaulay, in the second volume of her History, p. 434 et seq.

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'was resolved, as he said before, the next day 'after he should be vindicated from those 'odious aspersions, he would cast himself at the 'king's feet, with all the humility, and sub-'mission, which the most guilty man could 'make profession of. It was in this point he 'desired their advice, to which he would, with-'out adhering to his own inclination, entirely 'conform himself; and therefore desired them, 'singly in order, to give him their advice.' He repeated the several, and distinct discourse every man had made, in which he was so punctual, that he applied those phrases, and expressions, and manner of speech to the several men, which they were all taken notice of frequently to use; as many men have some peculiar words in discourse, which they are most delighted with, or by custom most addicted to: and in conclusion, 'That they were unanimous 'in their judgments; that he could not, with 'the preservation of his honour, and the opinion 'of his integrity, decline the public hearing; 'where he must be unquestionably declared 'innocent; there being no crime, or misde-'meanor proved against him in such a manner, 'as could make him liable to censure: they 'all commended his resolution of submitting to 'the king as soon as he had made his innocence 'to appear; and they all advised him to pur-'sue that method. This, he said, had swayed 'him; and made him decline the other expedi-'ent, that had been proposed to him.'

"This relation wrought upon those to whom it was made, to raise a prejudice in them against the justice of the cause, or the reputation of the council, as they were most inclined; whereas there was not indeed the least shadow of truth in the whole Relation; except that there was such a meeting, and conference, as was mentioned, and which had been consented to by the bishop upon the joint desire, and importunity of all the council; who, at that Conference, unanimously advised and desired him 'to use all the means and friends he 'could, that the cause might not be brought to 'hearing; but that he should purchase his 'peace at any price; for that if it were heard, 'he would be sentenced very grievously, and 'that there were many things proved against 'him, which would so much reflect upon his 'honour, and reputation, and the more for 'being a bishop, that all his friends would 'abandon him; and be for ever after ashamed 'to appear on his behalf.' Which advice, with great passion, and reproaches upon the several persons for their presumption, and ignorance in matters so much above them, he utterly and scornfully rejected. Nor indeed was it possible, at that time, for him to have made his peace; for though upon some former addresses, and importunity on his behalf by some persons of power, and place in the court, in which the queen herself had endeavoured to have done him good offices, the king was inclined to have saved him, being a bishop, from the infamy he must undergo by a public Trial; yet the bishop's vanity had, in those conjunctures, so far transported him, that he had done all he could to have insinuated, 'that the court was 'ashamed of what they had done; and had 'prevailed with some of his powerful friends 'to persuade him to that composition:' Upon which the king would never hear more any person who moved on his behalf.

"It had been once mentioned to him, whether by authority, or no, was not known, 'that 'his peace should be made, if he would resign 'his bishopric, and deanery of Westminster, for 'he had that *in commendam*, and take a good 'bishopric in Ireland; which he positively re-'fused; and said, he had much to do to defend 'himself against the Archbishop here; but if 'he was in Ireland, there was a man, meaning 'the earl of Strafford, who would cut off his 'head within one month.'

"This Bishop had been for some years in the Tower, by the Sentence of the Star-Chamber, before this parliament met; when the lords, who were the most active and powerful, presently resolved to have him at liberty. Some had much kindness for him; not only as a known enemy to the archbishop of Canterbury; but as a supporter of those opinions, and those persons, which were against the Church itself. And he was no sooner at liberty, and brought into the house, but he defended, and seconded the lord Say, when he made an invective with all the malice, and bitterness imaginable, against the archbishop then in prison; and when he had concluded, that bishop said; 'that he had 'long known that noble lord, and had always 'believed him to be as well affected to the 'church as himself;' and so he continued to make all his address to that lord, and those of the same party. Being now in full liberty, and in some credit, and reputation, he applied himself to the king; and made all possible professions of duty to his majesty, and zeal to the church; protesting 'to have a perfect detes-'tation of those persons, who appeared to have 'no affection or duty towards his majesty, and 'of all evil intentions against the religion esta-'blished; and that the civility he had expressed 'towards them, was only out of gratitude for 'the good will they had shewed to him; and 'especially that he might the better promote 'his majesty's service.' And it being his turn shortly after, as dean of Westminster, to preach before the king; he took occasion to speak of the Factions in Religion; and mentioning the Presbyterian Discipline, he said, 'it was a go-'vernment only fit for taylors and shoemakers, 'and the like: not for noblemen, and gentle-'men:' which gave great scandal, and offence to his great patrons; to whom he easily reconciled himself, by making them as merry with some sharp sayings of the court, and by performing more substantial offices for them.

"When, upon the Trial of the earl of Strafford, it was resolved to decline the judgment of the house of peers, and to proceed by Bill of Attainder; and thereupon it was very unreasonably moved, 'That the bishops might have 'no vote in the passing that act of parliament;

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'because they pretended it was to have their 'hand in blood, which was against an old 'canon;' this bishop, without communicating with any of his brethren, very frankly declared his opinion, 'that they ought not to be present;' and offered, not only in his own name, but for the rest of the bishops, 'to withdraw always 'when that business was entered upon:' and so betrayed a fundamental right of the whole Order; to the great prejudice of the king, and to the taking away the life of that person, who could not otherwise have suffered.

"And shortly after, when the king declared, that he neither would, nor could in conscience, give his royal assent to that Act of Attainder; when the tumults came about the court with noise and clamour for justice; the lord Say desired the king to confer with his bishops for the satisfaction of his conscience; and desired him to speak with that bishop in the point. After much discourse together, and the king insisting upon many particulars, which might induce others to consent; but were known to himself to be false; and therefore he could never in conscience give his own consent to them; the bishop, as hath been mentioned before, amongst other arguments, told him; 'that he must consider, that as he had a 'private capacity, and a public, so he had a 'public conscience as well as a private; that 'though his private conscience, as a man, would 'not permit him to do an act contrary to his 'own understanding, judgment, and conscience; yet his public conscience, as a king, 'which obliged him to do all things for the 'good of his people, and to preserve his kingdom in peace for himself and his posterity, 'would not only permit him to do that, but 'even oblige, and require him. That he saw 'in what commotion the people were; that his 'own life, and that of the queen's, and the royal 'issue, might probably be sacrificed to that 'fury; and it would be very strange, if his 'conscience should prefer the life of one single 'private person, how innocent soever, before all 'those other lives, and the preservation of the 'kingdom.'

"This was the argumentation of that unhappy casuist; who truly, it may be, did believe himself; for towards the end of the war, and when the king's power declined; he, being then an archbishop, did in person assist the rebels to take a castle of the king's; in which there was a garrison, and which was taken by a long siege; because he might thereby the better enjoy the profits of his own estate, which lay thereabouts. Upon all these great services he had performed for the party, he grew every day more imperious; and after the king thought it necessary to make him archbishop of York, which, as the time then was, could not qualify him to do more harm, and might possibly dispose, and oblige him to do some good; he carried himself so insolently, in the house and out of the house, to all persons, that he became much more odious universally, than ever the other archbishop had been; having sure more enemies than he, and few or no friends, of which the other had abundance. And the great hatred of this man's person and behaviour, was the greatest invitation to the house of commons so irregularly to revive that Bill to remove the Bishops."

Wilson, however, in his History of the Life and Reign of James the First, speaks very favourably of him; and Hacket, bishop of Litchfield (who had been his chaplain) has left an ample and encomiastic account of his Life. He was *eunuchus ab utero*; yet Wilson tells us that his intimacy with the countess of Buckingham gave rise to scandal: he had been chaplain to Bacon, from whom the Great Seal being taken in May 1621, it was in July following (having been held two months by commissioners) given to Williams, as Lord Keeper. In the same month he was made bishop of Lincoln. He held the seal somewhat more than four years. From Lincoln, he was translated to York in 1641, and he died in 1650. He seems to have been of a rash and insolent, though servile, temper, and of selfish, temporising and trimming political conduct. For more respecting him, see the Note to vol. 2, p. 1163, and the Case of the twelve Bishops, A. D. 1641, *post*.—He had preached king James's funeral sermon, and printed it with the title of "Great Britain's Solomon." The text was 1 Kings, c. xi. ver. 41, 42, and part of 43. Of the Discourse Harris in his Life of James gives some specimens, which will probably be sufficient for most readers. The flattery is at least as gross as might be expected: the style is pedantic, agreeably to the taste and practice of the time. The preacher exhibits sufficient powers of invention in his praises of the modern Solomon, and very considerable industry and ingenuity in the discovery of resemblances between him and his prototype.

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147. Proceedings in the Case of SHIP-MONEY, between the KING and JOHN HAMPDEN,* esq. in the Exchequer, 13 CHARLES I.† A. D. 1637.

The SPEECH of THOMAS Lord COVENTRY, Lord Keeper of the Great Seal of England, by command from his majesty, to all the Judges of Assize of England, in the Star Chamber, June 17, 1635.

MY Lords the Judges; The Term being done and ended, the Assizes are at hand: you are to divide yourselves for your several circuits. Circuits are for the service of the king and the good of the people; they are the execution of the king's laws, and administration of justice. In the Term, the people follow and seek after Justice; but in the Circuit, Justice followeth and seeketh after the people. So gracious is the frame and constitution of the king's government, that twice a year, at the least, Justice followeth the subjects home to their own doors; which, as it is a great ease to the trouble, charge, and travail of the country; so it giveth the peo-

* "Mr. Hampden was a man of much greater cunning, and it may be, of the most discerning spirit, and of the greatest address and insinuation to bring any thing to pass which he desired, of any man of that time, and who laid the design deepest. He was a gentleman of a good extraction, and a fair fortune, who, from a life of great pleasure and licence, had on a sudden retired to extraordinary sobriety and strictness, and yet retained his usual chearfulness and affability; which, together with the opinion of his wisdom and justice, and the courage he had shewed in opposing the Ship-money, raised his reputation to a very great height, not only in Buckinghamshire, where he lived, but generally throughout the kingdom. He was not a man of many words, and rarely begun the discourse, or made the first entrance upon any business that was assumed; but a very weighty speaker, and after he had heard a full debate, and observed how the house was like to be inclined, took up the argument, and shortly, and clearly, and craftily, so stated it, that he commonly conducted it to the conclusion he desired; and if he found he could not do that, he was never without the dexterity to divert the debate to another time, and to prevent the determining any thing in the negative, which might prove inconvenient in the future. He made so great a shew of civility, and modesty, and humility, and always of mistrusting his own judgment, and esteeming his with whom he conferred for the present, that he seemed to have no opinions or resolutions, but such as he contracted from the information and instruction he received upon the discourses of others, whom he had a wonderful art of governing, and leading into his principles and inclinations, whilst they believed that he wholly depended upon their counsel and advice. No man had ever a greater power over himself, or was less the man that he seemed to be, which shortly after appeared to every body, when he cared less to keep on the masque." Lord Clarendon.

To which, when relating the circumstance of his death, he adds:

"He was a gentleman of a good family in Buckinghamshire, and born to a fair fortune, and of a most civil and affable deportment. In his entrance into the world, he indulged to himself all the licence in sports and exercises, and company, which were used by men of the most jolly conversation. Afterwards, he retired to a more reserved and melancholy society, ye preserving his own natural chearfulness, and vivacity, and above all, a flowing courtesy to all men; though they who conversed nearly with him, found him growing into a dislike of the Ecclesiastical Government of the Church, yet most believed it rather a dislike of some churchmen, and of some introducements of theirs, which he apprehended might disquiet the public peace. He was rather of reputation in his own country, than of public discourse, or fame in the kingdom, before the business of Ship-money: but then he grew the argument of all tongues, every man enquiring who, and what he was, that durst, at his own charge, support the liberty and property of the kingdom, and rescue his country, as he thought, from being made a prey to the court. His carriage, throughout this agitation, was with that rare temper and modesty, that they who watched him narrowly to find some advantage against his person, to make him less resolute in his cause, were compelled to give him a just testimony. And the judgment that was given against him, infinitely more advanced him, than the service for which it was given. When this parliament begun, being returned knight of the shire for the county where he lived, the eyes of all men were fixed upon him, as their *Patriæ Pater*, and the pilot that must steer the vessel, through the tempests, and rocks which threatened it. And I am persuaded, his power and interest, at that time, was greater to do good or hurt, than any man's in the kingdom, or than any man of his rank hath had in any time: for his reputation of honesty was universal, and his affections seemed so publicly guided, that no corrupt, or private ends could biass them.—He was of that rare affability, and temper in debate, and of that seeming humility and submission of judgment, as if he brought no opinion of his own with him, but a desire of information, and instruction; yet he had so subtle a way of interrogating, and, under the notion of doubts, insinuating his objections, that he infused his own opinions into those from whom he pretended to learn, and receive

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ple a better knowledge of Justice; and the end of it, that they may bless God and the king for the same.

It hath been the custom, that before your Circuit you should receive such Directions as the king, or his council, thinks seasonable to impart unto you, for the service of the king and weal of the people: In the declaring whereof, I shall say little of the just acts you are to do between party and party, only that you do equal right between poor and rich; the particulars are left unto yourselves, as they happen in your Circuits. But since you are sent by the king to hear the causes of the people, it is his majesty's pleasure, that you so hear and order the same, that they may have no cause to complain to his majesty either for denial or delay of justice.

Of the Trial of capital offenders, I shall say as little; that part of Justice moveth in a frame,

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them. And even with them who were able to preserve themselves from his infusions, and discerned those opinions to be fixed in him, with which they could not comply, he always left the character of an ingenious, and conscientious person. He was indeed a very wise man, and of great parts, and possessed with the most absolute spirit of popularity, and the most absolute faculties to govern the people, of any man I ever knew. For the first year of the parliament, he seemed rather to moderate, and soften the violent and distempered humours, than to inflame them. But wise and dispassioned men plainly discerned, that that moderation proceeded from prudence, and observation that the season was not ripe, rather than that he approved of the moderation; and that he begot many opinions, and motions, the education whereof he committed to other men; so so far disguising his own designs, that he seemed seldom to wish more than was concluded; and in many gross conclusions, which would hereafter contribute to designs not yet set on foot, when he found them sufficiently backed by majority of voices, he would withdraw himself before the question, that he might seem not to consent to so much visible unreasonableness; which produced as great a doubt in some, as it did approbation in others, of his integrity. What combination soever had been originally with the Scots for the invasion of England, and what farther was entered into afterwards in favour of them, and to advance any alteration of the government in parliament, no man doubts was at least with the privity of this gentleman.

"After he was among those members accused by the king of High Treason, he was much altered; his nature and carriage seeming much fiercer than it did before." [Upon this passage Mr. Laing has a very shrewd observation in relation to the character of king Charles, and the sentiments respecting him which his conduct had inspired.] "And without question, when he first drew his sword, he threw away the scabbard; for he passionately opposed the overture made by the king for a treaty from Nottingham, and as eminently, all expedients that might have produced any accommodations in this that was at Oxford; and was principally relied on, to prevent any infusions which might be made into the earl of Essex towards peace, or to render them ineffectual, if they were made; and was indeed much more relied on by that party, than the general himself. In the first entrance into the

troubles, he undertook the command of a regiment of foot, and performed the duty of a colonel, upon all occasions, most punctually. He was very temperate in diet, and a supreme governor over all his passions, and affections, and had thereby a great power over other mens. He was of an industry and vigilance not to be tired out, or wearied by the most laborious; and of parts not to be imposed upon, by the most subtle, or sharp; and of a personal courage equal to his best parts; so that he was an enemy not to be wished wherever he might have been made a friend; and as much to be apprehended where he was so, as any man could deserve to be. And therefore his death was no less pleasing to the one party, than it was condoled in the other. In a word, what was said of Cinna, might well be applied to him; 'he had a head to contrive, and a tongue 'to persuade, and a hand to execute, any mis-'chief.' His death therefore seemed to be a great deliverance to the nation." Lord Clarendon.

† "Our greatest news here now is that we have a new Attorney General (William Noy), which is news indeed, considering the humour of the man, how he hath been always ready to entertain any cause whereby he might clash with the prerogative, but now, as Judge Richardson told him, his head is full of Proclamations and devices how to bring Money into the Exchequer. He hath lately found out among the old Records of the Tower some precedents for raising a Tax called Ship Money in all the port towns when the kingdom is in danger." James Howell's Letters, 248, B. 1, sect. 6, letter xi. to sir Arthur Ingram, dat. Jan. 30, 1633 (1634). Other particulars of this Noy occur in other letters of Howell. Some mention of him as a lawyer was made by Thurlow C. and Buller J. in the Case of the bishop of London *v.* Disney Fytche in Dom. Proc. 178. (See Cunningham's Law of Simony.) "Mr. Noy," says Selden, (Table Talk) "brought in Ship Money first for maritime towns, but that was like putting in a little auger that afterwards you may put in a greater. He that pulls down the first brick does the main work; afterwards it is easy to pull down the wall." On the office of Attorney General and the operation of the office upon the character and conduct of the officer, some observations will be found in the Case of Rex *v.* Horne. A. D. 1777. *post.*

"The Narrow Seas were at this time" (says Kennett) "infested with Pirates of all the

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and if all officers under you did their parts, you should walk in so straight a path, that you would find it very hard to tread awry: therefore you had need to heed them narrowly, lest they pervert justice. Look to the Corruptions of the Sheriffs and their Deputies: the partiality of Jurors; the bearing and siding with men of countenance and power in their country. When you meet with any such, your proceedings ought to be severe and exemplary against them, otherwise Justice shall be overborne, howsoever in your own persons you bear yourselves with never so much uprightness.

And because the time of Assize is very short, and expireth in a few days, it is necessary that you afford as much time as may be unto those businesses that are most general, and most concern the public; the Trials of *Nisi prius*, and particular causes, they are in the number of those things that are not to be left undone; but those

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neighbour nations, and the Dutch began to challenge such a right of Fishery, as would have robbed the king of that Dominion, which had been alway claimed and exercised by his royal ancestors. To carry on this new pretension, they encouraged their learned Grotius to assert their free use of Shipping, in a Treatise stiled *Mare Liberum*; answered, and sufficiently refuted, by our excellent antiquary Mr. Selden, in his *Mare Clausum*, of which the materials had been formerly thrown together at the motion of king James, and were now put in order, and within a twelve month published at the command of king Charles. But this controversy was not likely to be determined in paper: Therefore to shew a just concern for the honour and safety of the nation, the king on May 5, published two several Proclamations. In the first declaring his royal will and pleasure, 'That no mariner or seafaring men, 'shipwright or ship carpenter, whatsoever, being 'his majesty's subjects, should without the 'King's License, or or the License of the admiral of England, enter or attempt or go 'about to enter, into the service of any foreign 'prince or state, or be employed out of this 'realm in any sea service whatsoever, unless it 'were in the king's own service, or of some of 'his subjects. And if any at this time be in 'the service of any foreign prince, that they 'forthwith return under a great penalty.' In the other of the same date he declares his farther pleasure 'concerning the Flags to be employed 'for his royal navy, as well as for the ships of 'his subjects of South and North Britain; and 'conceiving it meet for the honour of the king's 'own Ships in his navy royal, and of such other 'Ships as are, or shall be employed, in the 'king's immediate service, that the same be by 'their Flags distinguished from the ships of 'any other of his subjects; doth therefore pro'hibit and forbid, that none of the subjects of 'any of his nations and kingdoms, shall from 'henceforth presume to carry the Union Flag 'in the main-top, or other part of any of his 'ships, that is, St. George's Cross and St. 'Andrew's Cross joined together; but that the 'same Union Flag be still reserved as an orna'ment proper to the king's own ships, and ships 'in his immediate service and pay, and none 'others. And his majesty's farther will and 'pleasure is, that all other ships of his subjects 'of England or South Britain, bearing flags, 'shall from henceforth carry the red cross, 'commonly called St. George's cross; and also 'that all the other ships of the king's subjects 'of Scotland, should from henceforth carry the 'white cross, commonly called St. Andrew's 'cross.'

"But the great difficulty was how to raise money for fitting out a Navy sufficient to guard the seas; as necessity seemed now to require not only against the encroachments of the Dutch, but against the growing insolence of the Turkish and Algerine pirates. By degrees a Project was framed out of ancient Records by Mr. Attorney General Noy, to impose upon every sea-port and place of merchandize the finding such a number of ships and men, in proportion to their wealth and trade, or to compound with commissioners at such a rate. The first Writ for this Tax called Ship-Money was dated the 20th of October, beginning with the city of London in this form:

THE FIRST WRIT FOR SHIP-MONEY.

'*Carolus Rex, &c.* To the Mayor, Commo'nalty and Citizens of our City of London, 'and to the Sheriffs of the same City, and 'good men in the said City and in the liber'ties, and members of the same, greeting;

'Because we are given to understand that 'certain thieves, pirates and robbers of the 'sea, as well Turks, enemies of the Christian 'name, as others, being gathered together 'wickedly taking by force, and spoiling the 'ships and goods and merchandizes, not only 'of our subjects but also of the subjects of our 'friends in the sea, which hath been accus'tomed anciently to be defended by the Eng'lish nation; and the same at their pleasure 'have carried away, delivering the men in the 'same to miserable captivity. And forasmuch 'as we see them daily preparing all manner of 'shipping further to molest our Merchants, and 'to grieve the kingdom, unless Remedy be not 'sooner applied, and their endeavours be not 'more manly met withal; also the dangers 'considered, which on every side in these 'times of war do hang over our heads, that it 'behoveth us and our subjects, to hasten the 'defence of the sea and kingdom with all ex'pedition or speed that we can: We willing, 'by the help of God, chiefly to provide for 'the defence of the kingdom, safeguard of the 'sea, security of our subjects, safe conduct of 'Ships and Merchandizes to our kingdom of 'England coming, and from the same kingdom 'to foreign parts passing: Forasmuch as we 'and our progenitors kings of England, have 'been always heretofore masters of the afore'said sea, and it would be very irksome unto

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things that concern the general and public good, you are to account them as the weightier matters of the law; and therefore you are to take them into your prime and chief care and cogitation. Now among those, I shall commend unto you in the first place, The presenting and convicting of Recusants; for as it concerneth Religion, so it hath relation to his majesty's Profits, which are two great motives, to which you may add a third, because the king hath many years since assigned these forfeitures to the public defence.

In the next place, I do require you, that you make a strict inquiry after Depopulations and Inclosures; a crime of a crying nature, that barreth God of his honour, and the king of his subjects: Churches and houses go down together. His majesty knoweth and taketh notice, that according to former directions given you in this place, you have given it in charge to the

'us, if that princely honour in our times should 'be lost, or in any thing diminished. And 'although that charge of defence, which con-'cerneth all men, ought to be supported by all, 'as by the laws and customs of the kingdom of 'England hath been accustomed to be done: 'notwithstanding, we considering, that you 'constituted in the sea coasts, to whom by sea 'as well great dangers are imminent, and who 'by the same do get more plentiful gains, for 'the defence of the sea, and conservation of 'our princely honour in that behalf, according 'to the duty of your allegiance against such 'attempts, are chiefly bound to set to your 'helping hand: we command, firmly enjoining 'you the aforesaid mayor, commonalty and 'citizens, and sheriffs of the said city, and the 'good men in the said city and in the liberties, 'and members of the same, in the faith and 'allegiance wherein ye are bound unto us, and 'as ye do love us and our honour, and under 'the forfeiture of all which ye can forfeit to 'us, that ye cause to be prepared and brought 'to the port of Portsmouth, before the first day 'of March now next ensuing, one ship of war 'of the burthen of 900 tons, with 350 men at 'the least, as well masters as very able and ex-'pert skilful mariners; one other ship of war 'of the burthen of 800 tons, with 260 men at 'the least, as well skilful masters as very able 'and expert mariners; four other ships of war, 'every of them of the burthen of 500 tons, 'and every of them with 200 men at the least, 'as well expert masters as very able and skilful 'mariners; and one other ship of war of the 'burthen of 300 tons, with 150 men, as well 'expert masters as very able and skilful mari-'ners. And also every of the said ships with 'Ordnance, as well greater as lesser, gun-pow-'der and spears and weapons, and other ne-'cessary arms sufficient for war, and with 'double tackling and with victuals, until the 'said 1st of March competent for so many 'men, and from that time for 26 weeks at your 'charges, as well in victuals as men's wages, 'and other things necessary for war, during 'that time, upon defence of the sea in our ser-'vice in command of the admiral of the sea, 'to whom we shall commit the custody of the 'sea, before the aforesaid 1st day of March, 'and as he on our behalf shall command them 'to continue, so that they may be there the 'same day at the farthest, to go from thence 'with our ships, and the ships of other faithful 'subjects, for the safeguard of the sea, and 'defence of you and yours, and repulse and 'vanquishing of whomsoever busying them-'selves to molest or trouble upon the sea our 'merchants, and other subjects and faithful 'people coming into our dominions for cause 'of merchandize, or from thence returning to 'their own countries. Also we have assigned 'you the aforesaid mayor and aldermen, of the 'city aforesaid, or any thirteen or more of you, 'within thirty days after the receipt of this 'writ, to assess all men in the said city, and in 'the liberties, and members of the same, and 'the landholders in the same, not having a 'ship, or any part of the aforesaid ships, nor 'serving in the same, to contribute to the ex-'pence, about the necessary provision of the 'premisses, and to assess and lay upon the 'aforesaid city, with the liberties and members 'thereof, viz. upon every of them according to 'their estate and substances, and the portion 'assessed upon them, and to nominate and ap-'point collectors in this behalf. Also we have 'assigned you the aforesaid mayor, and also 'the sheriffs of the city aforesaid, to levy the 'portions so as aforesaid, assessed upon the 'aforesaid men and landholders, and every of 'them in the aforesaid city, with the liberties 'and members of the same, by distress and 'other due means, and to commit to prison all 'those whom you shall find rebellious, and con-'trary in the premises, there to remain until 'we shall give further order for their delivery. 'And moreover we command you, that about 'the premisses ye diligently attend, and do and 'execute those things with effect, upon peril 'that shall fall thereon, but we will not that 'under colour of our aforesaid command, more 'should be levied of the said men, than shall 'suffice for the necessary expences of the pre-'misses; or that any who have levied money 'for contribution, to raise the aforesaid charges, 'should by him detain the same, or any part 'thereof, or should presume by any manner of 'colour to appropriate the same to other uses. 'Willing, that if more than may be sufficient 'shall be collected, the same may be paid out 'among the contributors, for the rate of the 'part to them belonging. Witness, myself at 'Westminster the 20th day of October, in the 'tenth year of our reign.'

"This Writ was read in a common council held at Guildhall Dec. 2, where the matter gave a general disgust, and brought out this Resolution upon it. 'This Court, after due and seri-'ous consideration taken of the premisses, con-'ceiving that by their ancient liberties, charters, 'and acts of parliament, they ought to be freed

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grand Inquests to inquire of these things, but to little effect: and without doubt the freeholders of England do hate and detest them. Depopulation is an oppression of an high nature, and commonly done by the greatest persons that keep the Jurors under and in awe; and that is the cause there are no more presented and brought in question: but however your Charge and Inquiry, touching this point, hath not taken effect worthy his majesty's care and your pains; yet his majesty willeth, that you do not cease, but enquire on still; for it is his resolution, against all opposition, to make all men see he hath a care of this overspreading evil, and of the means of his people having churches and towns demolished, and his people eaten up like bread, to satisfy the greedy desires of a few, who do waste as profusely, as they gather together unconscionably, and bring unto their posterity that woe which is pronounced against

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'and discharged of those things which by the 'said Writ are required by them to be done, 'doth order and agree, That the draught of a 'Petition touching the said business, this day 'read to this Court, shall be engrossed, and 'with all dutiful respect for and on this city's 'behalf, humbly presented to the king's most 'excellent majesty.'

"Which Petition was drawn up, and presented in this form:

'To the king's most excellent majesty; The 'humble Petition of your faithful subjects, 'the mayor and commonalty, and citizens of 'your city of London, most humbly shewing;

'That where your majesty by Writ bearing 'teste 20 Oct. last, commanded your peti-'tioners, at their charge to provide 7 ships of 'war furnished with men, victual, and all war-'like provisions, to be at Portsmouth by the 'first of March next, and to continue from 'thence by the space of 26 weeks in your ma-'jesty's service, upon the defence of the seas, 'and other causes in the said writ contained:— 'Your petitioners do in all submissive humble-'ness, and with acknowledgment of your sacred 'majesty's many favours unto your said city, 'inform your majesty that they conceive, that 'by ancient privileges, grants, and acts of par-'liament (which they are ready humbly to shew 'forth) they are exempt and are to be freed from 'that charge. And do most humbly pray, That 'your majesty will be graciously pleased, That 'the petitioners, with your princely grace and 'favour, may enjoy the said privileges and 'exemptions, and be freed from providing of 'the said ships and provisions.—And they shall 'pray, &c.'

"This Petition seemed to have no other effect, but only to express a dissent, when there must follow a compliance. And the example of submission, however extorted from the city of London, would have its sure and certain influence upon all inferior places. The legal right of this aid was not yet disputed in any court of justice, but it created a general offence and odium. The nobility and gentry had reason to be jealous of any methods of raising Money out of parliament: The merchants and traders had the Grievance of thinking the whole burden cast upon them: The Clergy could not at first obtain an Exemption from their considerable share in it; and the Country Farmers thought it little less than seizing their corn and cattel to be sent on Shipboard. The murmurs were indeed so universal, and so artificially improved by the enemies of the court, that they looked upon the death of the projector to be a Judgment sent upon his head. Mr. Attorney General Noy departed this life August 9."

Lord Clarendon speaking of the innovations made about this time in the proceedings of the Court of Star-Chamber, says, "These errors (for errors they were in view, and errors they are proved by the success) are not to be imputed to the court, but to the spirit, and overactivity of the lawyers themselves; who should more carefully have preserved their profession, and its professors, from being profaned by those services, which have rendered both so obnoxious to reproach. There were two persons of that profession, and of that time, by whose several, and distinct constitutions (the one knowing nothing of, nor caring for the court; the other knowing, or caring for nothing else) those mischiefs were introduced, Mr. Noy, the Attorney General, and sir John Finch, first, lord chief justice of the common pleas, and then lord keeper of the great seal of England. Mr. Noy upon the great fame of his ability and learning (and he was very able and learned) was by great industry and importunity from court, persuaded to accept that place, for which all other men laboured (being the best for profit, that profession is capable of) and so he suffered himself to be made the king's Attorney General. The court made no impression upon his manners, upon his mind it did: and though he wore about him an affected morosity, which made him unapt to flatter other men; yet even that morosity and pride rendered him the most liable to be grossly flattered himself that can be imagined. And by this means the great persons, who steered the public affairs, by admiring his parts and extolling his judgment us behind his back, wrought upon him by degrees for the eminency of the service, to be an instrument in all their designs; thinking that he could not give a clearer testimony, that his knowledge in the law was greater than all other mens, than by making that law which all other men believed not to be so. So he moulded, framed and pursued the odious and crying project of Soap; and with his own hand drew and prepared the Writ for Ship-Money, both which will be the lasting monuments of his fame. In a word, he was an unanswerable instance how necessary a good education and knowledge of men is to make a wise man, at least a man fit for business."

"On the death of Mr. Noy, sir John Banks

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those that 'lay house to house, and field to 'field,' to dwell alone in the midst of the earth.

The next thing that I shall mention unto you, is, the rectifying and reforming of Ale-houses and Tippling-houses, and those I account one of the greatest pests of the kingdom. First, therefore, let none be enabled to set up or continue without licence: there are a kind of people that do take upon them licences, recognizances, or laws, or what you will, and who have been a great deal the worse, because they see a great multitude tolerated that have no licence; and therefore I give it in charge, to take a course that none be permitted unless they be licensed: And for the licensed Ale-houses, let them be but a few, and in fit places; if they be in private corners and ill places, they become the dens of thieves, they are the public stages of drunkenness and disorder. In market towns, or in great places or roads, where travellers come, they are necessary.

Next unto this, let those that be licensed be held strictly to it, according to law. It hath been observed, and very truly, that in the Taverns, Inns, and Ale-houses in England, by the falshood of their measure, and their unjust prices, they have drawn more money from the guest, than out of the Excise of Ale and Beer are drawn out in Holland. A strange thing, that people for a public work, for any thing that is good, should be loth to part with any thing, and yet with open eyes, to see themselves deceived by such base and lewd people.

Next unto this, let care be taken in the choice of Alehouse-keepers, that it be not appointed to be the livelihood of a great family: one or two is enough to draw drink, and serve the people in an Alehouse; but if six, eight, ten, or twelve, must be maintained by Alehouse-keeping, it cannot chuse but be an exceeding disorder, and the family by this means is unfit for any other good work or employment. I have not skill enough to understand all the inconveniencies that come from this one ill fountain, and my memory will not contain what I have so many times observed of them myself; but your lordships have a knowledge and experience of them, therefore I will leave them unto you: only this, that because in many places they swarm by default of the Justices of the Peace, that set up too many, and there are none, except yourselves at the Assizes, all the year long can meet with this evil, but the Justices of the Peace. And if the Justices of Peace will not obey your Charge herein, certify their default and names, and I assure you they shall be discharged. I once did discharge two Justices for setting up one Alehouse, and shall be glad to do the like again upon the same occasion. . .

In the next place, I will commend unto you the Punishment of Vagabonds and wanderers; to beguile the Alehouses of such unruly guests; it would make some way of amendment to those Alehouses: and it cannot be deny'd, but the law hath appointed hands enough to do this work; the Constable, Headborough, Tything-men, and the rest of the inferior Officers, and the Watchmen, who may do all with a particular warrant from the Justices of Peace; and the Justices of the Peace are bound to call them to an account, and to punish them for their neglect. If this were done, and other officers were chosen as they ought to be, not people of little wealth, and as little understanding, but that they were elected out of the better sort of Yeomanry, and the watches kept by able men, I am sure that these loose people that wander up and down will quickly be gone: therefore you may do well to let it be known in the country, that the Lords of Leet and those that have the elections of constables and officers, they are by the law answerable for their choice. There have been Precedents, that where an insufficient coroner hath been chosen by a county, the whole county hath been answerable to the king for the coroner's fault. And if the Lords of Leet, and their Homagers, and those that make choice of the Constables and Officers, were sometimes awakened by soon seizing of their Leets, or Fine, or *Quo warranto*, I make no doubt, but the country would be better served many years after, for some such service done; therefore I could wish that this were made known unto the country, that the lords, and those that choose them, were answerable for their defaults.

Now for bringing loose people in order, the House of Correction hath need to be looked unto, and be put in readiness, that those that are idle may not want work. 'Ducere volentes, 'trahere nolentes.' And for the Houses of Correction, as it is in some countries, it were

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was constituted Attorney-General by patent dated Sept. 27, 10 Car. And sir Robert Heath being without reason given removed from the honour of lord chief justice of the common pleas, sir John Finch was advanced to that honour. Great were the discourses what the occasion should be of that sudden advancement. But four days after the Writ for Ship-Money coming forth, it was conceived by common discourse, that he was to be instrumental to advance that business. His concern in this invidious matter is thus represented by lord Clarendon. "Sir John Finch had much that Mr. Noy wanted, but nothing that the other had. Having led a free life in a restrained fortune, and having set up upon the stock of a good wit, and natural parts, without the superstructure of much knowledge in the profession by which he was to grow; he was willing to use those weapons in which he had most skill, and so (being not unseen in the affections of the court, but not having reputation enough to guide or reform them) he took up Ship-Money where Mr. Noy left it; and being a Judge carried it up to that pinnacle, from whence he almost broke his own neck; having in his journey thither, had too much influence on his brethren, to induce them to concur in a judgment they had all cause to repent."

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convenient they were placed near the Jail; that not idle persons only, but the prisoners of the Jail also might be made to work, and eat the labour of their own hands: this, as it hath been formerly, so it is now commended by his majesty to see it effected so soon as may be.

The binding out of Apprentices is a thing fit to be pressed throughout all your circuit. Opposition hath been made against it by some, though without any ground or law: sometimes the parents are not willing to leave their children, though they have not meat to feed them at home; sometimes the parishioners are not willing to give them clothes, and those that bind them are negligent: and all these must be over-ruled, and made smart for their opposition and neglect.

In a word, you are to call upon all to whom it belongeth, but especially to the Justices of the Peace, to see his majesty's printed Order be put in execution. You are to justify yourselves, what justices of the peace are diligent in it, and who neglect, and so to certify to the Lords of the Council.

I have but one thing more to give you in Charge, and it is a thing of great weight and importance; it concerneth the honour of his majesty and the kingdom, and the safety of both. Christendom is full of war, and there is nothing but rumours of war: what hath been done of late years abroad by fire and sword, it were a pity and grief to think of; yet we have by the goodnes of God, and his majesty's provident care, all this while enjoyed a most happy peace and plenty. As it is a good precept in Divinity, so it holdeth in Policy too; 'Nunc 'tua res agitur, jam proximus ardet;' which if we observe, to defend ourselves, it would be a warning to all nations, and we should be the more assured to enjoy our peace, if the war abroad do make us stand upon our guard at home. Therefore no question it hath ever been accounted the greatest wisdom for a nation to arm, that they may not be enforced to fight; which is better than not to arm, and to be sure to fight. Therefore his majesty in these doubtful times, hath not only commanded, that all the Land-Forces of the kingdom should be set in order and readiness, but to set to Sea a royal Fleet at his majesty's great charge, but with the assistance of the Maritime places of this kingdom.

The causes and occasions and times of war, with the preparations and ordering of them, is proper to the king; and dutiful obedience in such things does best become the subject. And yet his majesty hath vouchsafed, even by his writ, to declare enough to satisfy all well minded men, and to express the clearness of his princely heart, in aiming at the general good of his kingdom.

The Dominion of the Sea, as it is an antient and undoubted Right of the crown of England, so it is the best security of the land; for it is impregnable so long as the sea is well guarded: therefore, out of all question, it is a thing of absolute necessity, that the guarding of the sea be exactly looked unto; and those subjects whose minds are most fixed upon the honour of their king and country, will with no patience endure to think of it, that this dominion of the sea, which is so great an honour, should be either lost or diminished. Besides, for safety sake, the dominion of the sea is to be kept, and the seas guarded. The Wooden Walls are the best walls of this kingdom; and if the riches and wealth of the kingdom be respected for that cause, the Dominion of the Sea ought to be respected: for else, what would become of our wool, lead, and the like, the prices whereof would fall to nothing if others should be masters of the seas? There is a Case in the Book of Assize, fol. 43, which putteth me in mind of certain men that went down into the country, and carried a report, that no wool should pass over the sea that year; upon this wool fell to so low prices, that the men that carried the report were questioned and fined. And now if a report alone, and that a false one too, wrought such an effect upon the wools in England, think what would be wrought by a real loss of the dominion of the sea in all our commodities, if our trade should be at the command of other princes and states. Therefore, as his majesty, out of his great wisdom, hath found it expedient to set to sea that Fleet that is now upon the sea; so his majesty being engaged both in his honour, and the honour of the kingdom, he findeth it to be of absolute necessity, to strengthen this with a greater strength and more shipping the next year. Therefore, upon advice with his council, he hath resolved, that he will forthwith send forth new Writs for the preparation of a greater Fleet the next year, and that not only to the maritime towns, but to all the kingdom besides: For since that all the kingdom is interested both in the honour, safety and profit, it is just and reasonable that they should all put to their helping hands.

Now that which his majesty requireth from you, and doth command, is, That in your Charges at the Assizes, and in all places else, where opportunity is offered, you take an occasion to let the people know how careful and zealous his majesty is to preserve his honour, and the honour of this kingdom, and the Dominion of the Sea; and to secure both sea and land by a powerful fleet, that foreign nations may see, that England is both ready and able to keep itself, and all its rights. And you are to let them know how just it is, that his majesty should require this for the common defence; and with what alacrity and cheerfulness they ought, and are bound in duty, to contribute unto it; that foreign nations may observe the power and readiness of this kingdom, which will make them slow to contend with us either by sea or land, and that will be the best way to confirm unto us a firm and sure peace.—This is the substance of all that which I received in commandment from his majesty; there are many things else that concern the public, but your judgments are well versed in them. These are the particulars I had command to

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mention unto you, so I will trouble you no further, but leave them to your grave considerations.

The SPEECH of Thomas Lord Coventry, Lord Keeper of the Great Seal of England, to all the Judges of Assize of England, by command from the king, in the Star-Chamber, Feb. 14, 1636.

Together with the King's Letter and Case, touching Ship-Money, and the Judges Opinions thereupon.

My lords the Judges; the Term being now at an end, and the Assizes at hand, his majesty hath commanded, That according to the custom in former times, so now in this place you should receive some Directions for the execution of Justice in all parts of the kingdom whereto you resort. This, as it may justly be, is a great comfort to his majesty's subjects, to see his majesty's care herein; which as it is a testimony of their own happiness, in receiving justice from the king himself, the Fountain of Justice, so it may as justly add strength and encouragement to you when you go your circuits, not only to be armed with your own authority by commission, but with your prince's instructions.

In the doing of justice, you will find things of several natures and degrees: In some places before you, Communicative Justice heareth sway, as in that which concerns *meum et tuum*: In other, Distributive Justice, as in *præmium et pœnum*; some concern one and a few; others concern the multitude; others concern the king and all the king's people. In some pleas things are brought before you that are *ad nocumentum* of this or that particular town; some *ad nocumentum totius regni*. Some things are brought before you that are *contra pacem regis*, and others *contra coronam et dignitatem regis*; and in this variety of business, as there are many of a lesser and lower degree, yet not to be omitted, so you have 'Graviora Legis,' which you ought to pitch your mark; 'hæc 'opor et fieri, illa non omitti.'

In that Justice which you are to do between party and party, his majesty doth require you, as in all his Courts here, so in your Circuits to administer impartial justice, and repress vexatious and wrangling suits, not worthy the dignity of your own persons, and the court where you sit; for those actions, as they empty the spleen on the one side, so they never fail to empty the purse on both sides.

But besides the doing of justice between man and man, there is much more expected from your lordships; for the public business of the country is of much more importance than the trial of a *Nisi Prius*, and fitting you should esteem them so: and therefore it is his majesty's command, That those services which concern himself and the public, may be timely thought of, and not posted off to the end of the Assize.

Now before all things, the Advancement of Religion and Piety towards God, the peace of the Church, and the execution of those Laws that tend to those ends, ought to have the first place. As oft as I have had occasion to speak to you here, I have seldom spared to give you a Charge of the Laws against Recusants; and I must reiterate it now: for if you convict them not in the country, there is likely to be little reformation, or profit to his majesty; and whosoever they be that will not be found in the Church, it behoveth you that you take order they be found in the Exchequer.

In the next place, that you proceed roundly against capital and felonious offenders, especially Robbers on the Highways, who now march in troops after a high hand. As a good Judge ought in court to shew severity to those in the jail, also the ablest and activest men in the county ought to do their utmost endeavours for the apprehending of those offenders as are abroad; that when you are there or here in the term, the service may proceed in a good way, and you be made a terror to malefactors, as some of your predecessors have been; for if your care be not great, malefactors will abound; therefore you must shew a severe and constant way of justice when they are found, and it will soon abate their pride, wherewith they now bear up themselves; and fit it is with an unanimous consent you agree of one course; for if there be a remissness in any one circuit, it leaveth a way to malefactors to overthrow all reformation, and justice is thereby discouraged.

In the next place, care must be had of those laws which concern Luxury and Idleness, the suppression and punishing of Vagabonds, the ordering and employing of Houses of Correction, the suppressing of Ale-houses and Tippling-houses, and binding out of Apprentices. If these were well and constantly observed, they would save many able bodies that die miserably at the gallows, and cut off a multitude of enormities that pester the commonwealth, and lessen the number of thieves and robbers; and therefore your lordships should do well to have a special care of the execution of those laws. And this giveth me occasion to put you in mind of those printed Orders published by his majesty in the year 1630, wherein at first there was a direction given for an Account to be made by the sheriff and justices of the peace: this same was orderly kept in divers places, in others not so well. It was afterwards advised by yourselves, that the way of Account should be changed, and that you should receive it at the Assizes, and present it to the Council-Board; yet it is my part to tell you, that it hath not so appeared by the account that is come to the Council-Table, and it is expected a better be given by you the next Term.

Now in respect the public service dependeth much upon the Justices of the peace in the county, it will be necessary that you cast your eye upon them, that they give due attendance at the Assizes: it is their duty to do it, and yours to inforce it upon them. And Assize lasteth but a few days, but the Instructions that they may receive from you in that short time,

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may be of great use for the county for the whole year; Also that you examine whether they give due attendance at the Quarter-Sessions. Although there is an express article in their Oath that they should give it; I hear many neglect it; Therefore it is a thing very fitting, and well worthy your labour, that at the beginning of every Assize, you trust not to the clerk of the peace his Information, but that yourselves do cast an eye upon his Book, and command him to return the names of such Justices of peace as you find by his Book were absent at the Quarter Sessions. Fit it will be that you let them know, that to prefer a riding, or bowling, or hunting-match, before their attendance at Quarter-Sessions, is little less than perjury; and if your admonition will not serve the turn, a remedy shall be taken. In the third place, it is necessary for you to inquire how they attend the monthly meetings, or other times of public service; for this I am sure of, they are all within one commission, and have the same oath, and the same attendance is imposed upon all; and why the greatest number exempt themselves, and leave the public service upon a few, I know not; but if I may know the particular men (of which I hope I shall henceforward by your lordships) I shall rid them out of Commission, and put others in their places.

My Lords, I have but one particular more, and that is of great importance; whereof by special direction and command from his majesty, I am to speak unto you at this time. All of you are the witnesses of his majesty's proceedings, though the candour and clearness of his own heart exceedeth your testimony, and your testimony is not only fit to be declared in this place, but in all the places of this realm. His majesty hath now the third time sent forth Writs * to require the Aid of his subjects for the guarding of the dominion of the Sea, and safety of the kingdom. This his majesty did upon great deliberation and advice, and upon important and weighty reasons. In the first year when the Writs were directed to the ports and maritime places, they received little or no opposition; but in the second year, when they went generally throughout the kingdom, though by some well obeyed) have been refused by some, not only in some Inland counties, but in some of the Maritime places; and actions have been brought against some that have been employed in the execution of these writs. I suppose that no man will expect that *Arcana Regni*, the private reasons of a prince, should either upon this or other occasions be made public; but so many reasons as were fit to be opened, were formerly declared by me in this place to you the Judges of this realm.

The First was, That the whole kingdom is concerned in point of safety; admitting there were no other counsel or attempt against us, but only to interrupt us in the Dominion of the Seas, our most secure and safe defence, better either than castles or forts; which if it be commanded by others, it lays us open to much peril and danger.

Secondly, The whole kingdom is concerned in point of honour: for it is one of the most ancient and honourable rights of the crown of England, even the Dominion of the Sea. And all records do shew, how the kings and people of England have ever been careful that this honour should never perish: and certainly the whole kingdom is concerned in point of trade and profit; for the traffic does not only enrich the maritime parts, but the inland towns, and if trading fail, the inland places will find it in the fall of the prices of wool, lead, and other staple commodities. This experience sheweth daily, when upon every stop of the vent of cloth, there come such outcries by the weaver, the fuller, the spinner, and wool-growers themselves; and the authority of the law sheweth the same: 43, in the Book of Assize, which your lordships know better than I, it appears that certain men went into the country, and cast out a fame, that for that year no wool should be transported beyond the seas; presently upon this the price of wool fell, and those men were called in question, and were adjudged in a fine for it. Now if a rumour did so much abate the trade of the heart of the kingdom, what would the loss of the dominion of the sea do, which exposeth us, and all our trade, to the mercy of our neighbours? Therefore since the whole kingdom is concerned in point of honour, safety, and profit, what reason is there but that all should contribute to the maintenance of it? This, or to the like effect, I did formerly declare to you the judges by his majesty's command; and his majesty received satisfaction, in that you made a full declaration thereof in your circuits: and this I may say, for the most part, the subjects have shewed themselves most dutiful and obedient in this service of his majesty: and this year the sum imposed upon the county of York being 12,000*l.* is brought in already by the sheriff, and so is most part of Lancashire, and other shires; but when his majesty heard of some refusals, though he had cause to be sensible of it, yet he was far from being transported with passion, but thought good to resort to the Advice of you his Judges, who are sworn to give him faithful and true counsel in that which pertaineth to the law; and this his majesty, as well for the direction of his own course, as for the satisfaction of his subjects, required you to deliver your Opinions herein, to which you returned an Answer under your hands. And because the command which you received from the king, is expressed in a princely Letter under his own signature, I shall not take upon me to repeat it, you shall hear it read.

Which being delivered by my Lord-Keeper to one of the Clerks in Court, was read in *hæc verba:*

THE KING'S LETTER TO THE JUDGES.

"C. *R.* Trusty and well-beloved, we greet

* See the particular Taxation in 2 Rush. Col. 453.

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'you well. Taking into our princely consideration, that the honour and safety of this our realm of England, the preservation whereof is only intrusted to our care, was, and is now more nearly concerned than in former times, as well by divers counsels and attempts to take from us the Dominion of the Sea, of which we are sole lord and rightful owner; the loss whereof would be of greatest danger and peril to this kingdom, and other our dominions: We, for avoiding these and the like dangers, well weighing with ourselves, that where the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, there the Charge and Defence ought to be borne by all the realm in general; did, for prevention of so public a mischief, resolve with ourselves to have a Royal Navy provided, that might be of force and power, with Almighty God's blessing and assistance, to protect and defend this our realm and our subjects therein, from all such perils and dangers: and for that purpose we issued forth Writs under our great seal of England, and directed to all our sheriffs of all our several counties of England and Wales, commanding thereby all our said subjects, in every city, town and village, to provide such a number of Ships, well-furnished, as might serve for this our royal purpose; and which might be done with the greatest equality that could be. In performance whereof, though generally throughout all the counties of this our realm, we have found in our subjects great chearfulness and alacrity, which we graciously interpret as a testimony, as well of their dutiful affections unto us, and to our service, as the respect they have to the public, which well becometh every good subject; nevertheless finding that some few, naply out of ignorance what the laws and customs of this our realm are, or out of a desire to be eased and freed in their particulars, (how general soever the Charge ought to be) have not yet paid and contributed the several Rates and Assessments that were set upon them, and foreseeing, in our princely wisdom, that from hence divers suits and actions are not unlikely to be commenced and prosecuted in our several courts at Westminster: We, desirous to avoid such inconveniences, and out of our princely love and affection to all our subjects, being willing to prevent such errors as any of our loving subjects may happen to run into, have thought fit in a case of this nature to advise with our Judges, who we doubt not are all well studied and informed in the right of our sovereignty. And because the Trials in our several courts, by the formality in pleading, will require a long protraction, we have thought it expedient, by this our Letter directed to you all, to require your Judgments in the case, as it is set down in the inclosed Paper, which will not only gain time, but also be of more authority to over-rule any prejudicate opinions of others in the point.

'Given under our Signet at our court at Whitehall, the 2nd day of February, in the 12th year of our reign, 1636.*'

This being thus read, the Lord Keeper commanded the Case inclosed to be read, being as followeth:

'C. R. When the good and safety of the kingdom in general is concerned, and the whole kingdom is in danger; Whether may not the king, by Writ under the Great Seal of England, command all the subjects of this kingdom, at their charge, to provide and furnish such number of Ships, with men, victuals and munition, and for such time as he shall think fit, for the defence and safeguard of the kingdom from such danger and peril; and by law compel the doing thereof, in case of refusal or refractoriness? And whether, in such a case, is not the king sole judge, both of the danger, and when and how the same is to be prevented and avoided.'

THE JUDGES' ANSWER.

"May it please your most excellent majesty; 'We have, according to your majesty's command, every man by himself, and all of us together, taken into consideration the Case and Question, signed by your majesty, and inclosed in your royal Letter: and we are of Opinion, That when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, your majesty may, by Writ, under the Great Seal of England, command all the subjects of this your kingdom, at their charge, to provide and furnish such number of Ships, with men, munition, and victuals, and for such time as your majesty shall think fit, for the defence and safeguard of the kingdom from such danger and peril: and that by law your majesty may compel the doing thereof, in case of refusal or refractoriness. And we are also of opinion, That in such case, your majesty is the sole judge, both of the danger, and when and how the same is to be prevented and avoided.—— 'Jo. Brampston, Jo. Finch, Hump. Davenport, 'Jo. Denham, Rich. Hutton, W. Jones, Geo. 'Crooke, Tho. Trevor, Geo. Vernon, Fra. 'Crawley, Rob. Berkley, Fra. Weston.'†

* For an explanation of this transaction, see the Case of sir John Finch, lord Fordwich, 1640, 16 Car. 1.

† The influence and effect of this stated Opinion may be delivered in these words of the lord Clarendon. "It is notoriously known, that pressure was born with much more cheerfulness before the Judgment for the king, than ever it was afterward; men before pleasing themselves with doing somewhat for the king's service, as a testimony of their affection, which they were not bound to do. But when they heard this demanded in a court of law as a Right, and found it by sworn Judges of the law adjudged so, upon such grounds and reasons as every stander-by was able to swear was not law, and so had lost the pleasure and delight of

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The said Case, with the Judges' Opinions thereunto, (formerly in private delivered to his majesty) being thus publicly made known by my Lord Keeper, who, withal, caused their several Names to be read, as they were in order subscribed; (all the Judges being present save only Judge Crooke) the Lord Keeper spake as followeth:

My lords; This being the uniform Resolution of all the Judges of England, with one voice, and set under their own hands; I say, this being so resolved, as they do here express upon every man's particular studying the Case, and upon a general conference amongst themselves, it is of very great authority: for the very lives and lands of the king's Subjects are to be determined by these reverend Judges; much more a charge of this nature, which God knows cannot be burdensome to any, but is of singular use and consequence, and for the safety of the whole kingdom. The command from his majesty is, that I should publish this your Opinion in this place, and give order, That it should be entered in this Court, in the High Court of Chancery, and in the courts of King's-Bench, Common-Pleas, and Exchequer; for this is a thing not fit to be kept in a corner: and his further command is, that you the Judges do declare and publish this general Resolution of all the Judges of England, through all parts of the kingdom, that all men may take notice thereof, and that those his subjects which have been in an error, may inform themselves, or be reformed. You have great cause to declare it with joy, and you can hardly do it with honour enough to the king, that in so high a point of his sovereignty, he hath been pleased to descend, and to communicate with you his Judges; which sheweth, that justice and sovereignty, in his majesty, do kiss each other. His further pleasure is, That you let all know it is not his purpose by this resolution to stop, or check, the actions or suits which any have brought, or shall bring, concerning this; for it is his majesty's command, that all such as proceed in any action about the same have equal and meet justice, and that they be suffered to proceed in course of law, so as you call the king's learned counsel unto their proceedings, that they may not be surprized.

Now, my lords, I have little more to say, but this I am sure of, that if any contrary opinion shall yet remain amongst men, it must proceed from those that are sons of the law, (*Fælices essent artes*, &c.) and you the judges of the realm have been accounted the fathers of the law; then, in good faith, it will ill become the son to dispute against the father. Having thus delivered unto you what I received in command from his majesty, as his majesty doth, so do I, leave it to your judgments.

The KING *versus* JOHN HAMPDEN in the Case of SHIP-MONEY.

Trin. 13 *Car. I. in Scacc.*

By Writ. Of the Term of the Holy Trinity, in the 13th year of king Charles.

"Memorandum; that the Writ* of our lord 'the king under the seal of the Exchequer, by 'the consent of the barons here, issued out in 'these words:

'*ss.* Charles by the grace of God, of Eng-'land, Scotland, France, and Ireland, king, 'Defender of the Faith, &c. To the sheriff of 'Bucks greeting. Whereas several and divers 'sums of money, specified in the Schedule to 'this Writ annexed, by virtue of our Writ 'under our seal of England, bearing date the '4th day of August in the 11th year of our 'reign, were assessed and charged upon seve-'ral persons in the said Schedule named, for 'and towards the providing of a Ship of War 'together with the rigging and other things 'thereunto belonging, in the said Writ particu-'larly mentioned; which said several sums of 'money being so assessed and charged, and un-'paid and not satisfied, the Names of the said 'several persons, together with the several 'sums of money charged upon them, were cer-'tified into the Court of our Chancery by our 'Writ of Certiorari, bearing date the 9th day 'of March in the 12th year of our reign, issu-'ing under our great seal aforesaid: and by 'our Writ of Mittimus under the said seal, 'bearing date the 5th day of the month of May 'instant, were sent into our Exchequer for 'further process thereupon to be had, as by the 'tenor of the said Writ, bearing date the 4th 'day of August in the 11th year of our reign, 'and by the Writ of Certiorari, and Certifi-'cates thereupon made, sent into our said Ex-'chequer, and there of record, remaining in 'the custody of our remembrancer, more fully 'doth appear: We command you, that you do 'not, by reason of any liberty, omit entering 'thereupon; and by good and lawful men of 'your bailiwick, make known to the several 'persons aforesaid, named and specified in the 'said Schedule, that they appear before the 'Barons of the Exchequer at Westminster on

being kind and dutiful to the king; and instead of giving were required to pay; and by a logic that left no man any thing which he might call his own: they no more looked upon it as the Case of one man, but the Case of the kingdom; nor as an Imposition laid upon them by the king, but by the Judges, which they thought themselves bound in conscience, to the public justice, not to submit to. The damage and mischief cannot be expressed, that the crown and state sustained by the deserved reproach and infamy that attended the Judges by being made use of in this and like arts of power, there being no possibility to preserve the dignity, reverence and estimation of the laws themselves, but by the integrity and innocency of the Judges."

* A Latin Copy of this Instrument will be found at the end of these Proceedings.

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'the Octave of the Holy Trinity ensuing; to 'shew and propose, if they have or know any 'thing to say for themselves, why they ought 'not to be charged with the aforesaid several 'Sums of Money upon them assessed in manner 'and form aforesaid, and not paid, in the said 'Schedule specified, and to satisfy the same; 'and further, to do and receive in the premisses, 'what our Court shall then there think fit to 'be ordered; and there bring then this Writ, 'and the names of those by whom you have so 'made known unto them. Witness HUMPHREY DAVENPORT, knt. at Westminster, the '22d day of May, in the 13th year of our reign. '*By the Roll.*

'Memorandum of the same year of the king 'in the Record Roll of this Easter, and by the 'baron Feushaw, and the tenor of the aforesaid 'Schedule in the aforesaid Writ mentioned as 'touching John Hampden, followeth in these 'words, viz. A Schedule of the Names of cer'tain persons in the county of Bucks, and of 'certain Sums of Money upon them assessed, 'and charged for and towards the providing of 'a Ship of War, together with the rigging and 'other things thereunto belonging; by the vir'tue of a certain writ under the great seal of 'England, bearing date the 4th day of August 'in the 11th year of Charles our now lord the 'king, and certified into the court of Chancery 'of our said lord the king to be unpaid, by vir'tue of a Writ of Certiorari, issuing out under 'the seal aforesaid, bearing date the 9th of 'March in the 12th year of his reign; and by 'Writ of Mittimus under the said seal sent into 'the Exchequer of our said now lord the king, 'for further process thereupon to be made, as 'by the tenor of the aforesaid Writ, bearing 'date the 4th day of August in the abovesaid '11th year of our said now lord the king, and 'by the Writ of Certiorari, and the Certificates 'thereupon made sent into the said Exchequer, 'and there of record remaining in the custody 'of the remembrancer of our lord the king, 'more fully doth appear: *ss.* Stoake Mandi'vile, *ss.* J. Hampden esq. 1*l.* At which day 'Anthony Chester, bart. sheriff of the county 'aforesaid, as touching the aforesaid John 'Hampden, returned, that he by Nicholas Aris, 'Robert Alexander, Richard Harrison, and 'William Heyborne, good and lawful men of 'his bailiwick, made known to the aforesaid 'John Hampden amongst other things, that he 'appear before the barons within written, at 'the day and place within contained; to shew 'and propose, if he hath or knoweth of any 'thing to say for himself, why he ought not to 'be charged with the aforesaid sum upon him 'assessed, and not paid, in the said Schedule 'specified, and to satisfy the same, as it is fur'ther commanded him. And now, that is to 'say, from the day of the Holy Trinity, upon 'three weeks the aforesaid John Hampden in 'the aforesaid Schedule named, here cometh 'in his proper person, and prayeth Oyer of the 'Writ of Scire Facias aforesaid, the Return of 'the same, and the Schedule unto the same an'nexed, and they are read unto him. He like'wise prayeth Oyer of the aforesaid Writ, 'bearing date the 4th day of August in the 11th 'year of Charles our said now lord the king in 'the Writ of Scire Facias mentioned, and it is 'read unto him in these words.

'*ss.* Charles by the grace of God, of Eng'land, Scotland, France and Ireland, king, De'fender of the Faith, &c. To the sheriff of 'our county of Bucks, the bailiff and burgesses 'of the borough and parish of Buckingham, 'the mayor, bailiff and burgesses of the borough 'of Chipping Wiccombe alias Wiccombe, and 'the good men in the said boroughs, parish, 'and their said members; and in the towns of 'Agmondesham, Wendover, and Great Mar'lowe, and in all other boroughs, villages, 'hamlets, and other places in the said county 'of Bucks, greeting. Because we are given to 'understand, that certain thieves, pirates, and 'sea-robbers, as well Turks, enemies of Chris'tianity, as others confederated together, wick'edly take away and despoil the ships, goods, 'and merchandizes, not only of our subjects, 'but also of the subjects of our allies upon the 'sea, which of old used to be defended by the 'English nation; and at their pleasure have 'carried away the men therein, enslaving them 'in a most wretched captivity: And whereas 'we see them daily preparing Shipping further 'to annoy our subjects, and to aggrieve the 'kingdom, unless a more speedy remedy be ap'plied, and their endeavours more vigorously 'obviated: Considering also the dangers which 'every where in these times of war hang over 'us; so that it behoves us and our subjects to 'hasten the Defence of the sea and kingdom 'with all possible expedition: We being will'ing by the help of God, in the highest degree 'to provide for the Defence of the kingdom, 'the Protection of the sea, the security of our 'subjects, the safe convoy of shipping and mer'chandize coming to our kingdom of England, 'and going from the said kingdom to foreign 'parts: And since we and our progenitors, 'kings of England, have hitherto been Lords 'of the Sea aforesaid; and it would in the 'highest manner concern us, if this royal ho'nour should in our days be lost, or any ways 'diminished; since also this burden of De'fence which touches all, ought to be borne by 'all, as hath been accustomed to be done by 'the law and custom of the kingdom of Eng'land: We firmly enjoin and command you 'the aforesaid sheriff, bailiffs, burgesses, mayor, 'good men, and all others whomsoever above 'mentioned, in the boroughs, towns, villages, 'hamlets and places aforesaid, and their mem'bers, in the faith and allegiance whereby you 'are bound to us, and as you love us and our 'honour, as also under the forfeiture of all 'things you can possibly forfeit to us, that you 'cause to be fitted out one ship of war of the 'burden of 450 tons, with men, as well skilful 'officers as able and experienced mariners, a 'hundred and fourscore at least; as also with 'a sufficient quantity of cannon, muskets, gun-

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'powder, pikes and spears, and other arms necessary for war, with double tackling; as 'also with competent victuals for so many 'men, until the 1st day of March now next ensuing; and from thence for 26 weeks at your 'costs, as well in victuals, as the men's wages, 'and other things necessary for war by that 'time, on account of defending the sea at our 'command in company with the admiral; to 'whom we shall before the aforesaid 1st day of 'March, commit the custody of the sea, to be 'and remain where he on our behalf shall appoint; and that you cause the same to be 'brought into the port of Portsmouth before 'the said 1st day of March, so that they may 'be there that day at farthest; thence to proceed with our ships, and the ships of other 'loyal subjects for the Protection of the Sea, 'the Defence of you and yours, to repel and 'vanquish all those whosoever they are, that 'endeavour to molest and annoy on the sea 'our merchants and other loyal subjects aforesaid, coming into our dominions on account 'of traffic, or returning thence to their own 'country. We have also appointed you the 'sheriff of our county of Bucks, the bailiff and 'mayor of the boroughs and parish aforesaid, 'or any two or more of you, of whom our will 'is, that you the aforesaid sheriff of our county 'of Bucks be one, within 30 days after the receipt of this Writ, to assess as much of the 'Charges aforesaid upon the aforesaid boroughs 'of Buckingham and Chipping Wiccombe alias 'Wiccombe with their members, as ought severally to be laid on or assessed. And if such 'Assessment within the aforesaid 30 days shall 'not happen to be made by you, two or more 'of you; then we have appointed you the aforesaid sheriff of our county of Bucks, to make 'such assessment upon the aforesaid boroughs, 'and parish, and members, as you shall see 'reasonable to be done. And our will is, that 'of your so doing, you the aforesaid sheriff of 'Bucks wholly certify under your seal the 'mayor and bailiffs aforesaid. We have also 'appointed you the aforesaid bailiff of the borough and parish of Buckingham, to assess 'every man in the said borough and parish, 'and in the members thereof, and the land-'tenants in the same, not having the ship aforesaid, or any share thereof, or not serving 'therein, to contribute to the expences about 'provision of the necessary premises; and to 'assess and lay upon the aforesaid borough and 'parish with the members thereof, so as aforesaid, that is to say, every one of them according to their estate, goods, and employment, 'and the portions on them assessed, by distresses, or other due ways and means to levy, 'and collectors in that behalf to nominate and 'appoint; and all those whom you shall find 'rebellious and refractory in the premises to 'imprison, there to remain till for their delivery we shall further think fit to direct. We 'have also appointed you the aforesaid mayor 'of the borough of Chipping Wiccombe alias 'Wiccombe, to assess every man in the same 'borough, and in the members thereof, and the 'land-tenants in the same, not having the ship 'aforesaid, or any share thereof, or not serving therein, to contribute to the expences 'about provision of the necessary premises; and 'to assess and lay upon the aforesaid borough 'with the members thereof, so as aforesaid, that 'is to say, every one of them according to their 'estate and goods, or employment, and the 'portions on them assessed, by distresses, or 'other due ways and means to levy, and collectors in that behalf to nominate and appoint; 'and all those whom you shall find rebellious 'and refractory in the premises to imprison, 'there to remain till for their delivery we shall 'further think fit to order and direct. And 'moreover, we have appointed you the aforesaid sheriff of our county of Bucks to assess 'every man in the aforesaid towns of Agmondesham, Wendover, and Great Marlow, and 'in the members thereof, and in all the other 'towns, villages, boroughs, hamlets, and other 'places in the aforesaid county of Bucks, and 'the land-tenants in the same, not having the 'ship aforesaid, or any share thereof, or not 'serving in the same, to contribute to the expences about the provision of the necessary 'premisses, and to assess and lay upon the said 'towns, villages, burroughs, hamlets and places, 'with the members thereof, so as aforesaid, 'that is to say, every one of them according to 'their estate and goods, or employment; and 'the portions on them assessed by distresses or 'other due ways and means to levy, and collectors in that behalf to nominate and appoint; and all those whom you shall find rebellious and refractory in the premises to imprison, there to remain till for their delivery 'we shall further think fit to order and direct. 'And further, we command you all, that you 'diligently apply yourselves to the premisses, 'and effectually do and execute the same, as 'you shall answer the contrary at your peril. 'But our will and pleasure is, not that under 'colour of our mandate aforesaid, you cause to 'be levied from the said persons more than 'shall suffice for the necessary expences of the 'premisses; or that any one who shall levy any 'money of the contributors to the charges 'aforesaid, detain the same or any part thereof 'in his own possession, or presume to appropriate it to other uses under any pretence or 'colour whatsoever. It being our will, that if 'more shall be collected than is sufficient, that 'the same be paid back again to those who 'shall have so paid the same, according to every 'man's respective share and proportion. Witness myself at Westminster the 4th day of 'August in the 11th year of our reign.

'He prayeth also Oyer of the aforesaid writ '*Scire facias* above mentioned, and it is in like 'manner read unto him.

'ss. Charles, by the grace of God, of England, Scotland, France and Ireland, king, defender of the faith, &c. To those who were sheriffs of our county of Bucks between the 4th 'day of August, in the 11th year of our reign,

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'and the 1st day of March then next ensuing, 'to those who were bailiffs of the burrough and 'parish of Buckingham, and the mayor and 'bailiffs of the burrough of Chipping Wic- 'combe alias Wiccombe, in the said county of 'Bucks, within the time aforesaid, greeting. 'Whereas by our Writ made under our great 'seal of England, bearing date the aforesaid 4th 'day of August in the 11th year abovesaid, for 'the defence of the kingdom, the protection of 'the sea, the security of our subjects, and the 'safe convoy of the ships and merchandize 'coming to our kingdom and passing thence to 'foreign parts; we commanded the sheriff of 'our county of Bucks, the bailiff of the bur- 'rough and parish of Buckingham, as also the 'burgesses of the said burrough, the mayor and 'bailiffs of Chipping Wiccombe alias Wic- 'combe, as also the burgesses of the said bur- 'rough, and the good men in the said burroughs 'and parish, and in the said burroughs and pa- 'rish and members of the same, and in the 'towns of Agmondesham, Wendover, and 'Great Marlow, and in all other places, towns, 'burroughs, villages, hamlets, and other places 'in the said county of Bucks, that you should 'cause to be fitted out one ship of war of the 'burden of 450 tuns, with men, as well skilful 'officers as able and experienced mariners, '180 at least, as also with a sufficient quantity 'of cannons, muskets, pikes and spears, gun- 'powder, and other arms necessary for war, 'with double tackling, as also with competent 'victuals for so many men, at a certain day in 'the said writ contained, and from thence for '26 weeks at the costs of the men and land- 'tenants of the burroughs, parish, towns, vil- 'lages, hamlets, and other places above men- 'tioned in the said county of Bucks, as well in 'victuals, as the men's wages, and other things 'necessary for war, by that time, for defending 'the sea; and that you should cause the same 'to be brought into the port of Portsmouth 'within the time in the said writ limited. And 'whereas by the said Writ, we appointed the 'Sheriff of our county of Bucks aforesaid, the 'bailiff of the burrough and parish of Bucking- 'ham aforesaid, and the mayor of the burrough 'of Chipping-Wiccombe alias Wiccombe afore- 'said, or any two or more of them, of whom 'our will was that the Sheriff of our said county 'of Bucks should be one, to assess as much of 'the costs aforesaid, upon the aforesaid bur- 'rough and parish of Buckingham, and upon 'the aforesaid burrough of Chipping-Wiccombe 'alias Wiccombe with their members as ought 'severally to be laid on, or assessed. And 'whereas we appointed the bailiff of the bur- 'rough and parish of Buckingham, and the 'mayor of the burrough of Chipping-Wiccombe 'alias Wiccombe, severally and respectively to 'assess every man in the said several boroughs 'and parish, and the members thereof, and the 'land-tenants in the same, not having the ship 'aforesaid or any share thereof, or not serving 'therein, to contribute to the expences about 'the provision of the necessary premisses: And 'upon the aforesaid borough and parish of 'Buckingham, and upon the aforesaid borough 'of Chipping-Wiccombe alias Wiccombe, so 'as aforesaid, then to be severally and dis- 'tinctly laid, that is to say, every one of them 'according to their estate and goods, or em- 'ployment, and the portions upon them assess- 'ed by distresses, or other due ways and means 'to levy, and collectors in that behalf to nomi- 'nate and appoint, in manner and form as in 'the said writ was commanded. And whereas by 'our said writ we moreover appointed the she- 'riff of our said county of Bucks to assess every 'man in the aforesaid towns of Agmondesham, 'Wendover, Great Marlow, and in the mem- 'bers thereof, and in all the other towns, vil- 'lages, boroughs, hamlets, and other places in 'the aforesaid county of Bucks, and the land- 'tenants in the same, to contribute to the ex- 'pences about the provision of the necessary 'premisses, and the other things to do and ex- 'ecute in manner and form as by the said 'writ was commanded. And because some 'men and land-tenants in the said county, bo- 'roughs, parish, towns, villages, hamlets, and 'other places, by several taxations, and sums of 'money, by you upon them respectively laid and 'assessed towards the contribution of the burden 'aforesaid, according to the exigency of the writ 'aforesaid, have not yet paid and satisfied the 'same, but have refused, and yet gainsay to pay 'the same, as we are informed. And whereas 'our late will was to be certified as well of the 'names of the men and land tenants who had 'been assessed towards the contribution of the 'expences abovesaid, and had not paid the 'money so assessed, as also of the several por- 'tions or sums of money laid upon them. You 'nevertheless in contempt of us, have sent no- 'thing upon the return of our writ limited. We 'therefore command you, the late sheriff of our 'county of Bucks, as we heretofore have com- 'manded you, that you certify to us, as well of 'the names of the men, and land tenants, in the 'aforesaid county, by virtue of our said writ by 'you respectively assessed, as the sums of mo- 'ney on them so assessed, which they have not 'yet paid, nor satisfied, but refuse to pay the 'same; as also of the several portions and sums 'of money, by you the aforesaid late sheriff of 'our county of Bucks upon them assessed, re- 'duced into writing, with all things touching 'the same, into our Chancery, distinctly and 'openly under your seals, without delay, or at 'farthest before the 26th day of April next en- 'suing, wheresoever you shall then be, together 'with this writ. And we command you the 'aforesaid late bailiff of the borough and parish 'of Buckingham, and the mayor of the borough 'of Chipping Wiccombe, alias Wiccombe, as 'we heretofore have commanded you, that you 'severally certify us, as well of the names of 'the aforesaid men and land tenants in the bo- 'rough and parish of Buckingham, and borough 'of Chipping Wiccombe alias Wiccombe, by 'virtue of our said writ first above mentioned 'by you respectively assessed, as the sums of

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'money on them so assessed, which they have 'not yet paid, nor satisfied, but refuse to pay 'the same; as also of the several portions and 'sums of money by you upon them respect- 'ively assessed, reduced in like manner into 'writing, with all things touching the same, 'into our Chancery aforesaid, distinctly and 'openly without delay, or at furthest before 'the 26th day of April next ensuing, where- 'soever you shall then be, together with this 'writ. Witness myself at Westminster, the '9th day of March, in the 12th year of our 'reign. EYRE. At which day, Peter Temple 'and Heneage Proby returned the aforesaid 'writ, by indorsement thus, *ss.* The execution 'of this Writ appears in certain Schedules to 'this Writ annexed. The tenor of which Sche- 'dules as to the aforesaid John Hampden re- 'turned by the aforesaid Peter Temple follows 'in these words. *ss.* Bucks. *ss.* I Peter Temple 'knight and baronet, who was sheriff of the 'county of Bucks, that is to say, between the '4th day of August, in the 11th year of the 'reign of our lord Charles now king of England, '&c. and the 22nd day of February then next 'following; on which day I went out of my 'office of sheriff of the county of Bucks afore- 'said; by virtue of the said Writ of our lord 'the king to this Schedule annexed, do certify 'unto our said lord the king into his Chancery, 'that by virtue, and according to the exigency 'of the writ of our said lord the king issued out 'of his Chancery, and there inrolled of record, 'and, amongst others, directed to the sheriff of 'the said county of Bucks, bearing date the '4th day of August, in the 11th year aforesaid; 'have assessed upon several men and land te- 'nants of the county of Bucks aforesaid, whose 'names are under-written, the several portions 'and sums of money at their particulars placed 'below, to contribute to the expences about 'the providing of the ship in the said writ men- 'tioned; which said portions and sums of mo- 'ney, or any parcel thereof, before my going 'out of my office of sheriff of the county afore- 'said, the said men and land tenants, or any of 'them whose names are under-written, have 'not paid, but have refused to pay the same to 'my hands, or the hands of the collector by me 'in that behalf appointed, by virtue of the writ 'last mentioned, viz. Stoake Mandiville, *ss.* Mr. 'John Hampden, esq. 1*l.* And the tenure of 'the other Schedule by the aforesaid Heneage 'Proby in like manner returned, and to the 'said Writ annexed also, follows in these words: '*ss.* 'There is to be accompted upon by the as- ''sessors, high constables, petty constables ''within the said county in general, which can- ''not be accompted for by sir Peter Temple, ''being as it is conceived short 4*l.*''

'I Heneage Proby, esq. who was sheriff of 'the county of Bucks between the 22nd day of 'February, in the 11th year of the reign of our 'lord Charles now king of England, &c. and 'from the said day and year, to the first day of 'March then next following; by virtue of the 'Writ of our said lord the king to this Schedule 'annexed, do certify unto our said lord the king 'into his Chancery, that the men and land te- 'nants of the county of Bucks aforesaid, or any 'one of them whose names are expressed in cer- 'tain schedules to this Writ annexed, who were 'assessed by sir Peter Temple knight and baro- 'net, late sheriff of the county of Bucks afore- 'said, whilst he was in the office of sheriff of the 'county aforesaid, in the several portions and 'sums of money placed at their several names 'above, to contribute to the expences about the 'providing of the ship; by virtue, and according 'to the exigency of the Writ of our said lord the 'king, issued out of his Chancery, and there 'inrolled of record, directed amongst others to 'the sheriff of the said county of Bucks, bear- 'ing date the 4th day of August, in the 11th 'year aforesaid, have not paid, but have re- 'fused to pay the same to Heneage Proby be- 'ing sheriff of the said county of Bucks, next 'after the going out of sir Peter Temple knight 'and baronet, from the office of sheriff of the 'said county, or to the hands of the collector 'in that behalf appointed by virtue of the Writ 'last mentioned. And further, the aforesaid 'John Hampden in like manner prayeth Oyer 'of the aforesaid Writ of Mittimus, of which 'mention is made in the Writ of Scire Facias, 'aforesaid, and it is read unto him in these 'words: *ss.* Charles by the grace of God, of 'England, Scotland, France, and Ireland, king, 'defender of the faith, &c. To the treasurer 'and barons of his Exchequer, greeting: By 'the tenor of a certain Writ of ours made 'under our great seal of England, bearing date 'the 4th day of August, in the 11th year of our 'reign, inrolled in the rolls of our Chancery; 'by which we commanded the sheriff of our 'county of Bucks, the bailiff and burgesses of 'the borough and parish of Buckingham, the 'mayor or bailiff and burgesses of the borough 'of Chipping Wiccombe alias Wiccombe, and 'the good men in the said boroughs, parish, and 'the members thereof, and in the towns of Ag- 'mondesham, Wendover, and Great Marlow; 'and in all other boroughs, towns, villages, 'hamlets, and other places in the said county of 'Bucks; that for the defence of the kingdom, 'the protection of the sea, the security of the 'subjects, and safe convoy of the ships and 'merchandize coming to our kingdom of Eng- 'land, and thence going to foreign parts, they 'should fit out one ship of war of the burden of '450 tuns, with men, as well skilful officers as 'able and experienced mariners, a hundred and 'fourscore at least; as also with a sufficient 'quantity of cannons, muskets, gunpowder, 'pikes and spears, with other arms necessary 'for war, and with double tackling; as also 'with competent victuals for so many men 'at a certain day, and from thence for 'twenty-six weeks at the costs of the men and 'land-tenants of the boroughs, parish, towns, 'villages, hamlets, and other places above 'mentioned in the said county of Bucks, 'as well in victuals as the men's wages, and 'other things necessary for war for that time,

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'on account of the defence of the sea under 'our command, in company of the admiral to 'be and remain; and that they should cause 'the same to be brought into the port of Ports-'mouth about the time limited in the said 'writ; and that they should respectively assess 'every man in the said borough and parish of 'Buckingham, and borough of Chipping-Wic-'combe alias Wiccombe, and in the rest of the 'boroughs, towns, villages, hamlets, and other 'places in the said county of Bucks, and the 'members thereof, and the land-tenants in the 'same, to contribute to the expences about 'the provision of the necessary premisses, and 'other things to do and execute in manner and 'form as was commanded by the said writ: 'We send to you being present the inclosed 'writ; for that the safety of our kingdom of 'England, and our people thereof were in dan-'ger, which we have taken care to have issued 'out of our Chancery amongst other writs, to 'make such provision and assessment through 'every county, city, borough, town, village, 'hamlets and places of our kingdom of Eng-'land, and of Wales, and the members thereof, 'out of our Chancery aforesaid lately issuing, 'and there in like manner inrolled. And also 'a certain other Writ of ours to certify us into 'our Chancery, as well of the names of the 'men and land-tenants in the aforesaid borough 'and parish of Buckingham, and borough of 'Chipping-Wiccombe alias Wiccombe, and in 'the rest of the boroughs, towns, villages, ham-'lets, and places of the said county of Bucks, 'who by our command aforesaid were assessed 'to contribute towards the provision of the 'premisses, and have not paid the sums of 'money upon them so assessed: as also of the 'several portions and sums of money so charged 'and laid upon the said men and land-tenants; 'as likewise certain certificates by virtue of the 'said writ reduced in writing, and sent into 'our Chancery. We also send you being pre-'sent the inclosed, commanding you, that hav-'ing inspected the writs and certificates afore-'said, you further cause to be done thereupon 'for the levying, collecting, and receiving all 'and singular the aforesaid sums of money of 'the aforesaid contribution as yet unpaid, as 'by right, and according to the law and custom 'of our kingdom of England hath been used to 'be done. Witness myself at Westminster the '5th day of May in the 13th year of our reign. 'EYRE. As in the said Writs and Schedules 'thereunto annexed, certified into the Exche-'quer of our said lord the king, and there in the 'custody of the remembrancer of our said lord 'the king remaining of record more fully is 'contained. Which being read, heard, and by 'him understood, the said John Hampden com-'plaineth, that by colour of the several Writs, 'their Returns and Schedules to them annexed, 'he hath been grievously vexed and disquieted, 'and that unjustly; because he saith, that the 'aforesaid several Writs above mentioned, 'their Returns and Schedules to them annexed, 'and the matter in them contained, are not 'sufficient in the law to charge the said John 'Hampden on or with the payment of the 'aforesaid sum of 20 shillings on him in the 'Schedule aforesaid, in the manner and form 'aforesaid taxed and assessed, or any parcel 'thereof; to which he hath no necessity, or 'is obliged by the law of the land to make an-'swer: Whereupon by reason of the insuffi-'ciency of the aforesaid several Writs above-'mentioned, their Returns, the Schedules to 'them annexed, and the matter in the said 'Writs and Schedules contained, he the said 'John Hampden prayeth Judgment, If our 'said now lord the king ought or is willing fur-'ther to assess or charge him with the aforesaid '20*s.* or any parcel thereof. ROB. HOLBORNE.

'And John Banks knight, Attorney-General 'of our now lord the king who sueth for our 'said lord the king, being present here in court, 'the same day in his proper person, saith, that 'the aforesaid several Writs, and their Returns, 'and the Schedules aforesaid to the same an-'nexed, and the matter in the same con-'tained, are sufficient in the law to charge 'the aforesaid John Hampden with the afore-'said 20*s.* upon him assessed in the form, and 'for the cause aforesaid; which said matter, 'he the said Attorney-General of our said lord 'the king, for and in behalf of our said lord 'the king, is ready to verify; and which matter 'the aforesaid John Hampden doth not deny, 'nor any wise make Answer thereunto, but 'wholly refuseth to admit the verification 'thereof, and therefore prayeth judgment; and 'that the aforesaid John Hampden be charged 'with the said 20*s.* and satisfy the same.

"JOHN BANKS."

The First Day's ARGUMENT of Mr. ST. JOHN,* on behalf of Mr. HAMPDEN, before all the Judges in the Exchequer Chamber, in the Great Case of SHIP-MONEY.

May it please your lordship; Pasch' xiijo Car' a Sciri Facias issued to the sheriff of Bucks,

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* "Mr. Saint John, who was in a firm and entire conjunction with the other two, was a lawyer of Lincolns-Inn, known to be of parts and industry, but not taken notice of for practice in Westminster-Hall, till he argued at the Exchequer-Chamber the case of Ship-money on the behalf of Mr. Hampden; which gave him much reputation, and called him into all courts, and to all causes, where the king's prerogative was most contested. He was a man reserved, and of a dark and clouded countenance, very proud, and conversing with very few, and those, men of his own humour and inclinations. He had been questioned, committed, and brought into the Star Chamber, many years before, with other persons of great name and reputation (which first brought his name upon the stage) for communicating some paper among themselves, which some men at that time had a mind to have extended to a design of sedition; but it being quickly evident

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reciting, That whereas several sums of money mentioned in a Schedule to that Writ annexed, by a writ under the great seal of England, dated 4 Augusti 11 Car' sessed upon several persons for providing of a ship of war, were not paid: and that upon a Certiorari dated 9 Martij 13 Caroli, these sums and the several persons upon whom they were assessed, were certified into the Chancery, and from thence by Mittimus dated 5 Maij, were sent into the Exchequer, that process might be issued against these defaulters: thereupon the sheriff is commanded, 'Quod sciri faceret' to those several persons to appear in the Exchequer Octab' Trinitat' 13 Caroli, to shew cause why they should not pay those sums assessed upon them.

The Sheriff returns, 'Quod sciri fecit' John Hampden, esq. who was assessed at 20*s.* and he hath not paid it. Mr. Hampden hath appeared and demanded Oyer of the Scir' Fac' of the Schedule of the writ dated 4 Augusti, the Certiorari and the Mittimus, and of their several Returns, and hath thereupon demurred in law.

The Writ dated 4 Augusti 11 Car' because it is the ground of the issuing forth the Sci fa', and so by necessary consequence, is that which first occasioned any process against him, it will be the subject from whence will be fetched all that shall be said either for or against my client. I will endeavour by breaking it into parts, more clearly to present it to your lordships view.

The thing commanded is, that this county should provide a Ship of war of 450 tons, with 180 men, guns, gunpowder, double tackling, victuals, and all other things necessary, and to bring her to Portsmouth by the 1st of March following, and from that time to provide her of victuals, mariners wages, and all other necessaries for 26 weeks. For effecting this, there is power given to assess each person within the county 'secundum statum et facultates,' and to bring in these sesses by distress, 'et quos rebelles invenirent' to imprison their persons.

My lords, if the Writ had staid here, and gone no further, the command though full in word, it had been void in law, because as yet it appears not for what end this ship was to be provided. 40 Ass. Plow. A Commission to seize mens goods notoriously suspected of felony, before conviction, adjudged void, because therefore the command, without cause shewn, and that sufficient in law too, would be void.

In the second place therefore they are set down to be these: 'Pro defensione Regni, 'tuitione Maris, securitate Subditorum, et 'salva conductione Navium,' both outward and inward, the Sea being infested with pirates, and more shipping being daily prepared 'ad Regnum 'gravandum;' these are the ends.

In the third place, the legality of it, that every man 'secundum statum et facultates' should be hereunto assessed, is thus inforced. First, from Custom and continued use, in these words; That the Sea 'per gentem Anglicanam 'ab olim defendi consuevit.' And secondly, this Use proved to be from a common ground of equity; 'Onus defensionis, quod omnes tan-'git, per omnes debet supportari:' And the Rule of Equity backed by the Common Law in these words, 'Prout per legem et consuetudinem 'regni Angliæ fieri consuevit.' The argument stands thus; All have benefit by defence of the realm, and therefore by law the Charge ought to be borne by all.

Then it is further inferred, that every man, even by his allegiance, is bound to contribute to this Charge, the command being 'in fide et 'legiancia quibus nobis tenemini.' Of these parts the Writ consists, which all being put together, in brief declare the scope and end of the issuing forth thereof to be the Defence and Safety of the kingdom; a thing so necessary, that it must needs be legal: for it is too near and too narrow a conceit of the wisdom and policy of the law to think, that whilst the care thereof should be confined only to the preservation of the general members of the body politic from the wrongs and pressures that might be offered from others to the fellow-members, that in the mean time it will leave the whole to the violence and will of enemies: so that whilst each subject, considered as a part of the whole, hath a known and sure estate in Lands, and real property in his Goods, not to be impeached by any whatsoever within the realm; yet considered all together as they make the 'Unum 'Compositum,' they should have in them only 'Præcariam Possessionem,' or Tenancy at Will in regard of Foreigners. My lords, this cannot be; for the law is so careful herein, that even afar off it foresees and prevents all dangers in this kind; and that is the reason that an alien, though a friend, hath not capacity to purchase any land in the realm. And if the law be so quick-sighted, as that to prevent but possibility of danger, it keeps such strangers from having any land within the realm, which desire to come by it peaceably and for valuable considerations; by this we may easily see the great care it hath to prevent apparent dangers, which usually proceed from open force and violence. Which further appears by the greatness of the punishment which the law inflicts upon offenders in this kind, which is High-Treason, of all other the greatest. 13 Eliz. Dyer 298. Story * con-

that the prosecution would not be attended with success, they were all shortly after discharged; but he never forgave the court the first assault, and contracted an implacable displeasure against the church purely from the company he kept. He was of an intimate trust with the earl of Bedford, to whom he was in some sort allied (being a natural son of the house of Bullingbrook) and by him brought into all matters where himself was to be concerned. It was generally believed, that these three persons, with the other three lords mentioned before, were of the most intimate and entire trust with each other, and made the engine which moved all the rest."

* See vol. 1. No. 59.

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spired beyond sea with a foreign state to invade the realm; and though nothing was attempted, yet it was adjudged High-Treason. And 21 Ed. 3, fo. 23. and 45 Ed. 3, 24. a man killed a captain that was going with 20 men at arms to the king in his wars, and it was adjudged to be High-Treason. And so by some opinions in print it is, to burn or sink any of the king's Ships. By the greatness of the punishment for the breach of the negative part of the Law, we might understand the peremptoriness and force of the affirmative part. So that, my lords, in this case the question is not *de re*, for by the law the safety of the realm is to be provided for; 'Salus Populi suprema lex:' Neither is the question *de personis*, either in respect of the Persons who are to bear the Charge of it, or of the persons whom the Law hath intrusted with the care and power of this common Defence.

For the first, that is, the Persons that are to bear this Charge, that in the writ, 'Quod 'omnes tangit per omnes debet supportari:' The reasons of the Writ are weighty, and agreeable to the rule both of the Civil and Common Law, 'Qui sentit commodum, sentire 'debet et onus:' So that I conceive the burden lies upon all. In respect of our *bona naturæ*, our Lives and Persons be equally as dear to one as another: In respect of our *bona fortunæ*, so *secundum statum et facultates*; because the greater the state and means of livelihood, the greater the benefit by the Defence. The law in this case of Defence against the invasion of living enemies, being the same with that against our soil and ground by the inundations and outrages of the sea and fresh water; for by the law, as appears by the Commission of Sewers, as well before the Statute of 28 Hen. 8, as since to the repairing of a bank or causey, river, or other sewer, all are chargeable that have 'Defensionem, Commodum, vel, Salva-'tionem qualitercunque.' All that have Defence must be assessed, the Assess must be equally distributed, and therefore laid upon every man within the level, 'Pro rata portionis 'tenuræ suæ, seu pro quantitate communis 'pasturæ vel piscariæ;' the more land, common, or benefit of fishing each man hath, according to the proportion thereof the Assess must be. So that, my lords, in the second place, the question will not be, Whether my Client by law be exempted from the Charge of the Defence of the realm; for which other his majesty's subjects he ought to help to bear the common burden, and more or less may be laid upon him proportionably to his estate and means of livelihood.

Neither, Thirdly, is there any question to be made but the law hath intrusted the person of his royal majesty, with the care of this Defence. The Defence and Protection which we have in our bodies, lands, and goods, against any within the realm, we know it is from him; for all jurisdiction legal, both ecclesiastical and civil, which defends us in them, is wholly in his majesty. The same it is in case of foreign defence, even by the *Jus Gentium*, as appears in the text, by the peoples desiring that they might be like other nations, by having a king that might go in and out before them, and fight their battles. That the king, and that legally, calleth the kingdom 'Regnum nostrum,' and every city and great town 'Civitatem et Villam 'nostrum:' Quoad 'proprietatem' it cannot be, because they are the several land-owners; it must be so therefore principally in this respect, 'Quoad protectionem et defensionem.' Neither hath the law invested the crown with this height of sovereignty only as a *honorarium*, for the greater splendor of it, but likewise as a duty of the crown, or *pars ministerii*, for the good and safety of the realm, which in many of the ancient Commissions of Sewers, before the statute of 28 Hen. 8, is thus expressed, The king 'ratione regiæ dignitatis et per juramen-'tum est astrictus ad providendum salvationi 'regni undiquaque;' so that both in honour, and by his oath he is bound to provide for the safety of the realm, and that *circumquaque*.

My lords, by the Law the king is *pater-familias*, which by the Law of Œconomick is, not only to keep peace at home, but to protect his wife and children, and whole family from abroad. It is his vigilancy and watchfulness that discovers who are our friends, and who are our foes; and that after such discovery first warns us of them; for he only hath power to make war and peace.

Neither hath the law only entrusted the care of Defence to his majesty, but it hath likewise, secondly, put the *Armat' Potestat'* and means of Defence wholly into his hands: for when the enemy is by him discovered and declared, it is not in the power of the Subject to order the way and means of Defence, either by sea or by land, according as they shall think fit; for no man without commission or special Licence from his majesty, can set forth any ships to sea for that purpose; neither can any man without such commission or licence, unless upon sudden coming of enemies, erect a fort, castle, or bulwark, though upon his own ground: neither, but upon some such emergent cause is it lawful for any subject, without special commission, to arm or draw together any troops or companies of soldiers, or to make any general collections of money of any of his majesty's subjects, though with their consent.

Neither, in the third place, is his majesty armed only with his primitive prerogative of Generalissimo and Commander in Chief, that none can advance towards the enemy, until he gives the signal, nor in other manner than according to his direction: but also with all other powers requisite for the full execution of all things incident to so high a place, as well in times of danger as of actual war. The sheriff of each county, who is but his majesty's deputy, he hath the *posse comitatus*; and therefore it must needs follow, that the *posse regni* is in himself.

My lords, not to burn day-light longer, it must needs be granted that in this business of Defence, the *suprema potestas*, is inherent in

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his majesty, as part of his crown and kingly dignity So that as the care and provision of the Law of England extends, in the first place, to foreign defence; and, secondly, lays the burden upon all; and, for ought I have to say against it, it maketh the quantity of each man's estate the rule whereby this burden is to be equally proportioned upon each person: So likewise hath it, in the third place, made his majesty sole judge of dangers from foreigners, and when and how the same are to be prevented; and, to come nearer, hath given him power by Writ under the great seal of England, to command the inhabitants of each county to provide Shipping for the Defence of the kingdom, and may by law compel the doing thereof.

So, my lords, as I still conceive, the question will not be *de persona*, in whom the 'Suprema 'Potestas' of giving the authorities or powers to the Sheriff, which are mentioned in this writ, doth lie, for that is in the king: But the question is only *de modo*, by what medium or method this supreme power, which is in his majesty, doth infuse and let out itself into this particular; and whether or no in this case such of them have been used, as have rightly accommodated and applied this power unto this Writ in the intended way of Defence: for the law of England, for the applying of that Supreme Power which it hath settled in his majesty to the particular causes and occasions, hath set down a method and known rules, which are necessarily to be observed.

In his majesty there is a twofold power, *voluntas* or *potestas interna* or *naturalis*, and *externa* or *legalis*, which by all the Judges of England, 2 Ric. 3, fo. 11, is expressed 'per 'voluntatem regis in camera,' and 'voluntatem 'regis per legem.'

My lords, the forms and rules of law are not observed in this case; the supreme power not working *per medias*, it remains still in himself as 'voluntas Regis interna,' and operates not to the good and relief of the subject that standeth in need. To instance: his majesty is the Fountain of bounty; but a grant of lands without letters patent transfers no estate out of the king, nor by letters patent, but by such words as the law hath prescribed. His majesty is the Fountain of Justice; and though all justice which is done within the realm flows from this fountain, yet it must run in certain and known channels. An Assize in the King's-Bench, or an Appeal of Death in the Common-Pleas, are 'coram non judice,' though the Writ be by his majesty's command; but so of the several jurisdictions of every court. The justice whereby all felons and traitors are put to death, proceeds from his majesty; but if a Writ of execution of a traitor or a felon be awarded by his majesty without Appeal or Indictment preceding, an Appeal of Death will lie by the heir against the executioner. If the process be legal and in a right court, yet I conceive that his majesty alone, without assistance of the Judges of the court, cannot give Judgment. I know that king John, Henry 3, and other kings, have sat in the King's-Bench and in the Exchequer, but, for ought appears, they were assisted by their judges: This I ground upon the Book Case 2 Rich. 3, fo. 10, 11, where the party is to make fine and ransom at the king's will and pleasure. This Fine by the opinion of the Judges of England, must be set by the Judges before whom the party was convicted, and cannot be set by the king. The words of the Book are thus: 'In Terminis et non per legem 'per se in Camera sua, nec aliter coram se, 'nisi per Justiciarios suos, et hoc est voluntas 'regis, scilicet per justiciarios suos et per legem 'suam,' to do it.

And as without the assistance of his Judges, who are his settled counsel at law, his majesty applies not his laws and justice in many cases; neither is this sufficient to do it without the assistance of his Great Council in parliament. If an erroneous Judgment was given before the statute of 27 Eliz. in the King's-bench, the king could not relieve his grieved subject any way but by Writ of Error in parliament: neither can he out of parliament alter the old laws, or make new, or make any Naturalizations or Legitimations, nor do some other things: and yet is the parliament his majesty's Court too, as well as other his Courts of Justice: it is his majesty that gives life and being to it, for he only summons, continues and dissolves it, and he by his *le veut* enlivens all the actions in it; and after the dissolution of it, by supporting his courts of justice, he keeps them still alive, by putting them in execution. And although in the Writ of Waste, and in some other writs, it is called 'Commune Con-'cilium Regni,' in respect that the whole kingdom is representatively there; and, secondly, that the whole kingdom have access thither in all things that concern them, other courts affording relief but in special cases; and, thirdly, in respect that the whole kingdom is interested in, and receives benefit by the laws and things there passed: Yet it is 'Concilium 'Regni' no otherwise than the Common Law is 'Lex Terræ,' that is 'per modum Regis,' whose it is, if I may so term it, in a great part, even in point of interest, as he is the head of the Commonwealth, and whose it is wholly in trust for the good of the whole body of the realm; for he alone is trusted with the execution of it. The parliament is the king's court, and therefore in the Summons the king calls it 'parlia-'mentum nostrum.' So the Returns of the knights and burgesses, 'Quod sint ad Parlia-'mentum Domini Regis.' Fleta, lib. 2, cap. 2, 'Habet Rex curiam suam in conciho suo in 'parliamentis suis;' and therefore the pleadings there anciently were usually wont to begin for the most part, 'Queritur Domino Regi;' of Petitions by private persons, 'Supplicavit 'Domino Regi,' though for relief against others, Inquisitions and *Venire fac'* returnable there sometimes 'Coram Domino Rege et Consilio 'suo,' as appears by infinite Precedents in the Parliament Pleas of Edw. the 1st and Edw. the

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2nd's time, both in the Tower, and many Cases adjourned into the King's-Bench.

The Patents passed by authority of parliament, and likewise the acts of parliament, had anciently so much of the king's name and style in them, that as it appears in the Prince's Case in the 8th report, it was a hard matter, otherwise than by circumstances, to know whether they had any thing of the parliament in them or not. And from those times even until now, the alteration is nothing in substance, for the acts for the most part are thus: 'It is enacted 'by our sovereign lord the king, with the 'assent of the lords spiritual and temporal, 'and commons.' The king both then and still is *pars agens*, the rest are but *consentientes*.

My Lords, to apply all to the Case in question: by the Cases before cited it appears, that what was done in parliament by the law phrase and dialect, is said to be done by the king; for as the Civilians say of the senate, that it is 'Pars corporis Cæsaris,' so we of the Parliament, that it is 'Pars corporis Regis.' The maxim of Justinian, 'Quod principi placet 'legis vim habet,' is agreed by Bracton and all the civilians. And yet both he and many of them say, that those must pass the Senate, and though done in the senate, yet they be *placita principis*. So it is, although when we speak *ut vulgus*, we say Fines are said to be set by the king's court; yet the law, when it saith that they be done and set, saith they be done and set by the king. By the same reason therefore, though when we speak *ut vulgus*, we say such a thing is done by the parliament, yet in the legal account these are done by the king: the Medium, or way of doing of them, is with the assistance or consent of his great Council in parliament.

The second thing which I observe is this: By the case before cited it appears, that without the assistance in parliament, his majesty cannot in many cases communicate either his justice or his power unto his subjects.—Hence, thirdly, it necessarily follows, as I conceive, that the kingly dignity doth most appear and manifest itself there; which was the opinion of all the Judges of England, declared in a parliament 34 Hen. 8, as appears by Crompton's Jurisdict. fo. 10, who by the king's commandment meeting together about point of Privilege of Parliament, the king afterwards in declaring of their Opinions, doth it in part of the Case in these words: 'Further, We be informed by our 'Judges, that we at no time stand so highly in 'our estate royal, as in time of parliament, 'wherein we as Head, and you as Members, 'are conjoined and knit together in one body 'politic.' Which Declaration of it shews likewise that it was the king's own opinion, that he at no time stood so highly in his estate, as in the time of parliament.

It appears not by the Record, that this Writ, which giveth power to sell and alter the property of the Defendant's Goods, issued from his majesty sitting in his estate royal in parliament, and therefore cannot be intended by your lordships and the court so to do. If therefore it hath issued from his majesty in the Chancery, otherwise than in parliament, where he stands in the height of sovereignty and perfection, that he hath not so much as a *posse nocere*; the question is, Whether it be erroneously issued, yea or no?

My Lords, I have now put the case, which although in this particular case it concerns the Defendant only; yet in consequence, as it appears, it concerns both his majesty and the whole state, and that in matters of the greatest and highest nature possible. His majesty is concerned in the way and manner of execution of the highest and greatest trust which the law hath reposed in him, the Safety and Preservation of the Kingdom; the Subject is concerned in that, wherein he is most tender, in the Property of what he hath.

My Lords, the greatness and weight of the Case puts me in this dilemma: not to argue it, were to deny that full submission to the command of some of your lordships that are sitting in the Court, neither should I do my client that service which he expects. If I proceed, the Case is too weighty and too great for me to argue. But I know the safest way is obedience, and that the Court cannot expect much from me. Having therefore already put the case, I will go on in the next place to state it, and afterwards to argue it.

The Question being concerning the Validity of the command in the Writs, which extends so far as to the altering of the Property of the Subjects Goods without their consent; and yet this being for a thing so necessary as the Defence of the kingdom both at land and sea; for the ends of issuing forth of the Writ are, 'Pro defensione regni, tuitione maris, securi-'tate subditorum, salva conductione navium,' both outward and inward. In the stating of this great question, I will in the first place endeavour to present your lordships those known and undoubted ways and means, whereby the law hath provided for the Defence of the realm both at land and sea, without the way in the Writ.

The first whereof is by Tenure of Lands. The services which hereby grow due are of two sorts; Service in Kind, which tends immediately to action in times of war, some whereof are for land-service, and some for sea-service. The second are such as supply his majesty for that purpose.

The second way is, those many Prerogatives which the law hath settled in the Crown, and made peculiar unto it for the Defence of the kingdom in general.

The third is, the particular Supplies of Money for the Defence of the Sea alone in times of danger, both ordinary and extraordinary, the thing principally intended in the Writ. These, my lords, will be the materials, whereupon afterwards I shall state the Question.

In that of Tenure, I shall begin with the service, and those which tend immediately to action in times of War. The kings of this

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realm, as they are the head of the Commonwealth in general, so are they the head and root from whence all Tenures spring; for as our Books agree, all the lands within the realm are held mediately or immediately of the crown. As therefore the law hath appropriated the Defence of the kingdom to the kings thereof, so hath it, as one of the principal ways for effecting thereof, trusted them with the reservation of such Tenures, as might serve for that purpose.

Amongst which, intending first to speak of Land-Service, I will begin with the Tenures of Knights-Service. Every man that holds by this service, from a whole Knight's Fee to any part thereof, ought to find a man completely armed for the war. Neither doth the finding of arms satisfy this Tenure: for he that holds by a whole Knight's Fee, ought to be 40 days in the service; and he that holds by a moiety of a Knight's fee 20 days; and so in proportion. In the Books of the Knights Fee, of Hen. 2, Edw. 1, and Hen. 6th's times, in the Exchequer, it appears, that there were many thousand Knights Fees held of the crown. And in the Red Book it is said, that it was 'in 'ore omnium,' that in the Conqueror's time there were thirty thousand held of him: some since have computed them to threescore thousand, which perhaps may be with the addition of those that were held of common persons, which are not of those upon which I shall insist.

But it may be objected, that in respect these Services are reserved by the king, that therefore they were not instituted only for the Defence of the realm, but may be exacted for foreign wars, or other-where for his majesty's peculiar service, as he shall think fit: which may be inferred both from the name which our old Books and Deeds style this Service by, when due to the crown, that is, 'forinsecum 'servitium;' and, secondly, from the use thereof, it having been performed in Normandy, Gascoyne, Tholouse, and Ireland, as appears by the Red Book, and many cases put together in the Institutes, in the Chapter of Escuage.

To the first Objection of the Name, the Answer is clear; for antiently, when those that held immediately of the crown by this service, did infeoff others of the land so held, desiring to free themselves of the burden of this service, besides the service which they reserved to themselves, they likewise commonly in the conveyance, made provision for their own acquittal against the king, and the feoffee took the whole burden thereof upon himself: and therefore in the Book of Knights Fees of Hen. 2's time, in so many hundred certificates of those that held immediately of the king, William London of Wilts certifies this; 'Quod nullum militem 'habeo feofatum, sed debeo defendere feodum 'meum per servitium corporis mei.' Of this nature are three or four others. All the rest after certifies, by how many knights fees he holds: them likewise he certifies that 'Defendit,' &c. of the king, by such and such 'Milites Feo-'fatos.' And in these deeds of Feoffment, after the reservation to the feoffor, was this clause: 'et faciend' inde,' sometimes 'Forin-'secum servitium,' sometimes 'Regale servi-'tium.' Bract. lib. 2. fol. 36, 37. and Fleta, lib. 3. cap. 14. saith, that it is called, 'Regale 'servitium, quia est servitium Domini Regis;' and by them 'Regale servitium,' and 'servi-'tium Domini Regis,' are all one and the same thing. To that therefore I shall need to give no further answer. By the same Authors it is called 'Forinsecum, quia capitur foris sive 'extra servitium, quod fit domino capitali;' and that is the meaning of the word; and that it is called 'Forinsecum,' in regard the Service is to be done Foris, that is, out of the kingdom, is cleared to your lordships by these Cases, P. 49 Hen. 3. Com. 31. Ed. 1, Rot. 32. Dors. Com. Hill. 33 Ed. 1, Rot. 52. Dors. Cornage, which we know is to wind a horn within the realm, in all those three cases is called 'servi-'tium Forinsecum Domini Regis Cornagij;' and Castleguard in the county of Northumberland, at the castle of Bamburgh, called 'Fo-'rinsecum servitium Domini Regis.'

To the second part of this Objection, that this service hath been often performed beyond sea; for the present I shall give Answer thereunto but in part, by telling your lordships without making proof thereof, that Escuage, which is all the penalty that lies upon the Tenant for his default cannot be assessed but in parliament; which, if it be so, proves that the king cannot command this service, otherwise than for the good and defence of the realm, in regard that if it be otherwise, no Escuage can be assessed without consent in parliament; which by intendment, according to the good the kingdom is likely to receive by the service, will proportionably lessen or increase the Escuage.

My Lords, That this Service was instituted for the Defence of the realm, appears by the care the law hath always taken for the increase and preservation of these services; so that if the lord purchase part of the land, yet the whole service remains: which being entire, and to be done by the body of a man, in that of being a steward or bailiff, or other private service, makes an extinguishment of the whole. The Authorities in point are many; the Statute of Mortmaine 7 Ed. 1, the mischief by conveying lands to houses of religion is there expressed to be, 'Quod servitia quæ ex hujus-'modi feodis debentur, et quæ ad defensio-'nem regni ab initio provisa fuerunt, indebite 'subtrahantur.' And besides the declaration that they are for the Defence of the realm, that Statute likewise promises for the increase of them; for if the lord enters not within a year and a day after the Feoffment, the king is to enter; and as the words of the Statute are 'alios inde feoffavimus per certa servitia nobis 'inde ad defensionem Regni nostri facienda,' the words are observable, 'per servitia nobis 'inde facienda;' for though the service be to be done to the king, it is to be done 'ad defen-'sionem regni.' This explains the Charter of

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Hen. 1, inrolled in the Red Book in the Exchequer, and cited in Mat. Paris, in the first leaf of Hen. 1's reign; where the king frees Knights-Service Lands from all Gelds and taxes; that being eased of this burden, 'apti 'et parati sint ad servitium meum, et ad de- 'fensionem regni mei.' In the Black Book in the Exchequer, fo. 3. Scutage is thus defined, 'ut inveniente in regnum hostium machina- 'tione,' it is then due: see Bracton in his second book fol. 36 and 37, that they are so, 'Propter exercitum et Patriæ tuitionem,' and to be performed 'certis temporibus cum casus 'et necessitas evenerit.' Bract. fol. 162. 'Les 'fees de chatre fuerunt purveans ad defence 'de notre realme.' The Books are express, the 35 Hen. 6, 11. 8 R. fol. 105. Talbot's case, 6 Rep. fol. 2. Bruerton's case, Institut. pl. 103. Co. Preface to the ninth Report.

For the further clearing of what is said already, and what I am to add, it is observable, that these Services are not created 'ex provi- 'visione hominum,' but 'ex provisione legis;' for as it is in 33 Hen. 6, 7. and sixth Rep. fol. 7. Wheeler's Case, if the king grants land without reserving any service at all, or 'absque 'aliquo inde reddendo,' the Patentee shall hold the land by Knights-Service *in capite*. The Book of 24 Ed. 3, 65. Stamford Prerogat. fol. 10. Institut. pl. 73, it is said the first kings of this realm had all the land of it in their own hands; which appears likewise by this, that all the lands within the kingdom are held mediately or immediately of the crown. In the transferring these lands to the several inhabitants, we see, by the cases before cited, that the care and provision of the law was, that all should by tenure of the crown be made liable to the defence of the kingdom. I shall briefly therefore show how the kings of this realm have executed the trust for the Defence of both land and sea.

And first, a little further to prosecute the Land-Service, because the Tenure by Knights-Service ties the tenant only to forty days service, and that for the Defence of the realm only in general; they therefore reserved divers other tenures for particular and certain services; as Grand-Serjeanties, some whereof, as in the Institutes, fol. 106. is observed, were for service of honour in times of peace; and some for military service, of which last sort, as appears in the Book of Serjeanties in the Exchequer, and many rolls of them in the Tally-Office, were very many; some whereof were to carry the king's banner, some to summons the tenants 'ad exercitum,' some to be of the vanguard, some of the rear; some to serve in Wales, some in Scotland, some 'infra quatuor maria,' some 'infra Cinque Portus Anglicæ.' Of these are Services of all sorts necessary for an army; and in respect of the multitude of these military Serjeanties over others, as forgetting them, Brit. fol, 164. in his definition of Grand-Serjeanty, saith, that they are 'Pur defence del royalme;' and Fleta lib. 3. cap. 16. 'Magna Serjeantia Regem tan- 'tum respiciunt et Patriæ defensionem.' Besides the Grand-Serjeanties, of this nature likewise are the Tenure of Cornage, to give warning of the enemies coming into the kingdom, and the Tenures by Castle-Guard: these by Littleton were 11,000, to defend the Castles when the enemy enters the realm, within forts and bulwarks of the realm. Mr. Camden, p. 515, observes, there were 1,115 in Henry 2d's time, whereof a great part, and especially such as were upon the sea-coasts and frontiers of Scotland and Wales, the places of greatest danger, were the king's. And besides these Grand-Serjeanties that were to be performed by the bodies of men, there are Petty-Serjeanties for finding of Armour of all sorts for the war.

My Lords, That the former kings did execute this power of Tenures for the Defence of the realm, according to the trust the law reposed in them, appears further in this, that in the places of greatest danger there ever were most of them. All along the sea-coasts of Kent and Sussex, nearest of all others to France, are the Cinque-Ports, which for their Sea-Service have all the jurisdiction within themselves, that the inhabitants, for weakening these parts, might not be compelled to travel out of them for any matters of justice, and divers other privileges; both to invite the people to live there, and to encourage them to the Defence of those parts. And Dover Castle, the Key of the Kingdom, as of greatest consequence, so hath it 200 Tenures by Castle-Guard, wanting very few, besides divers Tenures for the repairing of the Castle; which appears by the Record called the Quire of Dover, remaining in the Exchequer; which that it is a Record, and determines the service of the Cinque-Ports, as Doomsday-Book doth the Tenures of the antient demesne, appears in Comm' 27 Edw. 1, Rot. 35, and by another Record added to that Quire of Dover, 20 Edw. 4, it likewise appears, that in the time of war the king is to maintain in that Castle, 1,000 foot, and 100 horse. Next, to come to the borders of Scotland, there we find the franchisement of the bishopric of Durham, instituted likewise for that purpose, for the defence of those parts; which William the Conqueror, as Malms. fo. 157, observes, first made a County Palatine; and Walther bishop thereof, 'Ducem pariter et Episcopum, 'ut refrænaret Rebellionem gentis gladio, et 'reformaret mores eloquio.' And besides all this, in all the counties of Cumberland, Northumberland, and Westmoreland, are more such Tenures for the Defence of the realm, than in any of the Inland Counties, and those likewise most proper for bodies. Com. Pa. 31 Edw. 1, Rot. 32. It is there found by Inquisition returned into the Exchequer out of parliament, that every lord of a town within the county of Northumberland, held by Cornage when the Scots entered the realm. Mr. Camden in his Britannia, p. 794 and 799, mentioning the great number of Petty-Baronies and Castles all along those marches, which Brit. fol.

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37, and Instit. fol. 73, say were instituted for the Defence of the realm; observes here likewise the policy of the law, and likewise in the many Serjeanties there, in advancing of the king's army, to be of the vanguard, and in the retreat in the rear, those people best knowing the ways and passages of the country.

Whence, my Lords, when we come to the Marches of Wales, there we find another County Palatine, I mean that of Chester, and the care of Chester and his barons to oppose the Welsh invasions upon these Marches; besides the like services, as upon the borders of Scotland, there were likewise many Lords Marchers of several baronies, who had administration of all justice within themselves, 'secundum legem 'Marchiæ:' and for their service to be done against the Welsh, they had two special Privileges, that is, the third penny of all the Spoils in the war, as was adjudged in parliament, the 20 Edw. 1, Banc. Regis Rot. 123, in that great Case between the earls of Glocester and Hereford, and in the Parliament Book, 20 Edw. 1. And, secondly, all the Prisoners that they took in the wars, 'per consuetudinem Marchiæ,' belonged to the takers of them. Trin. 25 Ed. 1, Rot. 28, Co. Roger de Kownwell, 'in par-'tibus Montgomery, in guerra Walliæ,' 23 Ed. 1, had taken three Welsh prisoners; and because, by the king's command, they were released of their imprisonment, it is there adjudged, that the king should pay him 40*l.* in recompense thereof. And so it was adjudged, Com' Hill. 25 Edw. 1, Rot. 11, dors.

My Lords, His majesty is in the actual possession of these Military Services, by taking the profits of Wards, Marriages, Releases, Licences, Forfeitures for Alienations, and *primer seisin*, as fruits of them.—That the profits of Wards and Marriages are to be spent in wars, for the Defence of the realm, as well as for the bringing up the Ward, the Books are, 35 Hen. 6, 41, Brit. 162. That the king receives the profits, because he is not able to do the service. If the king's Ward was within age, when the tenants were summoned *ad exercitum*, he paid no Escuage, as is adjudged, M. 20, Edw. 1, Rot. 9, & 20, Comm' and M. 23 Edw. 1, Br. irrot. So it is for Reliefs and Licences; and Forfeitures of Alienation of the king's Tenant without his consent might not be altered; and for *primer seisin*, the king was to receive the profits till the Tenant, by his Homage, had assured the king of his service; the summons always commanding him to be at the place of rendezvous, 'in fide et homagio quibus nobis 'tenemini.' All these things being but Fruits that fall from these military services.

My Lords, Now to come to the Sea-Service; the care and execution of this trust by Tenures, was extended likewise to the Defence of the sea. The town of Lewis in Sussex holds by this service, 'quod si rex ad mare custodiend' 'suos mittere voluisset,' they paid so much money, 'et hos habebant qui in navibus arma 'custodiebant.' This, my lords, is in Doomsday-Book: In Colchester every house to pay 6*d.* per ann. 'ad victum soldior' regis, ad ex-'peditionem terræ vel maris.' Warwick, 'Si 'rex per mare contra hostes ibat,' the town was to find four boatswains. Salisbury, then to pay so much money, 'ad pascendum busk cor-'los domini regis,' which, as Florentius explains the word, be 'ministeros nauticos.' Glocester, and other places such a weight of iron, 'ad claves navium regis.' Others, to find horses to carry armour and weapons to the ships. My lords, of this nature are many in that Book, which particularly to mention, to gain time, I will omit.

That the Tenures of this kind after the Conqueror's time, continued in use, and were well known, appears by the Register fo. 2, where amongst other services, is this of Shipping also instanced in these words: 'Quod clamat tenere 'de nobis per liberum servitium inveniendi no-'bis quinque naves per annual' servitium.' In the Iter-Roll of Essex, 13 Ed. 1, Rot. 7, it is presented that the town of Maldon, 'tenet per 'Serjeantiam inveniendi unam navem quando-'cunque rex necesse habuerit ire vel mittere 'propter negotium regni.' And from the time they came to the place of their rendezvous, to stay in the service forty days, 'sumptibus pro-'priis.' And being there presented, that they made Default at the Welsh war, they plead they had no summons.

So, my Lords, in the Book of Serjeanties of Edward 1's time, in Kent, the town of Killinghorne is to find one Ship; and in the county of Berks, Fulke Caudry holds the manor of Padworth, 'per serjeantiam inveniendi servi-'entem,' to perform Sea-Service, Bract. 20, 8 Ed. 2, Rot. 40, William Dier, in the county of Sussex, to find a certain proportion of Cordage. Iter Cantiæ, 21 Edw. 1, Rot. 46, Solomon de Campis holds 'per serjeantiam tenen-'di caput domini regis,' when he is at sea, 'si 'necesse fuerit;' and so Rot. 30, another in the same Iter-Roll. The Cinque Ports and their members are to find 20 men, and a master, 'bene armatos et bene ariatos;' from the time that they come to their rendezvous, they are to continue in the service 15 days, at their own charge, and afterwards so long as the king pleaseth; but after the 15 days, the king is to pay the master 6*d.* a day, and the rest 3*d.* a day for their wages. This Service appears by the Record of the Quire of Dover before-mentioned, and the Patent Roll 7 Hen. 7, both which Records imply, that this Service of theirs cannot be exacted, otherwise than for the Defence of the Sea; for it cannot be demanded but once in a year, nor then neither, 'nisi ne-'cesse fuerit.' Parl. Pet. 1 Edw. 3, Rot. 4. the Barons of the Ports, in consideration of this Sea-Service, pray a confirmation of their Liberties, 'pro salvatione dicti Navigii et Regni;' and commonly when the Land-Service was summoned, these were likewise summoned to the same service at sea, as appears by the Close Rolls, 28 Edw. 1, m. 15. 31 Edw. 1, and 34 Edw. 1, m. 15, 16. In all which years the Land-Service was summoned for Scotland, and

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the summons both for the one and the other run in the same words, commanding them to be at the place, 'cum toto servitio vestro quod 'nobis debetis,' which shews it to be a Service by Tenure. That these services of theirs are for the Defence of the realm, and likewise that there are many other of the like nature besides these, which by a superficial reading of two or three Iter-Rolls, I have cited, appears by the Parliament-Roll, 13 Ed. 3, pars 1, M. 11, where it is declared in these words, That the Cinque Ports and other great towns and havens are franchised, 'pur estre et mure inter nous 'et aliens,' if it shall fall out that they shall endeavour, 'notre enter et assay et sunt tenus 'a ceo faire.' My Lords, a fuller Declaration than this there cannot be, that both the ports, and havens, and sea-towns, are bound to the service of Shipping, for the extraordinary Defence of the realm, as well as the ordinary.

I have now done with the Service in kind; and because these which immediately tend to action alone, were not sufficient to defend the realm; and this in the frame and first constitution of the Commonwealth being foreseen, and that the land, 'Fundus Regni,' the most visible and constant Supplies of our Wants, was best able to supply this likewise; therefore besides them, there were divers other Tenures created for that purpose. Those which I am next to speak of, are such as supply his majesty with Money for that purpose.

In the Black Book in the Exchequer, lib. 1. cap. 7, it is said, that in particular 'Regni statu 'ad stipendia et donativa Militum et alia ne-'cessaria et castellis,' and other lands 'in qui-'bus agricultura non exercebatur pecunia nu-'merata successebat.' It might from hence be colourably inferred, that in respect 'ex provi-'sione Legis,' upon the king's passing of lands, a Tenure for Knights Service for the Defence of the realm was to be reserved; that in case upon such grants, Rents only, without any such Tenure, were reserved, yet that Money should be imployed for Soldiers Wages, and other necessary affairs of the Commonwealth, 'ad stipendia Militum et alia necessaria.' But not to press this further, it is plain, that all men within the kingdom were not equally inheritable, either to the body or propriety of lands or goods, but that there are degrees and ranks, and each differing from other in all these. 1. Villains. 2. Freeholders, either by Knights Service, or Free Socage. 3. Tenants of ancient demesne, and that held by Burgage within cities and borough towns.

1. For the Villain, we know, that as to his lord he had freedom in neither; in respect of his body, he could not 'ire quo voluit;' but the lord at his will might imprison him, and in respect of his land and goods he might tax him 'de haut et de bass.'

2. The Freeholders, the greatest part of the realm, always had an absolute freedom in them both.

The third sort, and those are the Tenants in ancient Demesne and Burghers, they had an absolute freedom in their Persons, but qualified in the other of Property, not taxable at the will, as Villains, but for the Defence and other necessary affairs of the realm, they might be taxed without consent in parliament. My Lords, that these had a divided estate from other free tenants, is clear. And first, for Tenants in ancient Demesne: it is to be questioned whether such land be ancient Demesne, yea or no; the issue is in these words, Whether it be ancient Demesne or frank Fee. By this it appeareth they have not a frank and free estate, as the others have; and as all our Books agree, they have no Vote in parliament, for they have no voice in the election of knights, nor pay to the expences of the Knights that serve in parliament, nor Soldiers granted in parliament, Na. Brev. 79. and 14. It is often disputed in our Books, whether acts of parliament extend to them, unless they be especially named; neither can they sue at common-law for any thing that concerns the Freehold, but only by a Writ of Right close within themselves. And therefore Bracton, fo. 209, calls them 'Villanos Privilegiatos.' The same it is of Burgesses within cities and boroughs: and therefore the Statute of Merton makes it a disparagement for the lord to marry his Ward, 'villanis et aliis sicut Burgensibus,' Na. Br. 7, and other books. No Assizes will lie for such Lands, but they are impleadable without original writ, by a Bill of fresh force; and as a chattel, they may devise their land. By the Statute 1 Ed. 2, 'de militibus,' for such land and ancient demesne, no man is compellable to take the Order of Knighthood. Much more might be brought in proof of this, which I omit.

My Lords, all our Books agree, the Tenants in ancient Demesne were to plow and manure the king's lands, being his demesne. In a Manuscript that I have seen, the Author saith, that he hath an ancient Manuscript which saith, 'That the corn, and other vic-'tuals, arising hereby, was to store the king's 'Garrisons and Castles; and considering the 'numbers of those Garrisons, there being 'above 1,000 of them in the king's hand at the 'Conquest, as appears by Doomsday-Book, 'and that those Manors for the most part are 'great, and the greatest part of the Socage-'Tenures, till Henry 2'ds time, as appears by 'the Black Book, lib. 1. c. 23, were to find 'Victuals of all sorts, in kind, for the provision 'of the king's houshold, and were in his time 'turned into Rents.' Although this may seem probable, yet because I have not seen the manuscript, I will insist no more upon it.

That for which these, and the Tenures of Burgage in the king's cities and boroughs, were mentioned in the raising of Monies for the necessary affairs of the state; that these were anciently talliable without their consent in parliament, is so plain and frequent in the Exchequer Rolls, as that I intend to cite nothing in proof thereof; it will be admitted by them that argue on the other side. That which I shall endea-

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vour to prove is, that these were not talliable at the king's will and pleasure, but only for the Defence and other necessities of state, Na. Br. fo. 15. 49 Ed. 3. 22. They be not talliable, 'de haut et bass,' as villains are; and therefore Bracton, f. 209. calls them 'villanos privilegia-'tos,' lib. parl. fo. 112. 'talliare et rationabile 'auxilium dare pro necessitate.' Na. Br. 14. 'talliable pur grand cause.' Rot. Parl. 6 Edw. 3. Commissions to tax cities and boroughs, and ancient demesne, upon Petitions of the commons revoked, and Writs in due form to be sent; and for the time to come, the king shall not assess, but in such a manner, 'come ad 'estre fait en temps de ceux Ancestors et come 'il denera pur reason.' The occasion not requiring it, I shall say nothing of it, when these Taxes were disused. My Lords, I have now done with the Tenures, the first way whereby the law hath provided for the safety of this realm; which of themselves not enabling the kings intrusted therewithal sufficiently to do it, the law therefore, besides the honours, castles, manors, and other constant revenues of the crown, for the supportation of the ordinary charges thereof, hath appointed unto it divers Prerogatives, for the extraordinary, and for this of the Defence of the realm, as one of the chiefest of them; these Prerogatives then have an influence into the states of all the subjects in the realm, and are so many, that, to gain time, I will omit to mention any of them.

That which I will insist upon, will be to prove, that the things coming to the Crown by this Prerogative way, are to be employed for the defence, and other public affairs of the realm.

In his majesty there is a double capacity, natural and politic. All his Prerogatives are *jure coronæ*, and of all such things he is seised *jure coronæ;* and therefore, as in other corporations, such things are *patrimonia et bona publica*, to be employed for the common good, so likewise by the same reason here. The reason why the king hath Treasure Trove, and gold and silver Mines in the earth in the case of Mines, is declared to be, because the king is hereby to defend the kingdom: and in the Institute in the Title of Socage, fo. 28. 137. the reason of many of the rest: 'Quia thesaurus regis est fun-'damentum belli et firmamentum pacis.' This I conceive to be the reason, that by the Statute 14 Ed. 3. cap. 1. Escheats, Wardships, Customs, and Profits arising of the realm of England should be declared to be spent for the safeguard of the realm, more than the profits of the king's manors and lands; and of the difference made in the Comm' M. 3. Rich. 2. London, between 'Rectas promissiones Regni,' which by the advice of the Lords of the Council were to be spent in the household, and the other profits of the crown to be spent 'Circa 'salvationem et defensionem regni.' In the Parliament Roll, 6 Rich. N. 42. the commons petition that the king will live of his own revenues; and that Wards, Marriages, Releases, Escheats, Forfeitures, and other Profits of the Crown, may be kept to be spent upon the wars for the Defence of the kingdom: which sheweth, that there was always a difference made between the Profits arising of the king's Manors and Lands, and that which rose by the Prerogative, casual and accidental ways. My Lords, I have now done with these.

The third way the law hath provided for the Defence of the kingdom, is particular Supplies of Money for the Defence of the Sea alone in times of danger, both ordinary and extraordinary; for besides the Supplies of Money beforementioned, which are to be employed for the good and defence of the realm in general, as in the other cases where the law putteth the king to any particular charge for the protection of the Subject, it always enables him thereunto, and yields him particular supplies of money for the maintenance of the charge; so here the Courts of Justice, for the preservation of us in our Rights, are supported at his charge; and that is the reason why he hath all Fines and Amerciaments, the goods of outlawed men in personal actions, Bract. lib. 3. cap. 13, fo. 129. and Fines for purchasing of Original Writs, 'et 'pro licentiis concordandi,' which, in supposition of law, are paid for not proceeding, and troubling the court without cause. The king's Justices who are maintained in their places at the king's charge, these are the 'vectigal' justi-'ciar'.' The Defence of the realm extends itself to many particulars of the Church, and of Religion: and therefore in the summons of parliament, the cause of the calling the parliament is always declared to be 'Pro defensione eccle-'siæ Angliæ' in particular, as well as 'Totius 'Regni.' His majesty therefore hath the Temporalities of Bishopricks, *sede vacante*, a great prerogative, and that which patrons have not; with an addition of the First Fruits and Tenths of them, and all other Ecclesiastical Promotions and Benefices in Henry the 8th's time, and likewise the Tithes of all lands which lie not within any parish.

For Defence of the Land alone, besides those Military Services before-mentioned, the profits of Wards and Marriages, which, as I have read, no other Christian prince hath as a Fruit of them, are received for that purpose. So it is for the Sea, in Rot. Sco. 10 Ed. 3, m. 16, it is said that the king and his ancestors are 'Domini Maris Anglicani et defensores contra 'hostium invasiones ante hoc tempus exis-'tentes.' For the supporting of this Charge therefore, they have not only had the Grand Customs of the Mark and Demy-Mark upon the Wool, Wool-Fells and Leather, and the Prisage; that is, one Tun of Wine before the mast, and another abaft the mast of every ship, which were even due by the Common Law, as appears by the Book of my lord Dyer, 1 Eliz. 165, and sir John Davies Reports, fo. 8, et 9, and implied by Mag. Char. cap. 30, that Merchants may trade 'per rectas et antiquas con-'suetudines;' but likewise divers others things were afterwards granted by act of parliament in addition to them. As first, the Petty-Customs began 31 Ed. 1, and were made perpetual

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by the Statute of 27 Ed. 3. cap. 26, and likewise divers Aids and Subsidies, which are an increase of Custom upon the Staple Commodities of Wool, Wool-Fells, &c. Leather and Tonnage and Wines, and Poundage, and increase upon all other things either imported or exported, either by Denizens or Aliens. That which in this kind was taken by his majesty in the 11th year of his reign, when this Writ issued forth, was 300,000*l.* and upwards. The Aids and Subsidies, and likewise the Tonnage and Poundage anciently granted upon particular occasions only, and afterwards to the late kings and queens for their lives by act of parliament, and now taken by his majesty, and likewise the new Imposition, altogether makes up the aforesaid sum of 300,000*l.* Of the legality thereof I intend not to speak, for in case his majesty may impose upon Merchandize what himself pleaseth, there will be less cause to tax the Inland counties; and in case he cannot do it, it will be strongly presumed, that he can much less tax them. The proving these two things herein will serve my turn: 1. That his majesty *de facto* takes them, and that this judicially appears to your lordships in the court; and, 2, that these and the ancient Customs, are for the Defence of the sea.

For the first, it was declared by his majesty in the last parliament, and annexed to the Petition of Right as part of it, that his majesty took them, and could not be without them; whereof he likewise desired the Judges to take notice, and that they might so do, it is inrolled both in this and other the courts of Westminster-hall.

For the second, that the grant of Custom is principally for protection of Merchants at sea against the enemies of the realm, and pirates, the common enemies of all nations, sir John Davies Reports, fo. 9, and 12; and that those, and likewise the Impositions are for that purpose, was held by many of the Judges in the Argument of Ball's Case 7 Jac. in the Exchequer, in the Case of Impositions upon Currants, and likewise by the king's counsel, when the same case afterwards came to be debated in parliament, and was one of the main Reasons urged by them for the maintenance of that Judgment. That the Aids and Subsidies, and likewise Tonnage and Poundage, before they were granted for life, were not only for the Protection of Merchants, and the ordinary Defence of the sea, but also for the Defence thereof in times of extraordinary danger, and from Invasion from enemies, appears by the several Grants of them in the parliament Rolls. Rot. Parl. 1 Rich. 2. pars 2, M. 9, and 27, the kingdom being in point to be lost by the enemies of Spain and France, and divers others there mentioned, who made war against us both at land and sea, a Subsidy upon the grand Customs was granted, as the words are, 'pur le defence et 'rescous del kingdome;' this was for two years, and persons assigned to receive and expend the money. Comm' Mich. 3. Rich. 2, London: William Wallworth and John Philpot, citizens of London, appointed the treasurers of it, upon their account, shew the particulars how this Money was expended, 'circa salvationem et 'defensionem regni,' and were discharged. Rot. Parl. 3 Rich. 2, M. 16, and 17. The same cause continuing, Enemies intended to blot out the name of the English from under heaven, the Subsidy continued for a year longer. Rot. Parl. 5 Rich. 2, pars 2 M. 14, and 15. Tonnage and Poundage granted 'assint pre foit 'apply sur safeguard del Mers,' and the king at the Petition of the Commons appoints Receivers. 6 Rich. 2, M. 13, the Commons complain, that notwithstanding the Grant of Tonnage and Poundage, the sea is not kept, and therefore persons named and assigned in parliament to receive the money, and to do it. 10 Rich. 2, M. 1. Tonnage and Poundage for a year. 11 Rich. 2, M. 6, and 12. Tonnage and Poundage and Subsidy for a year. 12 Rich. 3, M. 20. both for a year. 14 Rich. 2, M. 16, both for a year. 17 Rich. 2, M. 12, both for 3 years. 20 Rich. 2, M. 28, subsidy for 5 years, and Tonnage and Poundage for 3 years. 2 Hen. 4, M. 9, both for two years. 6 Hen. 4, M. 9, and 10, both for 2 years, upon condition to cease if the king before St. Hilary provided not sufficient army for the sea. 8 Hen. 4, M. 9, and 9 Hen 4, M. 16, both for 2 years, for the common commodity and defence of the realm. 13 Hen. 4, M. 10, and 11, for 1 year, so as the same be confessed to proceed out of their own good will, and not out of duty. 5 Hen. 5, for 4 years, upon many conditions. 1 Hen. 6, M. 9, for 2 years. 3 Hen. 6, M. 17, Subsidy for 3 years, Tonnage and Poundage for 1 year. 4 Hen. 6, M. 22, 6 Hen. 6, M. 11, for 2 years Tonnage and Poundage; and 6*s.* 8*d.* upon every man within a parish-church that hath 20 nobles, and 6*s.* 8*d.* upon every Knights-Fee held immediately of the king. 8 Hen. 6, M. 15, Tonnage and Poundage to continue until the next parliament, 9 Hen. 6, M. 14, both, and for 2 years. 10 Hen. 6, M. 21, for 2 years. 23 Hen. 6, M. 16, for 4 years, and double upon strangers. 27 Hen 6, M. 20, and 23, for 5 years. 37 Hen. 6, M. 8, and 42, Tonnage and Poundage first granted for life; and M. 41, assigned into the subjects hands for 3 years for the good of the seas.

My Lords, either by the Grant itself of them, or by the Declaration of the cause of the calling of the Parliament, it appears, that these were all granted upon extraordinary occasions: and when they come to be granted for life, as appears by the Rolls and printed Statutes of 12 Ed. 4, c. 13, they were not only granted for the ordinary defence of the realm, and principally of the sea; but likewise that the kings might always have in readiness a stock of money in their hands to withstand an invasion, as is declared by the very words of those statutes.

My Lords, his majesty is in possession of them, and was pleased by his Proclamation printed 1626, declaring the cause of the Dissolution of the last parliament, as appears p. 17, to declare that they were always granted to his

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progenitors, for the guarding of the Seas, and safety and defence of the realm; and p. 18, is graciously pleased in these words, to declare that he doth, and must still pursue those ends, and undergo that charge for which they were first granted to the crown; and p. 44, that he receives them for the guarding of the Seas, and Defence of the realm.

My Lords, I have now done with the Ways which I first propounded, whereby the law hath provided for the Defence of the Realm. I shall add this only, That by the Statute of Winchester, which was made in 13 Edw. 1, every man 'secundum statum et facultates,' for the words of the Statute are according to the quantity of his Lands and Goods, is to find horse and armour for the Defence of the realm; for that the Statute in this particular, extends not only to the keeping of the Sea, but likewise to the Defence against Foreigners, is declared in the Parliament Roll of 3 Rich. 2, M. 36. and by the Statute of 5 Hen. 4, in the Parliament Roll M. 24, not printed, 'juxta quantitatum ter-'rarum et bonorum,' against Invasions each man is to find Armour. And by the Statute 1 Ed. 3, cap. 5, these men upon sudden coming of strange enemies into the realm, may be compelled to march out of their own counties where they live: whether they may be compelled so to do without Wages, I shall have occasion afterwards to speak. How far the Statute of Winchester and 5 Hen. 4, for Arms upon the Statutes of 4 and 5 Phil. & Mar. cap. 2, and 1 Jac. c. 25. are in force, I shall not speak.

My Lords, I shall now proceed to the stating of the question. Bracton in the beginning of his Book saith, That 'in Rege necessaria sunt 'hæc duo, arma et leges quibus utrumque tem-'pus Bellorum et Pacis recte possit gubernare.' Glanvill, in the beginning of his Book, saith, 'Reg' majestatem armis contra gentes sibi reg-'noque insurgentes oportet esse decorat."—His majesty, as he is lord of sea and land, so by that which hath been said, it appears that he is armed for the Defence of both.

My Lords, the Reasons in the Writ, as they are weighty, so from these known Supplies, whereby the law hath provided for the Safety of the realm, they will all of them be confessed; and yet thereby receive Answer, that the law hath foreseen and provided the supplies accordingly without the way in the Writ.

First, The command in the Writ being 'In 'fide et legiancia quibus nobis tenemini,' it is thence inferred, that each Subject's allegiance binds him to contribute to the Defence of the realm. In the old Customs of Normandy, cap. 43. allegiance binds 'ad concilii et auxilii ad-'jumentum.' This, though it be principally performed by the Parliament, both in Advices and Aids, yet besides these extraordinary, by that which hath been said, we see both by the Tenures in kind, and pecuniary Supplies, that, without the assistance thereof, our persons, lands, and goods, by his majesty's command alone, are made contributary thereunto, and that in a large proportion. Secondly, The Rule whereby this Contribution must be regulated, as in the Writ, 'secundum statum et 'facultates,' that likewise is satisfied, and that both for Sea and Land.

For Land, in case either the Statute of Winchester, or 5 Hen. 4, be on foot, then in words that of finding arms, 'juxta quantitatem ter-'rarum et bonorum.' So, secondly, in respect of the Tenures, by Knights-Service, by the Wards, Marriages and Reliefs; these, I confess, concern the Tenant only; but those other Tenures *in capite* and Grand Serjeanty, these concern all others, in respect of the Licences of Alienation, and of the Wardships of Lands, held of other lords, and that all the Tenants are become hereby wardable. And, Thirdly, in respect of the Prerogatives before mentioned; for the greater the Subject's Estate is, the greater influence they have into it, and proportionably raise more profit out of it.

In respect of the Sea, this is so by the Customs, Aids, Subsidies, Tonnage and Poundage, before mentioned; for the charge of these is not born by the merchants alone, but by each subject within the kingdom, and that 'secun-'dum statum et facultates suas.'

For, First, in respect of the Export: The greater the estate, the more Wool and Woolfells, and Leather, Lead, and other commodities; if that be done by the owner, he bears the immediate charge; if by the merchant, according to that proportion is his abatement in price to the owner. So it is for Goods imported; for the greater the estate and means of livelihood are, the more each person buys of these, and at a dearer rate. This is cleared by the Petition of the Commons in Parliament 22 Ed. 3, Rot. 22, M. 41, that the merchants had granted to the king 40s. upon a sack of wool, 'en charge del people et nemy des merchants.' And by the Statute 36 Ed. 3, c. 11. that no Subsidy or Charge be granted to the king by the Merchants upon Wool, without assent in Parliament.

Hence likewise that other ground of Equity in the Writ, 'quod omnes tangit ab omnibus 'debet supportari,' receives Answer: For as all have benefit by the Defence, so is the 'compensatio publica,' we see it comes from all. The fuller Answer is the Parliament Summons of 23 Ed. 1, for Provision against the French, who intended 'Linguam Anglicanam 'omnino delere.' Rot. Claus. 23 Ed. 1, M. 14. 'Lex justissima provida et circumspectione 'sacrorum principum stabilita,' statut' 'Quod 'omnes tangit ab omnibus approbatur;' the Charge must be borne by all, so it must be approved by all.

If his majesty be intrusted with the Defence of the realm, as in the great Case between the earls of Hereford and Glocester, it is said, that, 'incumbit domino regi salvatio populi sibi 'commis.' and that 'per jurament' est astrictus 'ad providendum salvationem regni circum-'quaque,' because no man goeth to war at his own charge. We see by that which is already said, that the law hath provided the 'Stipen-

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'dia Ministerii;' which that they do bind his majesty to the defence and safety of the kingdom, not only in point of care and vigilancy, but even in point of charge too, I shall endeavour to prove to your lordships and the court.

Allegiance we owe as an Act of Reciprocation; for as it binds the subject to Tribute and Subjection, so therefore the king to the charge of Protection by the expence of these, 'Rex ad tutelam corporum et bonorum erectus.' The supplies he hath, for these purposes, tie him to the supportation of the Laws, and the execution of Justice. 20 Ed. 1, in the Case before mentioned between the earls of Glocester and Hereford, it is said, that 'dominus rex est 'omnibus et singulis de regno suo justitiæ de-'bitor;' which that he is so, even in point of charge, appears in his majesty's supportation of the Courts of Justice, and the Salaries not only to your lordships, and other the inferior ministers of justice, and anciently to the Sheriffs, but likewise many other ways. 4 Hen. 7, c. 12, the king shall not let for any favour of charge, but that he shall see his laws fully executed. Parl. 23, Ed. 1. Rot. 12, Exchequer. A clerk that attended a committee of Grievances recovered Salary from the king, although the Commission was for the relief of that county. This I conceive to be the reason of the declaration in the Statute of 14 Ed. 3, c. 1. and other statutes, That aids, though granted in parliament, for Defence, shall not be brought into example; in that it might be conceived, that the commons were to bear that charge which principally belonged to the king. Pat. 48 Hen. 7, M. 8, it is recited, That whereas a late parliament 'in articulo necessitatis pro 'defensione regni contra hostilem adventum 'alienigenarum,' the commons granted him a large Subsidy, 'ultra quam retroactis tempo-'ribus facere consueverant;' now the king 'eorum indempnitati prospicere volens,' grants, that 'non cedat in præjudicium nec in pos-'terum trahatur in consuetudinem.' In Wiseman's Case, in the second Report, fo. 15, it is resolved that a Covenant to stand seized to the use of queen Elizabeth, that she is the Head of the Commonwealth, and hath the care of repelling foreign hostility, is not good, because, saith the Book, the king is bound to do that *ex officio*. Com. 315. One reason why the king is to have Royal Mines, alledged by all that argued for the king, is, because he is at his own charge to provide for the Defence of the realm, which he cannot do without money. In the earl of Devon's Case, Co. 11, 91, 6 Institut. fo. 28, and 131. 'Thesaurus Regis' is called 'Nervus Belli.' For the practice, the proof of the particular charges the several kings have been at for Defences of all sorts, would be so tedious, that I will omit the citing of any thing in this kind. Sir John Davies reports, fo. 12, many authorities, and in the treatise 'De Regalibus, p. 81. 'Principes totam 'navigationem pro vectigalibus præstare co-'guntur.'

But because his majesty, in the foremen-tioned proclamation, p. 18, and 44, is graciously pleased to profess, that he holds himself obliged to undergo the charge of the Defence of the realm, and of the sea in particular, I shall spare any further proof in this.

If that in the Writ, that the Sea 'per gen-'tem Anglicanam ab olim defendi consuevit,' be not answered by the Scotish Roll of 10 Ed. 3, before recited, which says, That the king and his ancestors 'Maris Anglicani defensores 'antehac constiterunt,' nor by what is now said, if it be admitted, yet that even the charge of this defence is borne 'per gentem Anglicanam,' is before proved.

The next, and one of the main things whereupon I shall state my question, is this. His majesty is in the actual possession, not only of the Service in kind, for the Defence of the land, by taking of the benefit of the Wardships, Marriages, Reliefs, Fines, and licenses of Alienations, and 'primer seisin,' and of the prerogatives beforementioned, but likewise of the services of the Cinque Ports, unless they be released since 7 Hen. 7, (for then their Services were summoned) and of the Tonnage and Poundage, and other duties for the Defence of the Sea: It appears not by any part of the Writ, nor by any thing in the record, that either the services of the Cinque Ports were summoned, or that any money at all of his majesty's was expended, either for this service, or at any other time for the defence of the sea. My lords, I desire to be understood, I do not affirm that none was expended; only this appears not to your lordships and the court: all that can be inferred from the Writ to this purpose is, that this ship for Bucks, is commanded to be at Portsmouth by such a day 'ad proficiend' exinde cum navibus dicti do-'mini regis et navibus alior' fidelium subdi-'torum suorum.' By this it appears not to the Court, that though the Ships are the king's, that they are to be set forth at the king's charge; for the charge may be borne by the subject, for aught appears.

Neither, Secondly, doth it appear, how many these ships were, whereby the charge, in case it were borne by the king, might in any proportion appear to be answerable to the supply beforementioned. Those other ships, 'alio-'rum fidelium subditor' nostror' regis,' as in truth they were not those of the Cinque Ports, neither can they be so intended, unless it had been so expressed.

The Service of the Cinque Ports, and Tonnage and Poundage, and other Duties, are the ordinary settled and known ways by the law appointed for the defence of the seas; the way in the writ by sessing and altering the property of the subjects goods without their consent, as in the writ, must needs be granted to be a way more unusual and extraordinary. Against the legality of it, I shall thus frame my argument by way of admission: first, that in case the service of the ports had been summoned, and the money by the forementioned ways raised had been expended upon the defence, and they had

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not been sufficient, that though in this case the writ had been legal; yet, as now it is, it is not. Rylie's Case in the 10th Report, fol. 139, and Trin. 18 Ed. 2, Banc. Regis 174, adjudged, that so long as he that is bound by tenure, or prescription, is able to do it, the whole Level cannot be assessed to the repairing of a wall or bank. It is a maxim, 'Lex non facit salutem,' nor that we are to run to extraordinary, when the ordinary means will serve the turn; these rules are often put in our books, I intend to instance but in one or two cases.

The Common Law is the common reliever of persons wronged; that in Chancery is extraordinary, and therefore no man can sue there, when he may have remedy at the common law. The ordinary way of Trial for Life is by Indictment and a Jury; when therefore this may be done, and that the sheriff, with the Posse Comitatus, is able to keep the peace, it cannot be done by martial law, or by judgment of the king and peers in parliament without indictment, as was adjudged in the case of the earl of March, Trin. 28 Ed. 3, Banco Regis, Rot. 21. My lords, the reason of this maxim of law is, as I conceive, these actions extraordinary are done *extra ordinem*, and done only in times of necessity, when we are not tied to any rules of law, and therefore not to be brought into example, nor have any warrant but only that of necessity; nor any rule to guide them but what, *pro hic et nunc*, shall serve for the bringing of them about: the same power then that may once do them, in the omitting of the ordinary way, may, by the same rule, always do them, and so by consequence, how far such power is tied at any time, or in any thing, to any rules of law, I shall humbly submit to your lordships consideration. My lords, I have now done stating the question, those things whereupon I shall spend the rest of my time are these.

First, Admitting that the ordinary means abovementioned had been all used, and that they had not been sufficient; whether in this Case his majesty, without consent in parliament, may in this case of extraordinary Defence, alter the Property of the Subjects Goods for the doing thereof.

In the next place, I shall endeavour, to answer some Objections which may be made to the contrary.

In the third place, for qualifying of this, I shall admit, that in some cases the property of the Subjects Goods for the Defence of the realm, may be altered without consent in parliament; and shall shew what they are in particular, and compare them and the present occasion together.

In the fourth place, because of some Precedents of the matter of fact, and likewise of all authorities that may seem to prove a legality in this particular of Shipping for Defence of the Sea, whatever it be in the general, I shall therefore endeavour to answer to such of them as I have met withal.

For the first, that to the altering of the Property of the Subjects Goods, though for the Defence of the realm, a parliamentary assistance is necessary. In this it must be granted, in the first place, that the law ties no man, and much less the king, to impossibilities: and secondly, that the kingdom must be defended.

As therefore the law hath put this great trust upon his majesty, so when the Supplies which by the ways before-mentioned it hath put into his hands fail therein, it hath provided other ways for a new Supply.

The first thing that I shall present unto your lordships and this court, are the Aids and Subsidies granted in parliament. That amongst the 'Ardua Regni negotia' for which parliaments are called, this of the Defence not only is one of them, but even the chief, is cleared by this; That of all the rest none are named in particular in the summons, but only this: for all the summons of parliament shew the cause of the calling them to be, 'pro quibusdam arduis 'negotiis nos et defensionem Regni nostri An-'gliæ et Ecclesiæ Anglicanæ concernentibus;' and in the conclusion the party summoned to be there, 'Sicut honorem nostrum et salvatio-'nem et defensionem Regni et Ecclesiæ diligit.' And in all the ancient summons of parliament, when Aid was demanded, the particular cause of defence, and against what enemy in special, was mentioned.

My lords, to gain time, I will instance but one or two of each king's reign. Claus. 23 Ed. 1, M. 4. dors. that the French 'ad expugnan-'dum Regn' nostr' classe maxima et bellatorum 'copiosa multitudine Regn' nostrum invadunt 'et linguam Anglicanam omnino proponunt,' &c. Claus. 3 Ed. 2, M. 3, dors. and 7 Ed. 2, M. 8. dors. that the Scots had entered, burnt and destroyed the Marches, and put them to a tribute. Claus. 1 Ed. 3, pars 2, M. 6, and 22 Ed. 3, M. 31, dors. that the Scots and French had invaded the realm. Claus. 7 Hen. 4, M. 29, dors. that the French were with a great fleet, Quasi in ore Thamesis, to invade the kingdom, and the king to go in person; after this king's reign, the summons was as now it is.

That these 'Ardua defensionem Regni con-'cernen',' are the Aids and Means of Defence, and not the way and manner of doing it, as their counsel therein is clear. In the Parliament Roll, 6 Rich. 2. M. 9. This of the manner and way and prosecution of the war being given in charge to the commons to advise upon, they answer this, 'Nec doit, nec soluit apper-'taine al eux mes al roy.' Rot. Parl. 13 Ed. 3, pars 1, M. 11, the same being given in charge to the commons, they pray 'que ils ne sont 'charge al councel doner al choses del queux ils 'n'ont pas conuzance:' And so Rot. Parl. 21 Ed. 3, M. 5, they excuse themselves, and say, that this belongs to the king and his council.

And that these 'Ardua circa defensionem,' were the Aids, is expressed in words in some of the Summons. Claus. 7 Ed. 2, M. 8, dors. the cause of the parliament to withstand the Scots, and that in 'tam arduis debetis extendere ma-'nus adjutrices opportun' auxil' faciendo.' Claus. 31 Ed. 3, M. 21, dors. that 'circa neces-

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'sariam defensionem Regni quam ad dictum 'negotium expediend' auxilium necessar' nos 'habere oportet.' Claus. 5 Rich. 2, M. 2, dors. the king being to make a voyage 'pro defen-'sione Regni,' which could not be done without borrowing great sums of money; therefore the parliament was called to advise about the assurance. So that, my lords, it is clear, that the law hath provided this parliamentary way for supplying of the king's wants for the extraordinary defence, and hath likewise put the power of using of it into his majesty's own hands, for he may call parliaments when, and so often as he pleaseth.

My lords, as the parliament, first, are best qualified and fitted to make this supply; (for some of each rank, and that through all the parts of the kingdom, being there met, his majesty having declared the danger, they best know the states of all men within the realm, and are fittest, by comparing the danger and men's estates together, to proportion the aid accordingly;) and, secondly, are fittest for the preservation of that fundamental propriety which the subject hath in his lands and goods; because each subject's vote is included in whatsoever there is done: so that it cannot be done otherwise, I shall endeavour to prove to your lordships both by reason and authority.

My first reason is this, that the parliament by the law is appointed as the ordinary means of supply upon extraordinary occasions, when the ordinary supplies will not do it. If this in the writ therefore may without resorting to that be used, the same argument will hold as before, in resorting to the extraordinary by way of the ordinary, and the same inconveniency will follow.

My second reason is taken from the actions of former kings in this of the defence. The Aids demanded by them, and granted in parliament even for this purpose of the defence, and that in times of imminent danger, are so frequent, that I will spare the citing of any of them. It is rare in a subject, and more in a prince, to ask and take that of gift, which he may and ought to have of right.

The second way was Loans and Benevolences demanded by them, with promise of repayment both for the ordinary and extraordinary defence of the realm; and that as well of all the subjects equally, as of some few. Pat. 43 Hen. 3, M. 16, a commission to the earl of Leicester and others, 'contrahendi mutuum in nomine 'nostro de denariis et victualibus,' and other things 'in munitionem navium ponendis et nau-'tarum stipendiis contra hostilem adventum 'alienigenar' in Regnum nostrum, et ad defen-'sionem et tuitionem ejusd' Regni;' and promiseth repayment. *Visis computis* in the Exchequer, 26 Ed. 1, Rot. 100, the king borrows of the merchants 28,966*l.* 'pro defensione Reg-'ni,' and promiseth repayment, Hil. 31 Ed. 1, Rot. 4, and Trin. 31 Ed. 1, Rot. 41. divers sums borrowed 'pro defensione,' and repayment promised. Br. irrot. 34 Ed. 1, Rot. 82. 10,000*l.* paid by the king at one time for money borrowed, this I confess is 'Arduis Regni negotiis. Br. irrot. 11 Ed. 2, Rot. 1, the Scots having entered the kingdom, 'diversa homicidia, incen-'dia, et deprædationes perpetrantes,' the king being in person to go against them, writes to his council to provide money; and they, 'di-'versas vias pro denariis providendis exquiren-'tes,' resolve to borrow. P. 12 Ed. 2, Commun' for the same cause a loan upon all merchants strangers. Rot. Scot. 1 Ed. 3, M. 3, the Scots having entered the realm and taken divers castles, and threatened a conquest of England, and 'Quia crescit sump-'tuum multitudo in tantum quod thesaurus 'noster ad sustentationem exercituum nostr' 'nequaq' sufficit,' he borrows. Claus. 14 Ed. 3, M. 8, the king had borrowed 3333*l.* 'pro 'salvatione et defensione regni, et vult promp-'tam solutionem fieri prout decet;' and now assigns it to be paid out of the customs. Walsingham, p. 179. 44 Ed. 3, the king 'Sinistro 'usus concilio magnas summas pecuniæ,' of all sorts 'mutuo petiit, asseverans quod in defen-'sionem ecclesiæ et regni illas expenderet;' but the people would not lend. Claus. 5 Rich. 2, M. 12, dors. the king 'pro defensione regni,' being to make a voyage to sea, desired to borrow money, and a parliament called to give assurance. 7 Hen. 4, Rot. Franc. money borrowed, 'pro defensione, volens promptam et 'securam solutionem fieri.' Rot. Parl. 11 H. 6, M. 13, 10,000*l.* borrowed 'pro defensione,' and spent, and the parliament order the security. Rot. Parl. 15 Hen. 6, M. 3, 10,000*l.* borrowed 'pro defensione,' by the king. Stat. 11 Hen. 7, cap. 10, it appears that a Benevolence had been desired by Hen. 7, for the defence of the realm, and wherein he went in person. The known commission to Cardinal Wolsey for the Benevolence in March, 16 H. 8, it was to withstand 'Infestissimos hostes,' of France and Scotland, who intended to invade the realm; and that the king's coffers were now empty, and therefore they have power 'Com-'municandi et inducendi, persuadendi et prac-'ticandi cum subditis regis super amicabilem 'pecuniarum concessionem,' 2 pars. Pat. 37 Hen. 8, 'cum pro sustentatione ingentis oneris 'nostrarum copiarum, quas in presenti tam per 'mare quam per terram conficere, et in promp-'tu habere cogimur ad resistend' propellend' 'hostem nostrum Francorum Regem, in defen-'sionem tutelam et securitatem dilectorum 'subditorum nostrorum, quorum ill' damnum 'et interitum omnibus viis et modis molitur. 'Statut' et ex consensu et scientia concilii nos-'tri decrevimus aliquam opem de dictis subdi-'tis nostris petere, et eand' cum eorum bene-'volentia recipien' pro eorum cujuslibet facul-'tate ministrand' nihil dubitans quin sponte et 'liberaliter quisq; pro sua portione et facul-'tate elargiturus sit, eoque magis et citius quod 'id totum consumat' et cedat in suam ipsorum 'defensionem;' and the power is given to levy it as a Benevolence only. By the Statute of 35 Hen. 8, c. 12, it appears that for the Defence Hen. 8, had borrowed divers sums of money.

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The third way was by anticipating their rents. Trin. 29 Ed. 1, Rot. 58, in the Exchequer, Writs went to all the sheriffs of England, 'pro salvatione regni ejusq; incolarum salvatione, et inimicorum depressione;' that all the profits arising out of their counties, and the rents of all the king's tenants due at Michaelmas, be paid at Midsummer, and allowance promised in the next half year's rent; and that this 'ad tam ardua negotia necessaria, et in 'consuetudinem non trahatur.'

My lords, that not one or two, but so many kings, and of such power and wisdom as many of them were, and that in a matter of such consequence, and in times of necessity, should so far descend from their greatness, or so far prejudice their right, as to borrow that of the subject, which, without being beholden unto them, they might take of right, and bind themselves to repayment, and all without any *salvo* of their right, your lordships will conceive that it can hardly be imagined.

My third reason is taken from the incertainty of the way intended by the writ; for the law delighting in certainty, to the end that the subject might be sure of somewhat that he might call his own, hath made all those things that the king challengeth as peculiar to himself from the subject, either certain in themselves, or else reducible to a certainty either by the judges, jury or parliament, or some other way than by his majesty himself, as indifferent between the king and his people. In this I intend not such things as are common to the king with the subject, of which nature are the aids for marrying the king's eldest daughter, or knighting his eldest son; for these are due to several common persons that are lords of a manor, as well as to the king, as appears by the statute of Westm' 1, 3 Ed. 1, cap. 35, M. 28, and are not due by any special prerogative, but by Tenure; and yet the common law for avoiding excess therein, calls it 'Rationabile 'auxilium;' and even this by the statute of Westm' 1, 3 Ed. 1, cap. 35, is put into certainty; and the cause of making the statute, as therein is expressed, is, because the people were grieved by paying more than was requisite; and thereby that which was reasonable, became an unreasonable aid. This statute was general, and named not the king in particular; but the statute 25 Ed. 3, cap. 11, is only in case of the king, and Na. Br. fo. 82, gives the reason of the making of that statute, because the king before did distrain for more than was fit, and therefore by reason of the excess, was restrained to a certainty as well as the subject. Neither are the taxes and tallages upon cities and boroughs, or ancient demesne against this, in respect of the baseness of their tenures beforementioned. And secondly, because the subject that is lord of such borough and manor of ancient demesne, hath them as well as the king, as appears by the case of New Salisbury, 33 Ed. 1, in the parliament book, and in the new parliament roll, 8 Ed. 2, for the borough of Cirencester, and Br. Trin. 33 Ed. 1, Rot. 22, and Na. Br. 97. These things which are peculiar to the king, either they be certain in themselves, as are treasure-trove, deodands, wrecks, and the like, where the king is to have the thing itself; and so if it be in money, as the demi-mark; when in a writ of right the tenant prayeth, that the seisin may be enquired, fines 'pro licentia concordandi,' it is the tenth part by the law comprized in the writ of covenant, and the post-fine one half so much more, and fines for purchasing original writs 2*s.* 8*d.* where the thing demanded is 40*l.* or 10*s.* where 100*l.* and so in proportion. Or else it is reducible to a certainty, as in all cases where the party is to be amerced, though he is 'mi-'sericordia dom' regis,' yet the jury must find the amerciament; and when he is to make fine and ransom 'ad voluntatem domini regis,' yet this fine must be set by the judges: when the tenant by knight-service makes default in the summons 'ad exercitum,' which is to pay escuage for the default; this cannot be set but in parliament, as I shall prove hereafter.

My lords, to apply all to the thing in question, there is a cause for raising money for the Defence of the realm, 'non definitur in lege,' what will serve the turn. If his majesty, as in the writ, may without parliament lay 20*s.* upon the Defendant's goods, I shall humbly submit it to your lordships, why by the same reason of law it might not have been 20*l.* and so *ad infinitum*; whereby it would come to pass, that if the subject hath any thing at all, he is not beholden to the law for it, but it is left entirely in the mercy and goodness of the king.

My lords, I am now come to the second kind of Proofs, and that is by authorities. The cases which in the first place I will insist upon, will be to prove it by induction: for if I shall prove that his majesty without parliament cannot tax his people for setting forth of Land-Forces for defence, for making and maintaining of forts and castles for defence, for victuals for a defensive army, for maintenance of prisoners taken in a defensive war, for pledges and hostages given by foreign states for the keeping of peace; if it cannot be in all or any of these particulars, the five supports of a defensive war; I shall then offer it to your lordships, whether it can be done at all.

Before I proceed to these particulars, I shall observe thus much, my lords, in the general; that if those that hold by ancient demesne and burgage, which are but base tenure, cannot be taxed 'nisi sur grand cause,' and that have many privileges in point of ease and profit in consideration thereof, as they have; much less then can the tenants by Knights-Service and socage, that are free tenants, and have no privilege in support of the charge, be taxed. And as they are not taxable, but 'sur grand cause' in the general, so neither in particular for this of defence, as is proved by that of escuage; for if his majesty without consent in parliament, cannot tax his own tenants, nor proportion the fine according to his pleasure, when the tenant holds the land *ad exercitum*, for the defence of

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the kingdom, much less can he do it where there is no tenure for that purpose. That escuage cannot be set without parliament, is first the statute of Running Mead, 'Nullum 'Scutagium vel auxilium ponatur in regno nos-'tro nisi per commune concilium regni nostri;' which though it be not printed, yet it is of record, and inrolled in the Red Book of the Exchequer, and cited in Mat. Paris, p. 348. And that as well before the confirmation of it, 9 Hen. 3, as since, it hath been by the judges reputed to be a statute and of force, appears by the book of 5 Hen. 3, Mordam. 53, where it is pleaded, and called by the name of Magna Charta, and allowed; and M. 19 Ed. 1, finiente 20. incipiente Banç. Regis Rot. 56. in the case of Ralph de Tunney, it is pleaded by the name of Magna Charta Johannis Regis de Running Mead, and allowed.

In the Book of Knights-Fees of Ed. 1.'s time, there is a writ cited, which went to the Sheriff of Hereford thus; 'Datum est nobis 'intelligi quod plures sunt qui tenent per ser-'vitium militarium de nobis, qui contradicunt 'solvere scutagia quæ nobis sunt concessa per 'commune concilium regni nostri;' therefore he is commanded to levy them. Comm' M. 8 Ed. 2, Rot. dors. many processes issued for the levying of escuage granted in Ed. 1.'s time superseded, and quite released; the reason entered on the Roll is, 'Quia dictum servitium non 'fuit communiter factum;' that is, as I conceive, that it was not done 'per commune con-'cilium regni:' The Books are express, 13 Hen. 4. Com. Banc. Na. Br. 83. Institut. § 97.

My lords, that those that held in socage or fee-farm, or not by so many Knights-Fees as they were distrained for, were always discharged, as appears by infinite precedents, I shall make no use of it, as the manner of entering these discharges upon the roll; it is observable, that he is distrained 'ac si tenerit per ser-'vitium militare,' whereas he holds the lands in Socage, 'pro quibus servitium aliquod regi 'in exercitibus suis facere non debet,' and in some rolls that 'Ratione alicujus authoritatis,' he ought not to be distrained; therefore 'Quia 'Dominus Rex non vult illum in hac parte in-'juriari prout justum est,' the distresses are released. Amongst divers precedents for this, I shall cite but one or two, Br. Trin. 34 Ed. 1, Rot. 20. the abbot of Abington and John Arden, the iter-roll of Sussex, 7 Ed. 1, Rot. 107. of Gilbert Gifford. My lords, if the king might have raised money, and seized money for finding of Soldiers, or for their arms, this manner of entry, as I humbly conceive, would never have been suffered.

I am now come to the first particular that I have instanced; that is, the charging the Subject for finding of Soldiers to go out of their county for the Defence of the realm. My lords, in that I shall in the first place admit these three things.

1. That every man after the Statute of Winchester, 'secundum statum et facultates,' was to find all manner of arms, as well for the defence of the realm against foreigners, as for the peace; and that I have before proved by that of 3 Rich. 2, M. 16. and after by the statute 5 Hen. 4.

2. That upon sudden coming of strange enemies, these are compelled to travel out of their own counties, is the statute of 1 Ed. 3, c. 5. and so for appeasing of any notable rebellion, when the king for the doing thereof goes in person, as appears by the statute 11 Hen. 4, c. 1, and 18.

'3. I shall admit, that so long as they remain at home, and go not out of their countries, they are to have no wages; and that the marinne shires, and those that border upon Scotland and Wales, were not to be at the king's charge, so long as they remained at home in their own counties for the preservation of them; but that they were in that case themselves to bear the charge against foreign invasion, as of making hue and cry, assisting the sheriff when he took the Posse Comitatus, and all other things concerning the keeping of the peace.

But that the Subjects are taxable either for Wages or Victuals, or otherwise for finding of soldiers out of their counties, though for Defence of the kingdom, or that any are compellable to do it at their own charge, I shall humbly deny. The statute 1 Ed. 3, says, That in this case it shall be done, as usually hath been done in times past, for the defence of the realm. My lords, I shall not deny, but that before Ed. 3's time commissions have issued out of the chancery for that purpose; against which matters of fact, not only to balance them, but even to weigh them down, it is as clear that whole armies, some of them of 30,000 at the least, over and above them that were summoned by their tenure, have been maintained at the king's charge, from the time that they have departed out of their counties, during the whole time of their service, and that not only with promises of payment, but that they were paid *ex Thesauro Regis*, out of the Exchequer; and many times upon failure of payment, victuals, wages, and other things, upon suit for them in the Exchequer, full payment has been made; of which sort in most kings reigns there are many cases.

My lords, this is the answer that I give to the commissions to the country, That *de facto* the king was at the charge usually for defensive war. By the statute 19 Hen. 8, cap. 1, those that have annuities of the king must attend him when the king in person goes for the defence of the realm, or against rebels: But there is a special Proviso, that they shall have wages of the king from the time they set out till they come to the king, allowing twenty miles a day, and afterwards as long as they shall remain in the service. Upon a rebellion in the North 28 Hen. 8, against which the king intended to go in person, privy-seals were sent to most of the gentry to attend the king with the best retinue that they could make, and likewise to bring the bills of their expence and payment promised, as appears by many of those privy-seals remaining in the palace-treasury. And besides the

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indentures themselves, whereof I have seen many, it appears by the statute 2 & 3 Ed. 6, cap. 2, that the retainer of soldiers at the king's charge, was as well for defensive as offensive wars; and also by the statute of 3 Hen. 8, cap. 5.

My lords, in the next place I shall endeavour the proof hereof by clear authorities. The statute of 25 Edw. 3. cap. 8, is, that none shall be compelled to find arms, but such as hold by such service, if it be not by grant in parliament. That this was not 'introductivum novæ legis,' appears by a petition whereupon the statute is made, that it is 'encounter le droit del roylme.' That the common law was so before the statute, and likewise in case of a defensive war, appears by the authorities following; P. 26 Ed. 1, Rot. 35. dors. the Scots entering the borders, a commission issued Reginaldo de Gray, to press soldiers in Lancashire; he certified by his letter inrolled there, 'que sans denieres prest,' he could not procure them to march out of those parts; and therefore order is taken in the Exchequer to send money. That the Scots had now invaded the kingdom, appears by Br. irrot' m. 26 Ed. 1, in Scaccar. where commissions are inrolled for many thousands to be levied for this war at the king's wages. Bra. Trin. 32 Ed. 1, Rot. 18, Communia. The wardens of the marches of Cumberland and Westmorland write to the barons of the Exchequer, that whereas the Scots lay near the marches with a great army, and that the people of these counties would not march out of their counties without wages and victuals, that they would provide for both. 2 Pars Pat. 10 Ed. 2, M. 26, and 9 Ed. 2, in parl. a grant to find one soldier for 60 days at the charge of the town against an invasion of the Scots. Now the king grants, 'Quod hujusmodi concessio non 'reddat in præjudicium, nec trahatur in ex-'emplum in futuro.' At the time when this aid was granted, the Scots had entered the realm, and wasted the bishoprick of Durham, as appears in 14 Ed. 2, Banc' Reg. Rot. 60. Rot. Scot. 12 and 13 Ed. 2, M. 7, and 13. The same indemnity upon the like occasion of defence, when they found the soldiers 'ad roga-'tum Regis,' and the king commanded the chancellor to declare as much. Claus. 13 Ed. 3. M. 38, dors. pars 1, the abbot of Ramsey discharged 'pro custodia maritima' in the county of Norfolk, because he remained in his own county of Huntington, 'cum equis et 'armis,' for the defence thereof, with this, that therefore it was not *rationi consonans* to charge him farther. The same it is Rot. Fra. 21 Ed. 2, M. 1, Pars 1. Oxon. because they were *prompti et parati* at home to defend the county. But the practice, it seems, not agreeing with the right in the parliament, 20 Ed. 3, M. 12, the commons complain, that commissions had issued out of the Chancery to charge the people in this particular and otherwise, without consent in parliament, and pray, that they may disobey such commissions. The answer is, that the commons had heretofore promised to assist the king with their bodies and goods in the war with France, and likewise for the defence of the realm; and that the great lords, considering the necessity as well for defence as for the king's wars, agree thereunto, and yet promise that this which is done in 'cest necessite, ne 'soit troit en consequence n' ensample.' My lords, this is a full declaration of the right, even when for the defence, and yet some practise to the contrary. Before the making of the statute 25 Ed. 3, procured the Complaints in this particular, in the parliament 21 Ed. 3, M. 22 Ed. 3, Pat. 8 Hen. 3. 'Fulcasius de Brent inimicus 'publicus et excommunicatus,' that imprisoned the justices itinerant in Bedford-castle, and held the castle against the king; the king, 'propter graves et manifestos excessus quibus 'regnum multiplicitur perturbavit,' besieged the castle; and whereas the clergy, *de mera gratia*, had granted the king aid for the doing thereof, 'Rex nolens gratiam sic nobis exhibi-'tam ad debitum retorqueri,' declares as much by his letters patent. My lords, it is here declared that the king cannot *de debito*, or *de jure*, take any aid against the subjects wills for besieging of a castle, held against the king by a public enemy. Rot. Inquision' 3 Ed. 1, Rot. 4. 'Kent' coram auditoribus querelarum post 'bellum Evesham et pacem proclamatam.' The castle of Tunbridge being held against the king, the hundred of Feversham was assessed at 15*l.* *per insultationem* of the castle: The jury presents this as a grievance, which the justices would never have received, nor suffered to be entered into the roll, if this assessment might have lawfully been made. My lords, this castle and hundred they were both in the same county, and being before the statute of Winchester, they are not compellable to besiege the castle; and if they were compellable to go in person and with arms, yet no assessment could be laid for the doing thereof. My lords, I shall only offer to your lordships consideration the Scotish roll of 20 Ed. 3, M. 6, the wardens of the marches of Scotland were to appoint 'Ex-'ploratores et vigiles,' which were to espy out and give notice of the enemy's intendments. By the commissions in Hen. 4, Hen. 5, and H. 6's times, they were 'explorandum defensione 'regni, et partium sumptibus incolarum:' But how? Only 'de assensu et voluntate sua, prout 'fieri consuevit.'

My lords, I am now come to that of Victuals. The statute 14 Ed. 3, c. 19, is, 'That 'for the Wars the Provision for them shall be 'done by merchants without commission or 'other power from the king, or any other power, 'that the people may not be compelled to sell 'against their wills.' That this was as well for defensive as offensive war, and that this was not 'introductivum novæ legis,' but was so at common law, is, by your lordship's favour, clear. Pat. 29 Ed. 1, M. 16, 19, 'ad reprimendam 'malitiam Scotorum,' and to repel them, Commissions to most counties to provide Victuals; and because they refuse to do it, the king then offers them security. Br. Trin. 8 Ed. 2, Rot.

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99. Victuals bought 'juxta forum patriæ pro 'munitione Marchiæ Scotiæ,' and there payment upon suit adjudged. Sometimes at Newcastle, sometimes at Carlisle, sometimes at Berwick, as the war required, were Store-Houses, where the Victuals were laid, and clerks of the stores to issue them out. That the king not only paid for the Victuals, but for the houses where they were laid, appears. Br. Trin. Ed. 3, about the end of the Roll, dors. the burgesses of Newcastle complain in parliament, that their houses had been taken up long time for the keeping of those Victuals; this was transmitted into the Exchequer by writ, which says, 'Volumus his pro domibus suis 'prædictis sic occupatis, satisfacere, prout debet et prout justum fuerit, et prout temporibus 'progenitor' nostror' fieri consuevit.'

My lords, in the next place for the Defence. When those that served with horse 'ad vadia 'regis,' lost their horses in the service, the owners did not bear the loss, but they were always paid for by the king; and therefore when they were first entered into the service, the marshal, or else the wardens of the Marches, who had the command of them, did set down in a roll the horse of each man, and the mark and price of each horse, to the intent that the owner by this certificate might be assured of the full value to be paid him, in case the horse was lost. This appears Claus. 34 Ed. 1, M. 16, where the 'custodes Marchiæ Scotiæ,' assigned 'pro defensione Marchiæ,' were to do it. Br. irrot. in the 26 Ed. 1, Rot. 105, 106, the Scots having entered the realm, divers 'homicidia, incendia et alia facinora perpetrantes,' there the horses *ad vadia*, for Defence were to be appraised. 2 Pars Pat. 10 Ed. 2, the same; and the Scotish Roll of the 21 Ed. 3, M. 7, the same, *prout jus est*. That thereupon, since, the subject hath recovered of the king, are many cases. I will instance but in two or three. In 24 Ed. 1, Rot. 16, dors. Robert Heiham recovered 20 marks in the Exchequer, 'pro equo 'perdito in conflictu Dover inter homines re'gis et inimicos Franciæ;' at which time the French had assaulted Dover, and burnt the priory and a great part of the town. Br. Hil. 17 Ed. 2, 'pro restauratione trium equorum 'perditor' at Carlisle. 9 Ed. 2, Com. P. 9 Ed. 2. Richard Waldegrave recovered for horses lost at Carlisle. Com. Hil. 2 Ed. 3, for wages 'pro restauratione equorum perdi'tor'' and burying of the dead when the Scots had entered the realm at Stanope-Park, for one troop 58,000*l.* allowed, 'habita inde deliberatione,' and adjudged.

For Castles, the antient Forts and Bulwarks for Defence, the statute 14 Ed. 3, c. 13, says, That merchants without any commission or power from the king shall victual them, so that the people shall not be compelled to sell against their will. That this statute in this particular is not 'introductivum novæ legis,' is cleared by the Case Trin. 16 Ed. 1, Rot. 93. Wilts, in a little Roll, and in a great Roll of the same year, Rot. 19. when in Trin. by John Eveshorne against John Flavell, 'Quia blada et 'garbas suas cepit,' the Defendant says, he was Constable of the king's Castle of the Devises, and that he had 'in præceptis Domini 'Regis, quod mur' faceret' to the castle 'de 'morturo stauro vel de bladiis;' and of these things, and that by virtue of this writ, he took an inquest to know where he might have best these provisions, 'ad minus nocumentum pa'triæ:' and the jury found it, that the Defendant might take it 'ad minus nocumentum pa'triæ;' of the Plaintiff; and that he came to the Plaintiff's house, and offered to buy 'pro 'denariis et ad usum regis;' and that because the Plaintiff refused to sell, they departed from his house; the issue joined, and found against the Defendant; 100 marks damages given the Plaintiff, and adjudged. There were always antiently *visores operationum*, and they upon oath certified, that they saw the king's money expended, which was demanded in the Exchequer. And for Victuals, as they were bought with the king's money, so when they grew stale, or the danger was passed, they were sold again to the king's use.

My Lords, that even in the time of war, when the Frontier Towns and Castles were besieged, and the Borders invaded, that even then the king did bear the Charges, appears by the allowances in the Exchequer, Trin. 27 Ed. 1, Rot. 47, 'pro tuitione Newcastle contra 'Scotos, qui hostiliter Regnum in partibus illis 'invaserunt.' M. 31 Ed. 1, Rot. 2, the Scots besieged Carlisle, 26 Ed. 1, and allowance now *de exitibus Castr'* which was the king's. And in the 27 Ed. 1, 75, 10,000*l.* allowed *pro ingen'* and Trin. 32 Ed. 1, Rot. 11, 12. *Visis comput.* 28 Ed. 1, Rot. 71. 'prout justum, quia Scoti 'contra regem hostiliter insurgunt,' therefore 'de thesauro Regis,' Berwick is fortified; et Rot. 78, dors. it appears that the sheriff of Yorkshire had carried 10,000*l.* 'de thesauro 'Regis' to those parts. Br. M. 17 Ed. 2, 'propter frequentes egressus Scotorum in reg'no,' the Castle of Sandall at the king's charge is fortified *prout justum*, and allowance given. And Brevia Hil. that year the castle of Horney for the same cause was fortified, the Scots having entered 'circa prædict' Castrum 'et apud Lancaster.' 3 et 4 Phil. et Mar. Dyer. 162. b. One in execution for debt in the Fleet, who, as the Book saith, was a man very necessary for the war; and it was moved by the king's attorney, 'per mandatum con'cilii,' if the prisoner might be licensed with a keeper by the queen to go to Berwick for the defence of it, or no; and it was held by all the Judges of the King's-Bench and Common Pleas, that the license was not good; and 4 et 5 the same Case cited accordingly to have been the opinion of all the Judges.

My Lords, for Prisoners taken in defensive Wars, and likewise for pledges and hostages for securing the peace, that the charge and maintenance, and the carrying them to the several places of their abode, have been always borne by the kings of this realm, the allowance

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thereof in the Exchequer are so frequent, that I intend to cite none of them, save that for the prisoners taken in the conflict at Dover before spoken of, which is Comm' 4 Ed. 2, Rot. 22. dors. neither do I find it at any time stood upon, save only 8 Ed. 2, among the Br. Trin. 8 Ed. 2. Rot. 88, dors. But the reason is, because that after the death of Ed. 1, in the commission of granting the Constableship of the Castle, no mention was made of the prisoners; and yet even in that Case, upon a *Monstravit Regi*, a writ of Privy Seal is awarded for allowance *prout justum*.

My Lords, if in all these particulars of Soldiers, Victuals, Castles and Forts, Horses, Prisoners and Pledges in case of a defensive war, the main supports of them, the kings could not tax their subjects, but have borne the charge thereof themselves; I shall then offer it to your lordships to be so for the defence in general.

My Lords, the Allowances in the Exchequer in all the particulars before-mentioned are frequent. In the Case of Mines, the profits of silver mines, that they upon an accompt in the Exchequer were always answered unto the king, was one of the principal arguments for the king's right thereunto; and there fo. 320, it is held, That in all things that concern the Revenue of the crown, because they are there debated, the Record of the Exchequer shews not only the course of the court, but what the law is through the kingdom.

My Lords, that in cases of War and Embassies the Chequer made Allowances, and with what great consideration, appears by the statute 5 Rich. 2, c. 10, that they were not allowed by the court, till the party brought the great seal, or the privy seal for it. And if a Writ of Allowance came to the Exchequer before the court had examined the accompt, yet they never made Allowance until the court had examined. it. Hill. 25 Ed. 1, Rot. 22. 'Licet 'breve de allocatione pendit de 1,000*l.* allo- 'candis tamen ante allocationem factam oportet 'inquirend' si pecunia illa ad opus Regis deve- 'nit et quod ipsi doceant super hoc Curiam 'Regis.' And Trin. 25 Ed. 1, Rot. 47, the Allowances are never in gross, but by particulars.

My Lords, the next proof that I shall humbly offer unto your lordships, is in that of borrowing of Money by the king for the Defence of the realm; which as they have usually done it, so it is as clear, that not only upon Petitions, their own pleasure, and upon grace, but likewise upon suit they have been adjudged so to do in the ordinary courts of justice. Comm' Pasch. 31 Rot. 41, 149*l.* borrowed of Henry Thompson, 'pro defensione totius Regni,' was sued for, and repayment ordered. M. 10 Ed. 2, Rot. 160. 'Grandes pecuniæ summæ' borrowed by the king for that purpose, and order for repayment. Br. 3 Ed. 2, Comm' Princip. Rot. 664*l.* My lords, in this particular I shall cite but this one case more, Comm' Pasch. 29 Ed. 1, Rot. 18. the king 'pro urgentissimis 'regni negotiis et defensione totius regni,' had seized divers sums of money in all the Abbies and Cathedrals, and other religious houses in the realm, 'et quo citius commode poterit' promised payment. In the parliament 29 Ed. 1, at Lincoln the king is petitioned for repayment of these monies, who promiseth repayment 'Ita quod regis conscientia super hoc 'exoneret,' and there, and Rot. 19. divers sums are adjudged to be paid.

My Lords, I shall thus humbly offer this unto your lordships, that if the king had conceived, that when himself wanted money for the defence, that he might have charged his subjects, he would never have made this answer of Repayment, 'ad exonerandum conscientiam' for then in equity and conscience the parliament should have taken care for the satisfaction of these debts, or should at leastwise have distributed part of the charge upon all his subjects; neither should the parties have had full satisfaction for all their debts, but should have borne part themselves. By the statute 35 Hen. 8, c. 12. the king for the Defence of the realm had divers great loans made to him. Now likewise there being great cause of new defence against France in Scotland in aid of the king, they release these Assurances given by the king, and likewise release to the king all suits and petitions concerning those moneys.

My Lords, I am now come to the other authorities for proof thereof, which is by acts of parliament. My Lords, before I come to the acts of parliament themselves, I shall humbly offer unto your lordships the Summons and Preparatives to them.

First, The 'ardua regni negotia' for which they are called, are principally 'defensionem 'concernentia;' that these are not the way and manner of Defence, and their advice therein, but the Supplies and Aids for this Defence, I have presented clear Proofs to your lordships before. That these Aids cannot be raised without their consents, is strongly inferred in this, that the knights of the shires are to have 'plenam et sufficientem authoritatem pro se et 'comitate comitatus præd' ad faciend' et con- 'sentiend' to the things in 'negotiis ante dictis.' If this might be done without consent of the commons, this in the writ would be needless. But that this cannot be done without their consents, is cleared by the words following in the negative, 'Ita quod pro defectu potestatis hu- 'jusmodi dicta negotia infecta non remaneant 'quovismod.' This, my lords, is the constant form of modern, and all the antient Writs, and shews clearly that the commons without their consents in parliament, are not chargeable to a defensive war.

In the acts of parliament, I will begin with that of William the Conqueror, anno 4 of his reign; which besides that it is cited in the preface of the 8th Report, and Instit. fol. 75, and by Ingulphus fo. 519, and Mr. Selden in his Eadmerus, page 171, it is likewise upon Record, and inrolled in the Red Book in the Exchequer. The words are these, 'Volumus et

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'firmiter præcipimus et concedimus quod omnes 'liberi homines totius monarchiæ regni nostri 'angliæ, habeant et teneant terras suas et pos- 'sessiones suas bene et in pace libere ab omni 'exactione in justa et ab omni tallagio. Ita 'quod nihil ab eis exigatur vel capiatur nisi 'servitium suum liberum quod de jure nobis 'facere debent et facere tenent' et concessum 'jure hæreditario in perpetuum per commune 'concilium totius regni nostri præd'.'

My Lords, the words by reason of the disjunctive 'et ab omni tallagio' are plain, that the king shall not exact, nor take any thing of any freeman, but what his Tenure binds him unto. As in words, by reason of the generality of them, it extends to cases of the defence of the realm; that it doth so in intent, I shall endeavour thus to present it to your lordships.

The Military Services before mentioned for the Defence of the realm, they are by Bracton attributed to the Conqueror's Institution; for in his second Book fo. 36, speaking of them, he saith, 'Secundum quod in Conquestu fuit ad 'inventum.' Plowden, in the Argument of sir Thomas Tresham's Case, means, the Conqueror had to do it by reason of the many Attainders of those that took part with Harold, and after his death with Edgar Atheling. That he did it in a great part, appears by Matth. Paris fo. 8, that he put all the clergy that before held in Franke Almogne *sub servitute Militari* to do service *tempore hostilitatis*, and by the county palatine of Durham and Chester in those places of danger. In the Book of Knights Fees in Hen. 2d's time, it appears by the Certificate, they had sometimes 'de veteri Feoffament'' and sometimes 'de novo.' And by some of them it appears, that the tenures 'de novo Fe- 'offament'' were before king Stephen's time, and therefore it is probable that the Veteri might be those created by the Conqueror. The Provision for Soldiers pay by tenures was likewise of his Institution, as appears by that before cited out of the Black Book, lib. 1, cap. 27, that 'in primitivo regni statu post conques- 'tum ad stipendia et donat' militum' out of the castles and other lands 'in quibus agricultura 'non exercebatur pecunia numerata succres- 'cebat.' The policy and provision of the Conqueror for the Defence being by Tenures, when in this act of parliament he says, 'quod nihil 'ab iis exigatur vel capiatur, nisi servitium 'suum quod de jure nobis facere tenentur,' I humbly conceive shews plainly, that the subject was not otherwise to be charged for the Defence, nor further than by their tenure. This, my lords, further appears by other parts of that act of parliament, where speaking of any thing of Charge that is to be done according to their tenures, as that all 'bene se teneant in equis et 'armis ad servitium suum integrum faciend'.' But in the next place speaking of the Defence it saith, that all within the realm 'sunt fratres 'conjurati pro viribus et facultatibus' to defend the kingdom and the peace, 'et ad judicium 'rectum, et justitiam faciend';' the coupling of the Defence with that of the peace, and doing justice, shews the personal care that all by their oath of allegiance ought to bear to the common peace and good of the realm.

The next Statute that I shall present to your lordships, is that of Running Mead, 17 Johannis regis; the words are these, 'Nullum scu- 'tagium vel auxilium pona in regno nostro nisi 'per commune consilium regni nostri nisi ad 'corpus nostrum redimend',' and to knight his 'eldest son, and to marry his eldest daughter As in words these extend to the Defence; because all Supplies for that purpose from the subject, they are only in *auxilium*, or in *subventione expensor'* of the king, who as before is provided, is principally bound thereunto: so may the intent likewise be further gathered, first from this, that the word *auxilium* is joined with that of Scutage, which is for the Defence; and likewise from this, that particular satisfaction is made, by other parts of that statute, to those that had been disseised by R. 2, and king John, which were things done only for the increase of their revenue, without shew of the common defence. That both before 9 Hen. 3, and afterwards 20 Ed. 1, this was a Statute, and so accounted, I have before proved. And in the book 5 Hen. 3, it is called by the name of 'Magna Charta sans addition.' So 37 Hen. 3, in that solemn confirmation observed by Matth. Paris, p. 115, this of Running Mead is confirmed by the name of Mag. Char. and 50 Hen. 3, p. 1220, which I note only to this purpose; that of speaking of Mag' Chart', this of Running Mead is intended as well as that of 9 Hen. 3, as part thereof, and bodied both together; yet that neither of them were observed either in king John's, or Hen. 3's time, our histories are full of it. And by the pope's bulls of 12 and 13 Hen. 3, the pope absolving the king from his oath in their confirmation, doth it because, as the words of the bulls are, 'Juramen- 'tum peccati vinculum esse non debet:' neither till after 29 Edw. 1, as I shall hereafter prove, were they at all observed in the things concerning the king's prerogative.

The next that I shall cite, are the statutes of 25 Edw. 1, and the statute 'De Tallagio 'non concedendo.' That of the 25 Edw. 1. c. 5 & 6, the grievance is for aids, tasks and prizes taken through the realm, for the wars, shall not be brought into any custom for any thing before done, be it by roll or any other precedent that may be found; and further grants, that for no business from henceforth he will take any such aids, tasks and prizes, but by common consent in the parliament of the realm, and for the common profit, saving the ancient aids and prizes due and accustomed. My lords, though by the copulative it is clear enough, that there must be a consent and common profit concurring, and although the saving of the antient prizes and aids accustomed might well enough have been satisfied in the aid excepted in Running Mead, and the prizing of wines and purveyance; yet to out these and all other scruples, the statute 'De Tallagio,' &c. made afterwards for that purpose, is ab-

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solute and general: That no talliage or aid shall be taken by the king, nor that any of his officers shall take any corn, leather, cattle, or any other goods without the consent of the party.

My lords, to bring these statutes to the thing in question, that these things cannot be done though for the defence, the times of the making of them, and the circumstances concurring thereunto, I shall present unto your lordships.

That of the 25th of Edw. 1, by the date appears, was the 10th of Oct. 25 Edw. 1. My lords, the king, the 12th of Aug. before being at Odimer ready to go over into Flanders, the parliament being then summoned by his letters patents, Rot. Pat. 25 Edw. 1, m. 7, taking notice of the constables and marshals departure from the court in displeasure, and of the rumours of the people, that the king refused to seal articles sent him for the common profit, for the redress of divers grievances done to the people. For the Grievances he saith, that without those things he could not have defended the realm, and yet saith, that he is sorry for it, and prayeth that this may be his excuse, as that he hath done those things, neither to buy lands nor tenements, nor castles, but to defend himself and the whole realm; and that if he returned again, he would have all know, that he had an intent to amend all those things, to the honour of God, and content of his people; that if he dies in this service, his heirs shall make amends. Hereby it appears, that the grievances that procured this statute, were for the defence of the realm; therefore from hence it follows, that the aid and taxes there mentioned were for the defence. So likewise that the exception of the antient aids extends not to those of the defence, that being the thing wholly complained of. This declaration of the king was the 12th of August; the September after the king being at Winchelsea, those articles are sent unto him, to which he deferred for the present to give his assent unto them, because his council was not there, and so sails over into Flanders. This statute of the 25th of Edw. 1, is past, the king beyond the sea, the 'Teste Edvardo filio nostro;' at his return, as appears by Walsingham, p. 42, the king is desired to confirm these articles, which in Walsingham, p. 40, are the same word for word as the statute 'De Tallagio,' which the king then deferred: 27 Edw. 1, they desire it again, which the king doth with a 'Salvo jure coronæ nostræ 'in fine adjecto, quod cum audissent comites 'cum displacentia ad propria discesserunt,' saith the Author, 'sed revocatis ipsis ad quind' 'Pasch' omnia sunt concessa.'

That the Statute 'De Tallagio' was after that of 25 Edw. 1, is plain in this, by the king's going over into Flanders without assenting unto any articles, in Sept. and 10 Oct. following, as appears by that statute 25 Edw. 1, itself, it was made; and likewise by the statute 'De Tal-'lagio' itself, the king's releasing all rancour to the earl marshal and constable who had most offended him, and first presented these articles to the king. My lords, I shall add this only, as I conceive it will not be proved, that this king either before or after the making of this statute, or any of his successors since, ever claimed this absolute power over their subjects, as to lay aids and tallinges upon them for the supportation of their own private estates, abstracted from the common defence or good of the kingdom. This king at this time, we see by his own declaration, was far from it. This last Statute fully satisfied those that desired it; for as Walsingham saith, 'Ad eorum votum 'absolute omnia sunt concessa.' If therefore it extends not to that of defence, I shall humbly offer it by what construction of it our ancestors judgments and discretions will be freed from a great deal of censure, that were so well contented with it.

My lords, Mag. Chart. being confirmed at the same time when the statute 25 Edw. 1, was made, and both that and the statute 'De Tal-'lagio' being only articles upon Mag. Chart. they were all of them, as I conceive, intended in the subsequent, and so often confirmation of Magna Charta.

My lords, the next is the statute of 14 Ed. 3, c. 1, that the people shall not be compelled to make any Aid, or to sustain any charge but in parliament. That this cannot be done for the defence, will, as I conceive, be inforced from the words; for a great subsidy having been granted as well for the war on this side the sea, that is for defence, as for the French wars, it is declared, that this shall not be drawn into example, and that out of parliament they shall not be compelled to sustain any charge; and then it is further enacted, that this subsidy and all the profits of wardships, escheats, and other profits of the realm, shall be spent for defence and safeguard of the realm, and the wars in Scotland and France, and not otherwhere; so that this statute, as I conceive, all put together, bears this sense, That the subsidies granted in parliament, and the wardships being a fruit of the tenures created for the defence of the realm, and other profits arising to the king by way of prerogative, are to be spent for the defence of the realm, and the king's other wars; but that no aid or charge for any of these can be laid upon the commons without consent in parliament. My lords, that the practice of the king, I mean Edw. 3, was contrary to these statutes, and that they were not kept, appears by the Parliament Roll, 15 Edw. 3, m. 9, the next year after, where the commons shew that their goods were seized, and their bodies imprisoned without any suit commenced against them.

My lords, the next which I shall cite are the statutes of 25 Edw. 3, and 1 Rich. 3, against Loans and Benevolences, which I shall humbly offer unto your lordships on this ground, 'Ad ea 'quæ frequentius acciderint adparantur leges.' As for my part, I have seen general loans and benevolences, but they were for the defence; so I conceive, if they were otherwise, they were but few in respect of the others. The common

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grievances therefore being by loans and benevolences of that nature, these statutes, I conceive, were made against them; for these not being within the words of any of the former statutes, that therefore the kings might with the more colour put them in practice, and on the other side being as equally dangerous to the subjects, because of the displeasure by denial, they procured the statutes. That Loans for the Defence were after 25 Edw. 3, counted unlawful, appears by Walsingham, p. 179, that 44 Edw. 3, the king 'Sinistro consilio magnas 'summas pecuniæ' of all sorts 'petiit, asserens, 'quod in defensionem ecclesiæ et regni illas ex-'penderet,' but that the people would not lend.

My lords, the next which I shall cite is direct in words, which though it be not an act of parliament, yet the weight of the authority by putting of it will appear. In the second part of the Parliament Roll, 2 Rd. 2, m. 3, 4, 5, the king being beset with the enemies of France and Spain, and Scotland, who all three by land and sea invaded the realm; the privy-council not willing, in a thing so much concerning the realm, to take the whole charge of it upon themselves, nor desiring so soon to call a parliament, a parliament but a little before being dissolved; they therefore resolved to assemble a great council of most of the bishops, lords and other great men and sages of the realm, who meeting and finding the absolute necessity of a preparation for defence, and that the king wanted money to do it; what their full and final resolution in this case of extremity for defence was, I shall read the words of the Roll; they say, 'Pur conclusion 'final quils ne poient cest mischiefe remedier 'sans charger les comm' del royalme, quel 'charge ne poient de fait ne grant sans parlia-'ment:' and therefore the necessity being urgent, the great men lend money for the present, with advice presently to call a parliament, as well to provide for the repayment of this Loan, as for further Supply. It is true, my lords, that this king was at this time within age, and it is likely that many of his council had been Edw. 3, his grandfather's privy-council, who well knew his prerogative, and extended it as far, by reason of his great wars, to the charging of his subjects, as any before him, or since his time. And that not only the privy-council, but likewise, as the record saith, almost all the prelates and others, dukes, earls, barons, bannerets, and other sages of the realm, which I conceive were the judges, should be so far from putting this in execution, that they declare in the negative upon full deliberation, that the commons cannot be charged herein but in parliament, themselves likewise thereby being to undergo a present charge, by lending to supply that necessity; the authority must needs be weighty: and upon second thoughts afterwards, the same was declared in full parliament by the Lord Chancellor, and so afterwards entered upon the Roll without any qualification at all, which adds farther to the authority thereof.

Ult. Feb. 3 Car. A commission issued to divers great lords; the end, as appears by the words, was for aiding the king's allies beyond sea, and for the defence and safety of the kingdom and people. They were, by the commission, to raise money by imposition or otherwise, which without extreme danger to the king, kingdom, and people, can admit no long delay, wherein form and circumstances are to be dispensed with rather than the substance lost. This, my lords, was a commission to tax the subjects in time of necessity for Defence. The last parliament, this commission as against the law was condemned by both houses, and cancelled in his majesty's presence.

Philip Comines in his 5th book, cap. 8, observing the same, above all other commends the policy of the English laws and government; and both he and Bodinus Reipublic. lib. 6, c. 11, and Pasquerus Advocate-General in the king of France his Chamber of Accompts in his second Book, c. 6 and 7, all shew this likewise to be the ancient law of France; and how the practice comes now to be otherwise, there, Pasquerus shews at large; and that the kings sometimes endeavouring to the contrary, found so much difficulty, that they afterwards, especially Charles the 5th, procured by the consent of the three estates these aids for defence to be granted for 3 or 4 years together: And that this consent of the people at the first, was afterwards that which gave the occasion to the king to take it without consent; and therefore he concludes, that France being 'Un Royalme 'de Consequence,' that they must not easily promise any thing, though but once, which they will not be willing to permit for ever.

My lords, I have now done with the Proofs; in the next place I shall endeavour an Answer to some few Objections that are obvious, both from Reason and Authorities.

For those of Authorities, 13 Hen. 4, 14, 16, Gascoigne's Opinion that the king may charge his people without parliament, to a thing that is for the common profit of the people; the thing that he applies it to, is, that the king may grant Pontage and Murage, &c. My lords, that the king may grant both these, and Tolls upon erection of a new fair or market, or pavage, I shall not deny. The Answer that I shall give to them is, first, That these Grants do charge *venalia* only, that is, goods carried to those places for merchandize; but that any tax may be laid 'secundum statum et facul-'tates,' either upon the Hundred or County, I shall humbly deny it.

It is true, my lords, by the Conqueror's laws it appears, that cities and walled towns were for the Defence of the country, and therefore by those laws no Fair or Market might be kept but in 'civitate aut burgo muro wallat'.' Therefore in Doomsday-Book in all such Cases it is found, that there are so many 'mansiones 'murales,' which by their tenure when need was, were bound 'ad murum reficiend'.' That no other land that holds not by that service is liable, appears by the Parliament Roll. 1 Ric.

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2, pars 2, m. 76, where all the cities and boroughs of England petition, that in this time of danger they not being able with their merchandize to do it, that others that had lands within the towns might be made contributaries, who before were at no part of the charge.

The Answer is, that all according to their Tenure, as they have antiently done, so shall they still; and if this might be done, there would have been no need of the statutes of 2 & 3 Phil. et Mar. c. 1, 23 Eliz. c. 4, for giving power to tax men 'secundum statum et facultates,' to repair Castles and Towns within 20 miles of Scotland.

For the Tolls and Pontages and Paveages, as there is a great deal of equity that those which receive benefit by bringing their goods to the market, and over the bridge, should contribute to the charges that make and maintain the market-places and the bridges; so neither are they compulsory, but voluntary charges: For as no man pays but he that receives the benefit, so none is compellable thereunto, but is left to his liberty. Neither is there any colour in respect of the town itself to whom the murage or paveage is granted, why they should not be charged, because the grant cannot be but at their own suits; for if it be not at the suit of *tot burgensium*, the Grant is void, and to be revoked.

It may be further objected, that as the law hath entrusted the way and manner of managing of Defence wholly and independently to his majesty, so likewise of Aids and Means, as the 'Causa sine qua non;' and therefore his majesty should not be dependent upon the parliament for them.

My lords, the near relation between his majesty and the parliament, that they are but one body, hath been presented unto your lordships, and that his majesty did exercise the *summum imperium* there. Bodin. lib. 1, cap. ult. says, 'quod ejusd' esset potestat' tributa nova imponere cujus est legem terræ;' but that the legislative is not in his majesty, out of parliament, will be granted.

The Subjects interest being as nearly concerned in the Defence, as his majesty's is; as there is no cause to fear that they should not be willing to proportion the aid to the occasion; so neither can the law presume otherwise, which hath so high an opinion of the judgment and integrity of this court, that as it is in the Comm' 398, it is unlawful for any man to conceive any dishonourable thing of it.

My lords, my last Answer thereunto is, that by the law the king hath as independent a power to make a foreign war, as to make a defensive. It will, as I conceive, be granted, that in this case his majesty hath not power to tax the Subject; for then it would follow, that as well as to the conquering of the next adjecent realm, so of all Europe, the subject should be at the charge, and yet the land conquered be only his majesty's; and yet upon this ground, in respect of the equality of the powers, it might be done.—Neither, as I humbly conceive, doth this only answer the objection, but returns upon the other side; for his majesty has power to make an offensive war, which for the most part causeth a defensive; by this means it should be in his majesty's power to make a defensive war, and to tax the subject for the maintenance of it.

My lords, the last Objection whereto I shall endeavour an Answer, stands thus: The parliament is a great body, and moves slowly; and that the case may be such, that the cause may be lost before the parliamentary supplies come. My lords, how means of effecting so sudden and so great a surprize can be so secretly carried, I shall not examine it in reason, but shall humbly offer unto it these Answers:

That the service whereby the law hath provided for the Defence both for land and sea, they have both the same limitation of time with the parliamentary Supplies in the summons of the tenants by knight's-service *ad exercitum*, and of the Cinque-Ports; forty days warning is to be given, as is for the parliament. And so it is probable, for that of Mould, 13 E. 1, it was for others that held by sea-service. And anciently the summons *ad exercitum* to the ports, and for the parliament, went out together, or much about the same time, that the parliament might assess the escuage; and in case the tenures and other revenues were not able to maintain the war, that the parliament might provide for further supplies, as appears Hil. 28 Ed. 1, M. 15, 31 Ed. 1, and 44 Ed. 1, M. 15, et 16, 'et oportet neminem legibus 'esse sapientiorem.'

The Tonnage and Poundage, when first granted for life, was, that the kings might always have money ready upon such sudden occasions. In the Parliament Roll, 4 Ric. 2, M. 42, the commons desire payment of Edward the 3d's Debts, that they might be encouraged to lend the king in aid of the realm, if a sudden cause of necessity should fall out. The Answer is, that it shall be done *selon le petition*. My lords, by this it appears, that this objection was not then taken to be of weight, many of the loans are in 'Causa necessitatis in Articulo.' The authorities that further answer this objection are great, and full in the point.

The first is that of the Parliament Roll of 2 Ric. 2, before cited; the business of defence could not stay so long as for a parliamentary Supply, yet agreed, that the commons without a parliament could not be charged; and therefore the same men that gave the judgment presently lend money for that purpose.

In the Statute 31 Hen. 8, for Proclamations, the cause of making the Statute is expressed in these words: Considering that sudden causes and occasions fortune many times, which do require speedy remedies; and that by abiding for a parliament, in the mean time might happen great prejudice might ensue to the realm; therefore the king's proclamation is by that act made equivalent to an act of parliament, but with a full exception of their lands, goods and chattels: which as it shews that before that, by the com-

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mon law, the king could not, in cases of exigency that could not stay for a parliament, take or seize their goods, so they were careful still to preserve their rights.

My lords, after the statute of 31 Hen. 8, the Maxim of Justinian was verified in Hen. 8, as of the Roman emperors after the *Lex Regia*, whereby the people transferred their suffrage to the emperor, 'Quod Principi placet legis vim 'habet;' so all that time was that other as true on the subjects part here, as there in the Digest, 'Lege omnia de Regalis: quod meum est non 'est universitatis, et quod nostrum est sine fac- 'to nostro ad alienos transferri non potest.' The 7 Prædict. of Spain, titul' 1. particular' 2. gives something more to the king, for he may take from the subject, 'pro necessitate, reipub- 'licæ dato primum tali causa dictæ rei bona 'lambia ejusd' vel majoris pretii bonorum viro- 'rum arbitrio;' he may in this case take, giving a pawn to the subject for the assurance of a future full satisfaction. Lyme in his 6th book, c. 35, Bodin in his 6th book, fo. 655, affirms, That when Hannibal had put Italy and Rome itself into so great a hazard, and that there was not money left in the common treasury, that yet the senate without their consent could not charge the people, but that 'unusquisque' of the senate 'mutuo dabat aliquid in usum pub- 'licum.'

My Lords, the last authority for the answering of this Objection, and the clearing of the whole business, is the Commission of the Loan. 2 Car. pars 4, Pat. Roll, the words are these: 'The great and mighty preparations both by 'sea and land did daily threaten the kingdom; 'that the safety and subsistence of the king and 'people, and the common cause of Christen- 'dom, were in apparent danger of suffering ir- 'reparably; that the king's treasure is exhaust, 'and the coffers empty: That the business of 'Supply cannot endure so long delay as the 'calling of a parliament, and enquiring into all 'means just in cases of such unavoidable dan- 'ger; the king is now resolved to borrow of the 'Subject, to enable his majesty for their safeties, 'and promiseth repayment.'

My Lords, the borrowing of Money only is the thing required, that is for Defence, the king had no money left; the exigency such, that it would not stay for a parliament. This Commission afterwards in the parliament 3 Car. was questioned, and upon debate adjudged by both the houses of parliament to be void in law; by the Petition of Right presented so to the king, his majesty denies it not.

My Lords, from this Objection of sudden Danger, I come to the next, which is the third thing before offered unto your lordships, which is an admittance, that the danger sometimes may be such, that the Subject's goods sometimes without their consent may be taken from them; for Property being both introduced and maintained by human laws, all [illegible] by the law of nature being common, [illegible] therefore some times, like the Phi- [illegible] on Sumpson, wherein these cords are too weak to hold us, 'Necessitas 'enim' (as Cicero saith) 'magnum humanæ 'imbecillitatis patrocinium omnem legem fran- 'git;' at such times all property ceaseth, and all things are again resolved into the common principles of nature. These times, as sometimes they are only *instanti*, and concern but some few, as in cases of killing one other men's Lands, or with their Goods upon sudden assaults; so sometimes they are longer in continuance, and larger in extent, and concern the whole kingdom, as it is in times of war, 'Quando agitur pro aris et focis flagrante 'Bello.' And as on the particulars before mentioned, which are but for a short time, and that concern some few only, the law hath no power for that time, nor maintains any property, so in the other case it loseth this power for a longer time, and over all. A dissent upon Disseisin in time of war, takes not away the entry of the Disseisee. Littl. Sec. 412, no plenary after the six months bars the patron of his 'Quare impedit' upon a presentation in time of war. 43 Ed. 3, 'Quare impedit' 135, Na. Br. 31. And in a Writ of Right, where the seisin makes the title, the taking of exploits must be alledged to be done *tempore pacis*, the law allowing no estate in such times, but calls it an occupation in time of war. Littl. fo. 12. And as 'inter arma leges silent,' so that of Bract. lib. 4, fo. 240, that 'tempus guerræ est 'tempus injuriæ,' is likewise true; for after the war is ended, the law, as not having cognizance of things then done, gives no remedy for wrongs in that time sustained, as the Case is adjudged in the roll of Kent. 7 Ed. 1. 'inter placita de 'querelis,' one Parleton 'die Petro Randal quod 'ipse die Mercurii ante festum Sti' Thomæ,' 46 Hen. 3, came to the town of Cleve, and took of the Plaintiff's goods three oxen, four cows, and three heifers, and yet detains them; the Defendant alledgeth the pardon of Henry 3, of 'Omnes transgressiones fact' ratione turbationis 'tunc in regno existen',' and that it was 'tem- 'pus guerræ' when the goods were taken; the Plaintiff replies, that the king pardons only offences done to himself, 'et non transgressiones 'aliis illatas;' the Defendant rejoins, that 'tempus illud' was 'tempus guerræ, et non 'tempus pacis,' and upon this the issue was joined; the Jury finds that when the Defendant took the goods, 'fuit tempus belli, et non 'tempus pacis,' and therefore it was adjudged for the Defendant. 'Tempus belli,' when Property ceaseth, is not upon every intestine or defensive war, but only at such times when the course of justice is stopped, and the courts of justice shut up: and this is 'tempus belli' in the Institutes, Sec. 412, 39 Ed. 3, Banc. Regis Rot. 49, the Attainder of Treason of Thomas earl of Leicester reversed, error assigned, 'Quia 'tempora pacis maxime cum per totum tempus 'prædi' cancellar' et al' curiæ Dom' Regis aper- 'tæ fuerunt, et in quibus jus cuicunq; fiebat 'prout fieri consuevit, nec prædictus dominus 'rex in tempore illorum cum illis explicatis equi- 'tavit.' That there were great armies on foot

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on both sides in this business when the earl was taken at Barrowe-bridge, our Histories are full; but yet it was not that 'tempus guerræ' intended by the law, because the courts of justice were open, and the king with banners displayed was not in person in the field.

My Lords, in these times of war I shall admit not only his majesty, but likewise every man that hath power in his hands, may take the Goods of any within the realm, pull down their houses, or burn their corn, to cut off victuals from the enemy, and do all other things that conduce to the safety of the kingdom, without respect had to any man's property. 12 Hen. 8, 2 Br. trans. 406, 8 Ed. 4, 23, that in such times a Subject may make a bulwark in other men's lands, and that the laws already established are silent in such times. And although in that foreseen and lingering War of Hannibal's, whereof I have before spoken, the Senate could not charge the people, yet when there was a 'Tumultus Gallicus,' that is, when the Cisalpani their neighbours, on the sudden, as sometimes they did, assaulted the city; by the same Author the case was otherwise.

My Lords, besides this sudden and tumultuous war, which shuts the Courts of Justice, and brings his majesty in person into the field, and wherein Property ceaseth; the law takes notice likewise of other times of war, as when his majesty upon just cause known unto himself by proclamation proclaimeth war against any foreign state, and likewise the law taketh notice of the effects thereof; that is, that no subject of such prince or state is capable to prosecute any suit in any his majesty's courts; and likewise, that then it is lawful for any his majesty's subjects to seize and keep to their own use, the goods of the subjects of any such prince or state, as in the books are adjudged: 7 Ed. 4, 18, 13 Hen. 8, Br. Property, 38, 22 Ed. 3, 16. My Lords, it appears not by any thing in this Writ, that any war at all was proclaimed against any prince or state, or that if any of his majesty's Subjects had taken away the Goods of any prince's subjects in Christendom, but that the party might have recovered them before your lordships in any of his majesty's courts. So that the case in the first place is, Whether in time of peace his majesty may, without consent in parliament, alter the property of the subjects goods for the defence of the realm. The time that will serve the turn for the bringing in of the supplies and means of the defence, as to your lordships appears judicially by the writ, that is seven months within four days. For the writ went out Aug. 4, and commands the ship to be at Portsmouth, the place of rendezvous, the first of March following; and thereby it appears, that the necessity in respect of time was not such, but that a parliament might in that time have been called for the effecting of the supply.

Yet in the next place it is averred, that 'Salus regni periclitabatur,' and that was the cause of issuing forth the Writ; and this by the Demurrer if it should be confessed, yet this is but in general; how or in what manner 'periclitabatur non constat.' By the law the Defendant may have a protection when he is in *Negotiis Regni;* but when he will make use of it, it is not allowable in that generality, but he must shew in particular, in what town or castle, or other particular service he is in, that so the court may judge whether the cause be sufficient, yea or no; and yet that is his majesty's writ too, as well as that in question. The Books for it are 36 Hen. 6, 28, 39 Hen. 6, 1.

Yet in the next place, if your lordships shall give any heed to this General, as to the particular of Pirates infesting the coasts, and preparations further 'ad regnum gravand'' mentioned in the writ, the Case then, as I conceive, is this.

In a time of peace, his majesty's vigilancy foresees a Danger likely to ensue; the Supplies for prevention of this danger will serve, if brought in seven months after within four days; yet whether in this their case without consents in parliament, his majesty may alter the property of the subjects goods?

The Second Days ARGUMENT of Mr. ST. JOHN.

My Lords, having done with the Defence in general, I shall now endeavour to prove, that this of the Sea hath no such peculiarity in it, but that it will fall within that of the Defence in general: wherein, in the first place, I will endeavour an Answer to some Objections both from Authority and Reason, that may seem to prove a Right: and secondly, to some Precedents concerning the Use and Practice.

Of the first rank, I shall begin with Danegelt. It may be said, that the Danes infesting the realm, that Ethelred, for the resisting of them first by his own authority, laid this upon the subject, and made it an annual charge. That after the Conquest they seldom infesting the coasts, the Conqueror took it not annually as at first, but at such times only as it is in the Black Book, lib. 1, cap. 11, when 'ab exteris 'gentibus bella vel opiniones bellorum fuerunt.' And that after Henry the 2nd's time, the kingdom being altogether freed from the Danish invasions; although Danegelt lost the name and use, it never after his time being taken by hides of land as before; yet the succeeding kings, by the same authority, did lay taxes upon the Subjects for Defence of the Sea.

My Lords, for Answer hereunto, I shall in the first place observe this only by the way, that the best and certainest Authorities agree not what it was, I mean the Laws of Edward the Confessor, cap. 11, and the Black Book. For the Confessor's laws say, it was one shilling upon every hide of land, and the Black Book two shillings; by which it should seem it was little in use in Henry the 2nd's time, nor much known. That 11 cap. in the Confessor's Laws, where this is mentioned, was no part of the antient laws themselves, but something afterwards added, appears by the words themselves. First, it speaks of the Freedom which

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the Church, in the first institution of it, had; Freedom, we know, was not lost till after the Conquest; and likewise of the granting of it by William Rufus in parliament: and therefore it should seem to be inserted in those Laws afterwards out of the laws of Henry the 2nd; for this 11 cap. and that of Danegelt in Henry the 2nd's laws, are the same, *de verbo in verbum*, as appears in Hoveden fo. 344.

But admitting the thing, I shall endeavour Answers to each part of the Objection: as first, that the Danegelt was granted in parliament. Mr. Cambden's Brit. p. 142, observes, that the Danes first infested the coasts A. D. 800, and, as his words are, With such hurliburlies, as the like was never heard of: havoc was made of all, razing of cities, and burning of churches; and for their continual piracy, they had got the nick-name of *Neccugii*, that is, Pirates. The Danegelt first began in Ethelred's time, almost 200 years after the Danes first invasion, for he began his reign A. D. 978. That Provision was made for Sea-Defence in the interim, and before Ethelred's time, appears by the many Sea-Fights of Alfred and other kings. That this provision was usually in parliament, is probable from that of Ingulphus, London print. fol. 488, where A. D. 833, which was 33 years after the Danes first Invasion, a Deed to the abbot of Crowland is dated thus, 'Coram Pontificibus Proceribus et Ma-'joribus totius Angliæ in civitate London, ubi 'omnes congregati sumus pro consilio capiendo 'contra Danicos piratas littora Angliæ assidue 'infestantes.' If king Ethelred, by his own authority, might have imposed this, it is like some of his predecessors, the Case so necessarily requiring it, in almost 200 years space, would have done it before this time. That this of Danegelt was done in parliament, the words carry as much; for the words of the law are, 'Danegeldi redditio primitus statut' fuit,' a word most proper for the parliamentary authority. But fully by the laws of that king, I mean Ethelred's laws, in Mr. Lambert's Saxon Laws, fo. 58, there 'ex sapient' suorum con-'silio,' peace is made with the Danes, and a certain sum of money granted to the army, as our Historians observe. The Danes, by composition, were to send away the whole Fleet, saving 45 ships, which were to remain to defend the kingdom against other enemies, and the king was to maintain them at his charge. That the Danegelt was paid to the Danes for this Defence, many of our Historians observe. My lords, that at the same parliament this was provided for, appears by the words of the law, 'Si quis igitur posthac navalis aspirat' in Anglia 'prædam fecerit, hic nobis auxilium ferat ex-'ercitus nosq; ei quamdiu in fide manserit quæ 'ad comitat' suppetent' paramus omnia.' That this was a parliament, as the words shew it, so it is held in the Preface to the 9th Report, and Huntington fo. 205. If this was not the Danegelt, yet this is clear, that in that king's time then provision 'contra Navales appara-'tus' was made by parliament. 'Primum sta-'tuerunt Angl' infausto consilio quod ipsi Da-'nis censum persolverent; regibus namq; nos-'tris modo per servitia ex consuetudine quod 'Danis persolvebatur ex ineffabili terrore.' That Danegelt which after the Conquest was paid to the king, we see by that author, 'Pri-'mum statuerunt Angl';' statutum Angl'' must needs be by parliament. If the Danegelt in such time of great danger was not imposed without parliament, it must strongly make against those that shall object it.

The Danes having quitted the realm, that the Danegelt was released by Edward the Confessor, as Ingulphus fo. 520, and Hoveden 253, and all our later historians. That of Ingulphus, my lords, alone, is without exceptions, who lived in those times; he was brought up in England in the Confessor's days, and therefore knew what he wrote; he afterwards went over into Normandy, and was the Conqueror's Secretary, came over with him to the Conquest, and at his own charge maintained twelve horses: he was so great at the court, that, as himself writes, fo. 514, 'quos voluit humiliavit, quos 'voluit exaltavit;' and pag. 518, a Charter of the Conqueror's to the Abbey of Crowland was made, 'ad petitionem Familiaris mei Ingulphi;' and therefore, in all likelihood, would not report this partially against the king.

My Lords, that we are not to put out our fires upon ringing of the Cur Feu Bell, we have no other law for it but disuse; and the testimony of Historians, that Henry 1 released it.

For that of the Black Book, that William the Conqueror retained it, 'Quando bella vel 'opiniones bellorum fuerint,' as that Book is mistaken in the thing, saying it was 2*s.* every hide of land, being in truth but one; so it is possible he might mistake in the other too. That it was released *in æternum* is apparent. That many things were done *de facto*, to the infringing of the Liberty of the Subjects both in his time, and the times of Hen. 1, and Hen. 2, too, it is clear by Historians; and if it were not released before, yet that king Stephen released it, is, Huntingdon fo. 221. Hoveden fo. 276. 'Hoc Deo voluit,' say these Historians, 'sed 'nihil horum tenuit:' and as all our Historians agree, that after Hen. 2.'s time, in whose reign the Black Book was compiled, it was never paid; so it may be collected out of the Red Book, for all or most of the Aids and Escuages in Hen. 2.'s time, and king John's time, are there mentioned. In 8 Hen. 2, it is said, 'quod 'Danegeldum assessum fuit;' but after that, neither in his time, nor in the time of king John, or of any other king, is any more mention of it. Sir Henry Spelman, in his Glossary, saith, that when it was taken in the Conqueror's time, and since, it was 'Consultis magna-'tibus et Parliamentar' deinum authoritat' 'diminut' sunt.'

My Lords, in the last place, if the succeeding kings, *mutato nomine* only, have in lieu thereof laid other Taxes upon the Subjects, they must hold proportion with that of Danegelt; that is, that they have been equally set

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upon all the Inland Towns throughout the kingdom, as that was, and 12*d.* upon every hide of land; and likewise in time, and that there was no intermission, but that in Rich. 1.'s time, and king John's, which were active, that then it was put in execution. Claus. 15, Joh' M. 3, dors. & 7. and Mat. Paris, p. 312, 313. The Pope had granted the crown of England to the French king, who was ready to invade the realm; great provision of Shipping was made, 'ad illibera-'tiones Regis et ad stipendia Regis:' so far was this king, in this time of necessity, from imposing any aid upon the subjects for the defence of the sea, as that he himself bore the charge.

My Lords, the next Authority that I shall insist upon, is, that in the terms of the law, fo. 114, in the Title of Hidage, the taxing by hides was used much in old times, and that chiefly in king Ethelred's days; who in the year 1006, when the Danes landed at Sandwich in Kent, taxed all the realm by Hides, and every 910 hides of land should find a ship.

My Lords, my first Answer to this is, 1. That this was done when there was a formidable enemy, and which soon after conquered the kingdom, was upon the shore, as by the Book appears; and therefore it is likely that the courts of justice were shut, and that the king was then in person in the field. 2. This was but *actus unicus*, and even by the Common Law, that easily admits of customs, not good; it is *actus binus* that hath any colour 'introducendi consuetudinem.' 3. It appears not by any thing in the Book, but that this might be done by parliament; many of the antient acts of parliament are *statuit Rex*: and whereas the Book saith, Taxing by Hidage was much used in old time, that these were by parliament, appears both by the use and authority express in the point in print, Doomsday-Book in Berks, 'Quando geldum debatur,' Matth. Paris 780, many Corneagia et Hidagia, recited in parliament, that had been formerly given to that king in parliament. Bract. in his second book, fol. 37, is express in the point, that they cannot be taken but by Grant in parliament; his words are these: 'Sunt quædam communes 'præstationes quæ servitia non dicuntur, nec 'de consuetudine veniunt nisi cum necessitas 'intervenerit, sicut sunt Hidagia et Corneagia 'de necessitate et consensu totius regni introducta.' Rot. Parl. 8 Hen. 3. M. 4.

My Lords, the next Authority I shall insist on is the Case of the abbot of Robertsbridge in Kent; which, because *prima facie* it seems to be to the point, I will put it at large. M. 25 Ed. 1. finient. I. Banc. Rot. 77. The Abbot brought a replevin against Adam de Bridland and others, for taking his cattel; the Defendants avow in these words, 'Dicunt enim occa-'sione turbationis inter regem, et regem Franciæ 'suborta, assignatus fuit Willielmus de Leigh-'bourne ex parte regis ad custodiam marie 'faciend' ratione cujus custodiæ faciend' terra 'et tenementa hominum ejusd' comitatus agis-'tata fuerunt ad custod' faciend'.' And the Abbot was assessed, 22 Ed. 1, at 7*s.* the 23 Ed. 1, at 13*s.* and 24 Ed. 1, at 15*s.* 'ad præd' 'custod, faciend';' and because he refused to pay, that the Defendants being collectors for the town, distrained the Abbot. The Abbot, in bar of the Avowry, says, that for his lands he was assessed to find a horse and man in 'subsidium custod' præd',' and that he found his horse and man accordingly, 'ad eand' custo-'diam faciend';' and therefore demands judgment, 'si una et ead' occasione custod' præd',' he ought to find the horse, 'et nihilominus præd' 'pecuniam solvere.' The Defendants maintain their Avowry, and say, that the abbot had divers other lands within the town, that he was assessed for them, for the money, and that he was not assessed for those for the man and horse; thereon issue is joined, and day given, without any more thereupon that I have seen.

My Lords, besides the Authority of it in point, these two things may be further objected from this Case: The county was agisted *ad Custodiam maris*, and likewise to find forces. My lords, for the last, I have before admitted, and by the Statute of Winchester that may be done, for the service was to be performed in Kent, the same county where the land lay.

My Lords, because this Case *primae facie* hath some shew of authority in point, I shall endeavour a full and clear Answer unto it. By the Case itself it appears, that these Sesses were in time of war: the words are, 'occa-'sione turbationis inter Regem et Regem 'Franciæ;' neither was the war with France only at that time, but likewise with Scotland and Wales, and all the effects of war accompanied it. The French had landed in divers parts of the realm, and in particular, 23 Ed. 1, in this county of Kent, and had burnt the priory, and the greatest part of Dover; the Havens were shut up for a great part of that time; the Goods both of the French and Scotish nation were seized through the whole kingdom; the lands of all priors aliens were seized, and those that were upon the maritime parts removed, and natives put into their houses, and all strangers whatsoever, that landed within the kingdom, to be arrested. All these, if any of them should be denied, will be made good, not only by our histories, but likewise by the public records of the kingdom. So that my first Answer is, that these sesses were in the time of an actual defensive war from the two next and greatest states unto the realm.

My second Answer is, that it appears not at all, by any thing in this case, that these Sesses were made by any authority from the king; for the words are only in the general, that the county was agisted, and that the Abbot himself was agisted, but says not by whom, or whose authority. That it was not by the king's authority, appears by Leighborne's commission appointed 'ad custodiam pred' faciend',' as the words of the case are; for by his commission whereby he was to do this, which is Rot. 22 Ed. 1, M. 8, he was so far from having any power to tax the county hereunto, that he is

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commanded for victuals, arms, or other things that he shall need in this business, that he shall pay those from whom he shall have any such thing; which likewise is entered in the Communia, 23 Ed. 1, Rot. 77. My lords, that there were parliaments in every one of these years, appears by the summons, and those in words not usual; for the great fleet of France being mentioned, and that the French did intend 'Linguam Anglicanam omnino delere,' they were now called 'ad tractand' ordinand' 'et faciend' nobiscum,' and the lords, 'et aliis 'Incolis Regni qualiter sit hujusmodi periculis 'obviend.,' as it is in the Close Roll, 23 Ed. 1, M. 4, dors. and 24 Ed. 1, M. 7, dors.

My lords, that accordingly order was taken 'cum Incolis;' and that the gentry and other inhabitants, by way of by-law or agreement amongst themselves, did make provision in this particular, I shall endeavour to prove to your lordships: that it hath been done at other times, and that such by-laws are good, appears, 14 Ed. 2, Banc. Regis, Rot. 60. The Scots entering Durham, a by-law was made by the inhabitants for the raising of money, and one that refused it was adjudged to pay it: besides Leighborne, who was admiral of all the English fleet, there were *Custodes maris* in each maritime county; these, as appears by Communia, 24. Ed. 1, Rot. 78. dors. were chosen by the commonalty of each county; and that these, together with the sheriff and inhabitants, did make orders for those things, appears by the Communia, 23 Ed. 1, Rot. 79, where writs are directed to the sheriff of Kent, and to the sheriff of other maritime counties, commanding them that 'circa maris custod' visis præ-'sentibus milites et potentiores liberos homines 'de balliva tua evoces, et cum ipsis provida 'circumspectione deliberes,' how he should do it. This, I conceive, is expressed in point, and the practice grounded upon that in parliament, 'ad ordinand' cum incolis.'

My Lords, my third answer to this Case is, that these sesses were for land-service only, and not for shipping. And this appears, First, by the case itself; for the abbot, in bar of the avowry, says, that he was sessed to find a man and horse 'in subsidium custod' præd',' which must be for land service; and therefore demands judgment, 'si una ead' occasione custod' 'pred',' he ought both to find the horse and to pay the sess. This is not denied by the defendants; but they say that the abbot had other lands, and that this sess was for those other lands; so that it is admitted that the sess for the horse, which must be for land-service, and that for which they avow, were both for the same use; all the difference is, whether the sess were upon the same land or no.

My lords, if the sess, for which the defendants avow, had been for shipping, they might have admitted all that the abbot had said, in bar of their avowry; that is notwithstanding he found arms for land-service, that yet he might, for the same land, have been sessed again to the finding of shipping. Neither do I doubt, but that the parties, in the action, now before your lordships, do find arms, and yet they are sessed for shipping; and that it will be stood upon by the other side, that the finding of arms for land-service excuseth not for shipping.

But it may be said that the very words are, that the sesses were 'pro custod' maris.' My lords, by divers records it appears expressly, that the custody of the maritime part of the land is called 'custod' maris.' Claus. 23. Ed. 1. M. 4, dors. A writ directed 'Collectoribus 'pecuniæ ad custodiam maris,' in this county of Kent, commanding them, that in respect that the Cinque Ports were at the charge of shipping, 'quod quieti sint de custod' maris faci-'enda,' which must needs lie at land. Communia 24 Ed. 1, Rot. 79. A writ to 'Wil-'liam Bonell, et sociis suis ad custodiam Maris 'in Com' Suff' assignatis,' and yet all that they are to do in that office is for defence at land. So Trin. 31 Ed. 1, M. 20. Communia. This 'Custodia Maritima,' how it is to be done appears, Rot. Parl. 46 Ed. 1, M. 49, and by the statute 5 Hen. 4, cap. 3, it is to be done, as heretofore it hath been done, according to the statute of Winchester.

My fourth answer to this case is, that the plaintiff was a clergyman, and the clergy having denied in parliament to aid the king, as the laity did this year, at this time they stood in the king's disfavour; and in Hil. Term. 25 Ed. 1, Rot. 17, the king commanded all his courts of justice, that if any clergyman was plaintiff in any action, 'quod nullum ei fiat remedium.' And therefore Walsingham, in his Annuatis Consiliis of this year of 25 Ed. 1, says, that it was 'Clero Angliæ importabilis, quia de pro-'tectione regia est exclusus, et per regem ni-'hilominus depredatum.'

But, my lords, if I should let all go that hath been said, yet, under your lordships favours, the case is of no authority at all: for, admitting that the sesses were for shipping, and that by the king's authority; yet had the plaintiff no reason to put himself upon the point of law when the matter of fact would help him: for the plaintiff says, that he had been sessed before for those lands; the other party says no, but that it was for other lands; and upon this the issue is joined.

Nay, my lords, if there be any authority at all in the case, under favour, it is strong the other way: for if the sesses were for shipping, the abbot says, that before he had found arms for the land service, and demands the judgment of the court, if therefore he ought to pay this sess too. The other party, if the law had been clear, might have demurred thereupon; so that the authority sways this way, that none for the same land are chargeable for arms at land and shipping too.

My lords, not only for the clearing of this case, but all other things that concern it, either in the mere right or matter of fact before the 29 Ed. 1, that before the parliament at Lincoln 29 Ed. 1, all things concerning the king's prerogative, and the subjects liberties,

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were altogether upon incertainties. The statute of Running Mead, Magna Charta, Charta de Foresta, had been confirmed at least eight times, from 17 Joh. unto 29 Ed. 1, and yet not only the practice, but likewise the judges, in the courts of justice, went clear contrary to the plain both words and meaning of them. By the second chapter of Magna Charta, a baron, 'pro Baronia integra,' was to pay but 100 marks for his relief; the practice and process of the Exchequer till 29 Ed. 1, was always for this relief 100*l.* Michaelis 28 Ed. 1, Rot. 34. Communia, after the death of John Gray, that held *per Baroniam*, the question was, whether he should pay 100*l.* as the record says, 'prout antehac onerari solebat,' or 100 marks, 'propter confirmationem secundum Magnam 'Chartam;' and this the court would not determine before they had consulted with the king; and yet the statute of Magna Charta had been confirmed by 25 Ed. 1, and likewise the same year, as appears by the statute De Articulis super chartas. Communia, M. 13. Ed. 1, Rot. 26. Philip Mermion died, and 100*l.* paid for his relief. It was now 29 Ed. 1, and in question, whether 100*l.* or 100 marks admittance, *licet hactenus*, they were always 100*l.* because the king had confirmed Magna Charta 29th of his reign, and by his writs had commanded his courts to inroll it, and would have it 'de cætero in omnibus suis Articulis obser-'vari.' My lords, of this kind there be many cases. The Charter of king John, and of the Forest, cap. 10, is Nullus 'de cætero amittat 'vitam vel membrum pro venatione nostra;' and yet against the plain letter and meaning, Communia Trin. 29 Ed. 1, R. 44, Adam Gower of Scarborough, as appears, had in this king's reign been beheaded *pro venationc* in the forest of Danby; and now an inquisition went out to find, what lands and goods he had; and then upon the return the question was, whether his land was forfeited, and should escheat upon such an attainder, and resolved that the land was not forfeited. Pasch. 22 Ed. 1, Rot. 48. The king's shepherd had put the king's sheep into a man's ground, who had distrained them; and for this process went out of the Exchequer to punish the man, who there pleads, that he knew not that they were the king's sheep. And there Rot. 51, dors. Lessee for life of a manor of the king's with an advowson excepted, the court declared, that he had forfeited the manor itself. By these cases it appears, that neither the practice nor the proceedings in the courts of justice in those times, in things between the king, and the subject, are so much to be relied upon, as the words of the law.

My lords, it may further be objected, that at common law, before the statute of Winchester, the king might compel the subject to find arms for the defence of the kingdom; and therefore, by the same reason, he may charge them to find ships for the defence of the sea.

My lords, not granting the thing, yet for the present admitting it, I shall thereunto give these answers:—That his majesty by tonnage and poundage, and the other duties at common law mentioned, hath a particular supply for that of shipping, but hath nothing in particular for the other of arms; and therefore that may with more reason be laid upon the subject than the other. And yet for one of the principal things in that statute of Winchester, that is, for watching and warding, the king before that statute had a particular and certain farm or sum of money of each county for the doing of it, which after that statute the county was discharged of, because by that statute the counties took the charge of doing of it upon themselves, as the cases are Comm. Hil. 20 Ed. 1, Rot. 10, and Br. Trin. 43 Ed. 1, Rot. 22, dors. 18*l.* 'pro 'Com. Northumb' and 16*l.* pro Cumberland.'

My second answer is, that each subject, and that *secundum statum et facultates*, is already chargeable for that of shipping, as hath been before proved; and therefore if he be chargeable both in money and kind too, the charge is double in the one, and but single in the other. Neither could it hold proportion with these cases of watching and warding, where the counties were discharged of the money, when they took the thing in kind upon themselves. And therefore this objection cannot, as I conceive, be made, unless his majesty first quit all the before-mentioned duties laid upon merchandize.—My third answer is, that in that of arms there is only *mutatio speciei*, changing of money into arms; for they remain the subject's still in property, and are in his own custody; he may sell them, or employ them at his pleasure to his own use: but in this way of shipping there is *ablatio rei*, in respect of the victuals and mariners wages.—My fourth answer is, that that of arms is not only for the defence against foreigners, but in watching and warding, upon Hue and Cry, and otherwise to keep the peace within the realm, and for the execution of justice, by assisting the sheriff when he shall have occasion to use the Posse Comitatus, and otherwise, all which do fail in the other. And as the use of arms is more general, so are they for the more immediate defence of that element, wherein we have our usual and certain livelihood. And yet the ordering of these for three hundred years and upwards, was by authority of parliament.—Lastly, my lords, in respect of the victuals and mariners wages to be found for 26 weeks, the case in question, as I conceive, cannot be compared to that of arms, but rather to that of taxing the country for finding of soldiers to go out of their counties.

My lords, the next objection that I shall endeavour to give answer unto, is, that it is in his majesty's power, for the safety of the realm, to shut up the ports and havens of the kingdom, and thereby to make a general stoppage of all manner of foreign trade; and therefore as his majesty may anticipate gain, by barring men from the exercising of their callings, so by the same reason may he take something away. —My lords, my first answer is, that the law therein doth trust the king only with that, which being done, is most to his own loss, as in

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respect of the customs and other duties this of prohibiting foreign trade would be.—My second answer is, that this cannot be done but in time of war, and imminent danger, and that therefore this objection will not be seasonable till the other be put in execution. The last objection is, that in divers old charters of liberties and exemptions, the patentees are freed *de Danegeldo et Navigio*, hereby is implied right.—My answer is, from the same charters it may as well be inferred, the subject is bound to make and repair the king's parks and houses, and to make up new bridges, and divers other things; these charters of exemption freeing them 'ab operationibus omnium regalium par-'corum et pontium,' and from divers other things which by law the subject is bound unto.

My lords, for the precedents that, from matter of fact and charge, may be brought for proof of the use and matter of fact, as I do not profess to know them all, so if I did, yet time would not permit to give a particular answer to each of them; I shall therefore offer these general answers to them:

The most of them, or all of them, are for charging the sea-towns, and haven towns which have ships, and many great privileges, and are infranchised for that purpose, as is declared in the Parliament-Roll of 13 Ed. 3, M. 11, before cited. These that are to find ships, besides the main prescription for wrecks and benefit of fishing, are discharged of arrays and defence at land, as appears not only by the Parliament-Roll, but by the Scotch Roll 10 Ed. 3, M. 28, dors. The town of Shoreham, in the county of Sussex, time out of mind had found ships, and therefore, being by the commissioners of array taxed to arms for the land-service, a Supersed' for that cause awarded. *Iter* Sussex, 7 Ed. 1, Rot. 63, dors. William de Bruce, lord of Shoreham, upon his claim adjudged, that all the customs of merchants at Shoreham belonged to him. Rot. Pat. 26 Ed. 1, M. 16, the town of Yarmouth, 'pro servitio navium 'impenso et impendendo,' are discharged of all subsidies granted in parliament, 'pro corpo-'ribus navium, et attito: et communia Trin.' 31 Ed. 2, Rot. 30. The town of Baldsey, in the county of Sussex, for the same cause discharged by judgment of the court. *Iter* Kant. 21 Ed. 1, Rot. 44, dors. Certain land-holders within the Cinque-Ports have Taillage 'de 'quolibet homine applicante,' upon their lands. Petitions 1 Ed. 3, Rot. 9, Office de Pat. In consideration of the charge of providing ships, the town of Southampton petition, that their privileges of having customs within their ports be confirmed to them; that they had these, appears Hil. 13 Hen. 4, Banc Regis Rot. 39, where they are indicted for extortion, for taking more custom than was due. Rot. Parl' 45 Ed. 3, the commons pray, that the franchises of the sea towns and havens may be allowed them as heretofore, and that by default thereof the navy of England is much decayed, to the disassurance of all the realm, if need should be. That these that are not maritime towns ought not to be charged, which is the very case of the defendant, I shall cite to your lordships express precedents. Clause 13 Ed. 3, M. 14, par. 2, the town of Bodmin in Cornwall discharged of ships, because in 'dicta villa portus non est et 'longe a mari et distat,' and hath not used before-time to find shipping, and an inquisition awarded to inquire of these particulars; whereby it appears, that the inland counties had not so much as *de facto* been usually charged with ships. Rot. Fra. 21 Ed. 3, M. 17, those towns 'quæ naves non habent, et quæ aliis naves ha-'bentibus contributoria non existunt,' that they should be discharged; it appears thereby that some towns that are members of great sea towns, are contributory to shipping, and other inland towns are not contributory, 2 Pars Rot. 2 Rich. 2, M. 42, in which 51 Ed. 3, is recited, whereby it is likewise recited, that the burgesses of Beverly had, by their petition in parliament, complained, that their town is 'in loco arido et 'a mari,' that 'ad sinistram procurationem 'quorund' machinantium ipsos indebite præ-'gravare ad contribuend' hominibus de villa de 'Kingston super Hull,' to the making of a barge 'per mandatum regis;' now they pray 'de om-'nibus et singulis hujusmodi oneribus insolitis,' to be discharged by their charter; and it appears they are discharged accordingly, and this now exemplified, 2 Rich. 2.

To those of 48 Hen. 3, both for taxes for soldiers and for shipping, I shall give a particular answer, that it was then 'tempus belli,' when the courts of justice were shut; for the commission went out after April, and in the Red Book fo. 241. 6, it was 'tempus belli' from 4 Sep. 48 Hen. 3. until the 10th of Sep. 49 Hen. 3, and that the courts of justice were shut up, appears 49 Hen. 3, Rot. 4. 'Comm' Scaccario 'non fuer' Barones residentes in Scaccario,' ad Pas. 48 Hen. 3, ad comm' Pas. 49 Hen. 3, 'propter turbationem nuper habitam,' there were no sheriffs in 'aliquibus comitatibus,' 48 Hen. 3, and those that were 'non poterint sic 'facere quæ ad officium vic' pertinebant.'

To the commissions 30 Ed. 1, M. 9, in the Patent Roll, 'de puniendo homines' that refused, it is 'quia ad rogatum mittere non con-'cesserint' so many ships. And if a by-law were good to bind them, as is before proved, as well as their own promise, it may be so; but I have never seen any legal proceedings against any of those that refused at that time, save only against the Cinque Ports that are summoned by their service. P. 33 Ed. 1, Banc. Regis Rot. 82, against Seaford, as a member of the ports; and the charge is, that 'per servitium 'tenentur invenire unam navem.'

For those of Ed. 3.'s time, his reign, for the most part, was a time of war; and that the offensive brought a defensive upon the kingdom, is plain. Walsingham saith, page 119, 131, that 10 Ed. 3, the French burnt Southampton. And Stowe, page 234, says, that Ed. 12. 3, they assaulted Southampton, and burnt part of Plymouth. 13 Ed. 3, they assaulted the isle of Wight. Rot. Parl' 13 Ed. 3, pars 1. M. 9, that

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they had done much mischief in the west-coasts, and conquered the isle of Guernsey. Rot. Sco. 10 Ed. 3, M. 5, dors. and M. 2, and all the ports of England were shut up.

My lords, in these years wherein most of these writs issued, the great danger appears; and yet that the charge laid upon the county was by by-law and agreement, I shall cite to your lordships the Scotish Roll, 10 Ed. 3, M. 3. The French riding at anchor at the isle of Wight, the king sends divers privy-counsellors to Dover, and commanded all the officers, masters of ships, mariners and inhabitants, from the Thames mouth to the West, to come thither, *ad tractand'* with those lords of the council for the defence of the sea by ships; and in the record it is cited, that notwithstanding the king's former command, 'hactenus quicquid 'non facer' impress',' the writs for shipping issued before and were not executed; and therefore now a commission, if so it might be done with consent. 20 Ed. 3, other writs went out, Rot. Franc. pars 2, M. 24, 20 Ed. 3, a writ to Yarmouth 'propter pericula maris' to stop up their haven, and Rot. Franc. pars 1, M. 19. that no fishermen go out to sea.—I shall endeavour a particular answer to this. Claus. 10. Ed. 3, M. 23, the writ says, that 'valida defen-'sionis super mare solvi non solebant tempo-'ribus progenitorum' of the king. To this I shall give this answer, that these wages were demanded before their time of going to the service; and the record is, *hujusmodi vadia* have not been paid.

My lords, if this answer be not sufficient, my second is by denying the thing; for besides that of 15 Johan. in that time of necessity, the ships were to serve 'ad liberationes et ad stipendia regis;' and 46 Hen. 3, M. 4, both in Ed. 1, Ed. 2, and this king's time before the tenth year of his reign, wages for defence were frequently paid.—My lords, because I know not how far this will be stood upon, I shall spare the citing of any of them, and to this purpose shall cite to your lordships only this case. It is amongst the parliament petitions 1 Ed. 3, and transmitted into the Exchequer, Hil. 2 Ed. 2, dors. The fishermen upon the coasts of Yarmouth, 20 Ed. 2, were daily robbed and killed, and for rescous of them, those of Yarmouth were commanded to set out some ships to sea; and Adam Bridlington, the king's clerk, sent with 300*l.* to set out this fleet, which the men of Yarmouth intended they should have as wages for the voyage; but the clerk would not let them have above 230*l.* and that as money borrowed of the king, and for this they gave their bond of repayment thereof. 1 Ed. 3, they complain in parliament, and pray that they may be discharged of the 230*l.* and that the bond may be cancelled; which is adjudged accordingly, and transmitted into the Exchequer for a trial, whether the service was done or not.—My last answer to these precedents is, that the matters of fact in these years, to the violation of the subjects rights, procured upon fresh suits, not only the before-mentioned statute of 14 Ed. 3, cap. 1, against any charge to be laid upon the subject without assent in parliament; but afterwards they complain in parliament, 15 Ed. 3, M. 9, that their goods were seized, and their bodies taken without any suit commenced against them, contrary to Magna Charta, and the statutes and ordinances made thereupon with so much discretion of their ancestors; and in particular in the Parliament-Roll of 22 Ed. 3, M. 4, for the guarding of the sea, and in 36 Ed. 3, M. 9, and 37 Ed. 3, M. 2, as before in 15 Ed. 3.

My lords, I now come to the last thing, which is the Proofs in the point, which I shall humbly offer to your lordships. The first authority that I shall offer unto your lordships is the Patent-Roll, 26 Ed. 1, M. 21, whereby I shall endeavour to prove to your lordships these two things:—The confession of that king and his council, that he was so far from having power to tax the people for the custody of the sea, as that he is bound to make satisfaction for any thing taken from the people for this purpose. The second, that the charges laid upon the people for the custody of the sea, were the principal grievances that occasioned the making of the statute of 25. Ed. 1, and the statute of 'Tallagio non concedendo.'

For the first that the king declares that he had a desire to redress the Grievances made to the people in his name, and instanceth what they were, 'veluti de rebus captis in ecclesiis, 'et de aliis rebus captis et asportatis tam de 'clericis quam de laicis, sive pro custodia maris 'vel alio modo quocunque;' whereby, my lords, there is an acknowledgment that it is grievance, and to be redressed, to lay any tax upon the subject for the defence of the sea.—Commissioners are there named throughout all England to enquire of these grievances; herein they are to proceed according to certain instructions from the king and the council, which are these three: First, Whether the things were taken without warrant; and if so, then the party that took the goods is to make satisfaction, and further to be punished for the trespass. Secondly, If there were no warrant allowed, then the officer was to make satisfaction. Thirdly, If all were done according to and in pursuance of the warrant, and no more; then what upon certificate thereof is, the words are 'et enferra tant que il se fienera appais 'pur reason:' The king hereby promiseth, that whatsoever things were taken from the people by any command of his for the custody of the sea, that he will make reasonable satisfaction to the party for such things.

My lords, for the second thing, that is, that these grievances occasioned the making of these statutes, is clear from the words of the patent; for they were made 'post guerram inter regnum 'et regem Franciæ;' which, as appears by the Case of the Abbot of Robertsbridge, were from the 22d to the 25th of Edward the first, and by all our historians, and many records. It appears likewise, by those other words, that the king, before his going into Flanders, intended

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to have remedied those Grievances; he went over in Sep. 25 Ed. 1, and the statute 25 Ed. 1, was made the 10th of Oct. after. Hence likewise it follows, that the exception of the king's antient aids and prizes, mentioned in the statute of 25 Ed. 1, extends not to this of charging the people to the custody of the sea, that being one of the principal grievances that occasioned the making of it. That the same grievance caused the making of the statute De Tallagio, &c. I have before offered to your lordships.

My lords, the next authority which I shall present is the Communia Hil. 23 Ed. 1, Rot. 77. There the king commanded 30 gallies to be made by several great towns, every galley was to have 120 men a-piece; these were 'pro defensione 'regni et securitate maris.' My lords, the cases are many in the Exchequer, where the money for making these gallies was recovered against the king. I confess my lords, that the king had promised payment to those that made them, which I shall thus submit to your lordships: That in case the king might have commanded the making of them, at the charge of the towns, that then the king's promise was but *nudum pactum*, for promising of payment for that which by law they might have been forced to do, and so the payment rested only the king's grace and good pleasure But, my lords, upon suits in his own time, and in the times of Ed. 2, and Ed. 3, the monies for making these gallies were received by several towns, M. 29 Ed. 1, Rot. 29, dors. for York, M. 31 Ed. 1. Rot. 77, Ipswich and Dunwich. P. 5 Ed. 3, Rot. 31, for him 'prout justum fuer'' nothing having been paid before. Bract. M. 16 Ed. 2, Rot. 14, both for the galley made at Southampton, and the bringing her to Winchelsea, at their own charge, Præcept. P. 1 Ed. 3, all the money from Southampton not being paid, now ordered that it should be paid.

My lords, the next authority that I shall present to your lordships is the Parliament-Roll, 13 Ed. 3, pars 1, M. 9 & 11. The causes of calling the parliament are declared to be these: First, the keeping of the peace. Secondly, the defence of the marches. Thirdly, the safeguard of the sea, that the enemy might not enter the realm to destroy it. These were the three points for the commons to advise on, which are put into writing, and entered upon the roll. My lords, by the articles themselves propounded on the king's part, it appears, That the commons are not chargeable to the guarding of the sea; and they pray, that this advice of theirs may not be prejudicial to them to bind them thereunto, and that there are ships enough in England to do it, if the people were willing. M. 11. The commons afterwards in debating of these articles, when they came to this of the sea, notwithstanding the caution before, they are afraid, that if they should debate it, it might imply, that they are chargeable to do it; and therefore they protest against giving any advice therein, as a thing whereof they have no cognizance; and do further declare, that the Cinque Ports, and other great towns, that have franchises, are bound thereunto, that they should do it. And therefore the merchants, masters of ships, and mariners, throughout England, are summoned to be at the next parliament for advice about shipping.

My lords, the next authority is the Parliament-Roll, 22 Ed. 3, M. 21. The commons petition in these words, 'que le guard de la 'mere se face descries res soit le guard fit man 'ad refait amant vis senois at semble que mel- 'liur guard ne poit estre fait que le Roy ne fait 'ne qu'il demeritissent de la sur la guer et par 'de fair de c'est ter.' The commons having formerly granted the king divers Aids and Subsidies upon Wool, Wool-fells, and Leather and otherwise, for the guarding of the seas, they now grew weary of it, and desire, that the king himself from thenceforth should bear the whole burden, and charge him with his promise to that purpose.

My lords, this Petition, though in the name of the commons, yet the lords joined in it; for otherwise all acts of parliament of those times being made upon Petition and Answer, should be without the lords assent. Hence it appears, that the whole kingdom, at this time, was so far from thinking that the king could charge them, without their consents, to the guarding of the sea, as that they alledge, the king himself ought to bear the whole charge. Neither doth the king deny his promise, nor wholly deny the thing; for though he saith, it should be done as it hath been done before, yet it is with a qualification, because the sea cannot be better kept than he hath kept it, by reason of his being so often at sea in person, in going and returning from France, and diverting the enemy by his wars in France. If the king had given his absolute denial, yet here is the judgment of both houses of parliament express in the point.

Rot. Franciæ 21 Ed. 3, pars 2 M. 9 & 11. The merchants had granted 2*s.* 8*d.* upon their goods till Michaelmas, for providing 120 great ships 'pro secura conductione navium et mar- 'chandizarum, et pro defensione ceterarum 'maritimarum partium regni, et aliis periculis 'his guerrinis temporibus regno imminentibus.' This grant being made, the king alledging that this was not sufficient for the service, and to remove the causes of the stopping of the trade by reason of the wars; the king now lengthens out the same from Michaelmas to Easter following; and to satisfy the people, the king by his proclamation declares, that the 2*s.* 8*d.* shall cease at Easter, according to the grant; which, as it should seem, not satisfying the people, or the king continuing the taking thereof, the commons in parliament, 22 Ed. 3, M. 16, pray that it may cease, and that by procurement of no merchant, 'pluis largent soit continue.' An imposition but for half a year, and that upon merchandize, and by consent of the merchants for the defence, yet taken off upon complaint. The Answer is, that it should cease.

My next authority is the Parliament-Roll 2 Ric. 2, pars 2 M. 5, before cited, where the great council and sages of the kingdom resolve,

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that the commons are not chargeable to the defence of the realm without parliament; which extends to this particular of the sea, for the present preparation, whereunto the commons are not chargeable, was for defence at sea; and therefore the money lent was to provide an army for the sea, 'en defence et salvation del 'dit Royalme et de la Navy et des costiers del 'mere.'

My lords, the next authority is the Parliament-Roll 2 Hen. 4, M. 22. Commissions to charge the people to make ships for the defence of the realm without consent of parliament, repealed by the king and the whole parliament for that very cause.

'Item pur ceo quere tarde divers Commis-'sions fueront foist an divers cities burroughs 'et villages du royalme pur faire certaines 'Barges et Ballingers sans assent du Parliam' 'et ont mt' pr' nad estre fast devant ces hents' 'nr' les Commons pray nr' snr' le Roy que les 'ditz Commissions soient repeals et que ils ne 'soient forces ne fait a quore loir fuit respons' 'que le Roy vest que in les Commissions soient 'repeals in tout points mes pur le grand neces-'sity que ad des tiels vessels pur defence du 'royalme in case que les quens sint priment le 'Roy vost commuuer de rest matter ouesque 'les Snrs' et puis apres le mre' al' dits Com-'mons pur intisuner loir councel et advise tiel 'party.' The first commission's repealed, because the commons were not chargeable without a parliament. And now the king will put it in a parliamentary way, by doing it with the assent of the lords and commons.

My lords, my next authority is the Parliament-Roll 9 Hen. 4. The cause of the calling the parliament is for the safeguard of the sea, and of the North Marches; and M. 17, great mischief shewn for default of keeping the sea; and M. 21, it is there enrolled by the king's command, that there was communication had between the king and the lords for the defence of the realm, and for resisting of the enemies, who made preparations on all sides; whereunto sufficient resistance cannot be provided, unless the king have in his parliament some notable aid granted unto him. My lords, the king hereby acknowledgeth, that he cannot without the parliament charge the people for the safe keeping of the sea, that being the principal part for the defence there intended, the same with the summons, that without the consent of the commons 'negotia præd' infecta remane-'rent,' and with the summons in the Close Roll 23 Ed. 1, before-mentioned, 'Quod om-'nes tangit per omnes debet supportari.'

My lords, the next authority is the Parliament-Roll 4 Hen. 4, M. 28. The lords spiritual and temporal, and the commons, grant the king a Subsidy upon the staple commodities, and Tonnage and Poundage, and likewise a Tenth and Fifteenth, with this protestation, 'Protestant que cest grant in temps avener ne 'soit point en example de charger les dits Surs' 'ne Commons du royalme de nul manner del 'Subsidy ne 10th ne 15th a les guerris desco-'regates, on safegard del mere sans soit per le 'volents des Seig' et les Commons de realme 'et ceo a novel grant faire in pleine Parlia-'ment.' Rot. Parl' 6 Hen. 4, M. 12, and Rot. Parl' 1 Hen. 5, M. 17, the same protestation as before.

My lords, that the charge of the defence at sea, and that in a large proportion, by reason of the before-mentioned duties, is to be borne by his majesty, I conceive that it will not be denied; that in *subsidium* and aid of his majesty therein, the commons are not chargeable without their consent in full parliament. In these three records there are not only these protestations of the whole realm being made by the lords and commons, but likewise the king's consent by accepting the things granted, and that without any qualification of the protestations. Those protestations, that they are not chargeable to the guarding of the sea in a certain way, as are 10ths and 15ths, do much more fail in a way uncertain as here.

My lords, my next proof is from the practice of former kings in their frequent demands of aids from parliaments for the defence of the sea, as well before the statutes of tonnage and poundage, as then and since; moneys borrowed by former kings for ships and defence at sea, and indentures of retainer for that purpose at the king's charge; and not only so, but upon suit allowance in the Exchequer for victuals, mariners wages, anchors, prisoners taken in fights *pro defensione*, and also other things necessary for shipping when for defence of the realm. Whereupon the same argument may be made in this particular for the sea, as was before for the defence in general.

The first thing that I shall press, is that of the Cinque Ports. Their service is certain in respect of the time, but 15 days in a year; and in respect of the charge, but 20 men and a master; and the number of ships certain: besides that they are discharged of arms for the land-service, they have likewise divers other privileges for the doing hereof; they were free from all aids and subsidies granted in parliament, and are by privy seals discharged thereof. Hil. 2 Ed. 3, Comm' about the end of the roll; they are freed from all tolls, murage and pontage throughout the realm, which bringeth a greater charge upon the rest of the subjects. —My lords, I shall thus offer it unto your lordships: If they that have these privileges shall serve but 15 days in a year, how the others that have no privilege at all, should do it for 26 weeks, as in the writ?

Secondly, Their charge is certain in the number of men and ships; how the rest of the commons that are so far from having any privileges or recompence for it, as that they do contribute to this charge of the Cinque Ports, shall, as by the way in the writ, be altogether uncertain in the matter of charge, both in the number of men and ships, and of every other thing. —My lords, I shall press this further, that when the ports exceed their charge in the number of men or ships, allowance by the king is to be

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made unto them, as appears by the Quire of Dover, and Pat. Roll' of 7 Hen. 7, before cited, that after the 15 days they were to be at the king's charge; so in the Pat. Roll' 19 Hen. 3, m. 14, because they found 40 men in the ship, the king promised payment for all over and above the number of 20. Banc. Regis Trin. 33 Ed. 1, Rot. 22, allowance to service in Scotland; the Scots, as appears by Walsingham, p. 53, and otherwhere, having about that time burnt divers English towns and ships, and a school-house, with 200 scholars in it, Visus Comp. P. 33 Ed. 1, pro ingenti Ro. Scotland P. 34 Ed. 1, Rot. 37, Comin' la Composition.

My lords, if the ports who are bound to the defence at sea, when they have performed their service, be not compellable to any further charge, I shall humbly offer it to your lordships, whether those that be not bound at all, from the same reason, are chargeable at all.

My lords, I have now done, and shall not further press upon the patience of your lordships; I know that 'nullum tempus occurrit 'regi;' the disuse thereof, I shall press it no otherwise than that it is an interpretation of the Statute made against all Aids and Taillages in general; and of the complaints of the parliament of 15 Edw. 1, m. 9; 36 Edw. 3, m. 19, and 37 Edw. 3, m. 9, that those statutes had not been kept; and further, as it is an interpretation likewise of the before-mentioned declaration, petitions and protestations against this in particular; and as it is an execution of them, and putting them into practice: 'Praxis 'sanctorum,' as the divines say, 'est interpres 'præceptorum.'

The claims which anciently the subjects have made upon the crown, that none of the great officers of the kingdom could be chosen but in parliament, nor that the king had power to sell any of the antient crown-lands; the disuse shews, that those claims of their's were not legal. Br. in his fourth book, fol. 209, saith, that 'longa patientia trahitur ad consensum.' The non-claims therefore of so many kings and queens I shall present unto your lordships, as so many *le voéts* and declarations of their general consents, that without assent in parliament they could not have laid the like sess upon any of their subjects, as is now laid upon my client.

The first Day's ARGUMENT of Sir EDWARD LITTLETON, knt. his Majesty's Solicitor General, in the Exchequer-Chamber, before all the Judges, on behalf of HIS MAJESTY, in the Great Case of SHIP-MONEY.

May it please your Lordships; May 22d last, issued a Sciri Facias out of the Exchequer to the sheriff of the county of Bucks, to warn Mr. Hampden to shew cause why the 20*s.* should not be charged on him towards the finding of a ship of war, with men, munition, and victuals, expressed in a writ dated 4 Aug. 11 Car. And the sums and the names of the defaulters were certified into the Exchequer by a Mittimus, dated 5 May, 13 Car. to be there proceeded upon for the levying of the 20*s.* according to the law and custom of England: Mr. Hampden appeared, and desired that all the writs might be read unto him; they being read, he demurred, and Mr. Attorney joined with him in demurrer, and adjourned out of the Exchequer into this court, to have the advice of all the judges of England.

Before I enter into my Argument, because the true stating of the question in this and all other things doth exceedingly conduce to the clearing of the thing in question; I shall in the first place, observe the writ, dated 4th August, 11 Car. the ground of this assess, which was directed into Bucks, and others into all the counties of England, and this was for raising aids for ships, for the defence of the kingdom, with a notable circumstance, 'quia salus regni 'periclitabatur;' which being expressed in the record, is confessed by the demurrer, and not only so, but testified by the king himself under the great seal in the Mittimus: and in all matters, especially in matters concerning the public safety, the king is 'Recordum superlativum 'et præexcellens,' as in the great Case of the earls of Gloucester and Hereford, 20 Edw. 1, so that the question is only this, Whether the king, in his judgment, finding the safety and preservation of the kingdom and people, necessarily and unavoidably to require the aid commanded by the Writ, may not command such aid by the Writ, for saving and preserving the kingdom and people?

Having stated the question, I shall now discard many things as impertinent to the question, not that I that am sworn counsel for the king, do agree in those things against the king; but that they are not now in question. It is not now in question, What may be imposed by the king upon the subject for Defence, at their charge, for conquest or conservation of foreign countries or territories beyond the seas. Neither is it in question, what may be laid by the king upon his subjects, for vindicating injuries done by foreign princes or states. Neither is it in question, whether arbitrary impositions or taxes may be laid at pleasure upon the subject for the mere increase of the revenue of the king's treasure. Neither, whether in ordinary and common defence, for preservation of the kingdom, though necessary, it may be thus imposed.

But the question is, 'Quando salus regni 'periclitabatur;' in truth, the question is, whether we can be charged 'pro salvatione nostr' 'et nostror'.' Again, it is not in question, whether the subject hath a property in his goods, or can lose them without consent in parliament. I shall shew that his property shall remain unto him, notwithstanding this assess; and the argument on the contrary savours more of malignity than reason, to say that by this the subject shall lose his property in his goods.

It was rightly admitted, that the law of property must give place to the law of nature, for the common defence; the levying of a debt

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or duty public or private, upon any subject, is so far from destroying the property, that it doth confirm it. He hath as good property that payeth debts to the king, as he that doth not.

We agreed *de re*, the kingdom is to be defended; no man in his five senses will deny that *de personis*, according to the equitable rule in the writ 'quod omnes tangit per omnes 'debet supportari:' we are in this as in the Conqueror's laws, 'sumus fratres conjurati ad 'regnum defendendum.' *De persona* whom the law hath intrusted with the defence of the kingdom, viz. the king, we are likewise agreed. The only difference is *de modo*, whether the right *media* be observed by the king? and whilst we are disputing whether he may do it, I am told he may do it in parliament; true, he that may do it every where, may do it in parliament. And I shall be sorry to hear there shall be no salvation for the people but in parliament.

And whilst this was the question, though a great deal of care was had, and though it was done with advantage and policy, yet the bulk and mass of what was said, shall appear to fall quite off as nothing to the purpose. There were multiplicity of particulars, and a pretty survey of the king's revenues, no ways concerning the case, and as much mistaken in it, as he that reckoned without his host. He hath done like a discreet gentleman, and went as near the question as his client would let him; he hath agreed cases more prejudicial than this, as thus: It was admitted, that if there be any actual war, though there be but light skirmishes, the king may do it; nay, if there be but a war denounced, though there be never a blow struck, surely then can it not be done when 'salus regni periclitabatur?' This is the true state of the question.

Before I go further, I am not ignorant, and therefore cannot but be with what disadvantage I come to argue this case, every man being a party interested that hears me; but I fear not but that I shall satisfy all parties, I have truth to conduct me, 'Et magna est veritas et præ-'valebit.'

The method whereby I may maintain the right of my master, and the crown, is this; I shall first ground it upon reason; every human proposition is of equal authority, only reason makes the difference.—I shall ground my reasons, First, upon the law of nature: Secondly, of state; and Thirdly, of public safety, necessity, and conveniency. Neither shall it be against the statute law, common law, or any of the hereditary rights and liberties of the subjects of England, but consonant to, and warranted by all. I shall not only prove it 'ex rationi-'bus cogentibus,' or as lawyers say, 'ex vis-'ceribus causæ,' but 'de similibus ad similia.' I shall confirm it by a beadroll of examples and precedents of former ages, and compare them with this, and see if the case be altered.

First, I shall shew it from the foundation of the kingdom, to that which they call the Norman Conquest; from the Norman Conquest to the time of Magna Charta, made 9 Hen. 3, from Magna Charta to the statute 'De Tallagio non concedendo,' made 25 Ed. 1; from the statute 'De Tallagio non concedendo' to the first granting of Tonnage and Poundage; from Tonnage and Poundage to this very day, and that the Petition of Right doth no ways concern the dispute. I shall confute all precedents, objections, reasons, inconveniencies, authorities or records, of which a great number were cited, that there shall not be a syllable left; and in that, First, I will either shew that the record is mistaken, or impertinent and not to the question: Or, Secondly, Those that are pertinent, I will either agree them, or take the force of them away, that none of them shall be able to stand in the way of the king in this way of defence.

The fundamental reason is the exact rule of the law in the 10th Report cited by that learned gentlemen Mr. St. John, 'salus populi su-'prema lex.' All other laws positive are subordinate to this law, and are to be regulated by it. We are not to talk of positive laws, till we have a kingdom to use them. Glanvile saith, 'Regiam majestatem non solum armis 'oportet esse decoratum sed et legibus;' arms to defend us, laws to protect us. Bracton, fo. 1. In 'regibus duo sunt necessaria, arma et 'leges;' and gives the reason: If no arms, the kingdom would be left as a prey to the enemies. And truly it is a strange imposture, that the law should so provide, that the king by his writ can give us a remedy for white-acre and black-acre for a clod of earth, and not be able to give a writ to defend the kingdom when it is in imminent danger. Nay, positive laws are abrogated by reason, when the safety of the kingdom and people are in danger. As in Rome, in the night a man might not come over the walls, but if an enemy did approach the city, then it was lawful for him to do it.

In the next place, I take that ground which is taken in all laws; the common-wealth is to be preferred before all private estates. 13 H. 3, fo. 15, the opinion of Shelley. Rather than this shall suffer, the law will turn some prejudice to particular persons, who are but a part of the common-wealth, 21 Hen. 7, fo. 28, 8 Ed. 4, fo. 23, 29 Hen. 8, Dyer 36. If the enemy doth approach, for the defence of the kingdom one man may make bulwarks and forts on another man's soil, and shall not the king keep the outworks at sea, lest the enemy should land at our doors? Again, by the king's command, suburbs may be razed: In 1588 when three great land-armies, 20,000 foot and 1,000 horse, 30,000 foot and 1,000 horse, and 20,000 foot and 1,000 horse were raised. Now lest any army should land in other places, directions were given to keep them from landing; but if they could not keep them from landing, then that they should burn down houses, and come and destroy all whatsoever, that they might not have food and provision to stay there. Where is the law of property in this case, which is so much talked

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of? The public and private are so nearly connext that they can hardly be separated; the public loss falls immediately, and by consequence upon particular persons. Be a man in what condition he would be, if a public loss comes to the state, though it falls on his wedding-day, he shall suffer in it. It is impossible to save private fortunes if the public be lost, 'unaquaque amac' comm' bona totius, &c.' And another says very well, no man repines at that which is done for the good of the commonwealth. If a subject then can be enabled without parliament to make bulwarks and forts in another man's ground, shall not the king, that is *pater patriæ*, do the like for the defence of the whole?

My third reason is to confirm, or rather mind your lordships, that the crown hath many powers and prerogatives over the estates of private persons. May not the king enter into another man's house, or at least out-houses, and dig for salt-petre, because it is for the defence? 11 Report fo. 81, Bowles case, and enter into his lands and dig royal mines?

There is *proprietas dominii* belongs to the subject, but he hath not the power over all, without the property 'Ratione protectionis, ju-'risdictionis,' &c. Private interest must give place to a common good; the private prejudice that any man hath, is very well repaired by the public utility that comes to the kingdom. Fishermen may justify their going into the lands of others to fish, because it is *pro bono publico*. 8 E. 4, 18, 19. 29 H. 8, Dyer 36. 21 Hen. 7, 28. A man may pull down the house of another man, when the next house to it is on fire; 'Jam tua 'res agitur paries cum proximus ardet,' the private must suffer for the public cause. 22 Ed. 4, fo. 2. b. 26 Ed. 1, fo. 45. If two men are fighting, a man may part them, and put them into several houses, because it is for the good of the commonwealth. If a madman be abroad, he may be taken, whipped and imprisoned, lest he do violence to himself and others. 22 Ed. 4, fo. 45. A chirurgeon may cut off one member to save the rest, 22 Ass. Plowden 56. Necessity is the law of the time and action, and things are lawful by necessity, which otherwise are not; 'Quicquid necessitas cogit, defendit:' and the law of the time must regulate the law of the place in such public things. If a storm arise at sea, to cast out goods into the sea is lawful for the safety of the other goods; and they whose goods are not lost, shall be sharers with the others. If it be for safety of lives, all must be cast out, Duffeild's and Mowse's case; but if the party hath taken more in than is fitting, and that be the cause of casting away the goods, and not the tempest, there the party hath his remedy. 48 Hen. 3, there was a sudden summons to be in arms both at sea and land; they plead, that there was not a just time of summons; the king tells them, that no man shall excuse himself for want of convenient time of summons; nay, they shall not alledge the time of harvest, &c. it being safer to be somewhat diminished in estate, than the public to suffer: 'Necessitas 'est lex temporis,' whatsoever is done for public safety is best; other laws are tributary, and must give way to the law of necessity: What talk we of formalities, when we are like to lose the kingdom, when the keeping of the laws would end the commonwealth.

But this needs not, for I shall shew that his majesty hath trod in the steps of all those kings who have worn the diadem, and swayed the scepter of this kingdom.

In the next place I shall shew divers exemptions *à custodia maritima*, not only ancient but late: I will put you one, that is, King's College in Cambridge, 21 Hen. 6. When these grants are made, it extends to the ordinary defence of the people, and not extraordinary; no more than if the king grants an exemption to a man that he shall not be of a jury, yet if there be no other, that shall not excuse him. Matth. Paris 838, he speaks of privileges granted to the archbishop of Canterbury, London, &c. All are granted in *liberam eleemosynam*; they are bound to do nothing but to pray, and yet are not exempted from public defence, 'Nec adeo liber-'tates et propter publicam utilitatem regni et 'per ea resisteret hostem.' I shall give Mr. St. John's Argument an answer by and bye; yet by the way, if tenures *feod' Militar'* did begin, as was alledged out of Britton, in the Conqueror's time, how was the kingdom defended before? If wards and marriages, and accidents thereupon, did not go to the foundation of the kingdom, what was before?

The king is as much lord of the sea as land, 'æque dominus maris et telluris.' Selden Mare Clausum, 6 Ric. 2, Doctor and Student, lib. 2, fo. 51. 5 Report fo. 108. It is observed by a great lawyer, of what consequence it is to have power at sea. The naval dominion of England is of great consequence and use; for it is called *dotem regni*. If therefore the kingdom of England consists of land and sea, I hope we shall not stand at half defence, to defend the land and leave the sea. Rot. Parl. 2 Rich. 2, M. 25. It is a great advantage to have defence at sea, else we should have hot war at our turesholds; while the sea is open, men may go to plough, and have the courts of justice open.

The kings of England of themselves, by their prerogative royal, in times of war, denounced, intended or suspected, for the preservation of the public safety, may seize the lands of prior aliens, 41 Ed. 3, fo. 10, 22 Ed. 4, 43, 44. 14 H. 4, 36. And can a king of England take the possessions of aliens, and cannot he inforce his natural born subjects to defend the land and sea? God forbid; nay, if we would *parva componere magnis*, we should find in cases of lesser consequence, if they have relation to the defence, he may do it. As the king may lay a charge upon the subject for walling a town, the reason is, because they have benefit by it in time of danger; and hath not all the kingdom safety by the navy at sea? 3 Ed. 3, Ass. 445, Westm. 1, cap. 3, 13 Hen. 4, fo. 14, 15. Sir

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John Davies' Reports fo. 13, Litd. fo. 58. 33 Edward 1, 105. Parl. Book, Walsingham, 14 Edward 1, 60. 7 Edward 3, Pat. M. 2. And the king did not only command it, but took an account of it, if it was not done, and took it into his own hands, Trin. 27 Ed. 1, M. 14, *ex thesaur'* murage of Carlisle taken into the king's hands. Pat. 14 Edw. 1, pars 1, M. 14, and the surplusage paid into the Exchequer. And this agrees with the reason of all laws, where they have a benefit they must contribute to the charge, 10 Report, fo. 141, out of 44 Ed. 3, nay for lesser things, as for pavage and pontage. the king may impose that for a public good, and the king may distrain all the *terr' tenents*, and land-owners, to make contribution 'secundum statum et facultates.'

The king may dispose of the preparation for defence, he may compel men to be knighted, because it was for defence. Rot. Claus. 19 Ed. 2, M. 16. Mat. Paris, fo. 12. 37 Westm. 465, no man is exempted from defence; judges are not exempted, yet judges are not to fight; yet when it comes to necessity, they are not exempted. Trin. 5 Ed. 4, Moyle 13 Hen. 4, fo. 23. clergymen compelled; nay a serjeant at common law sworn at common pleas, is compellable. Sir John Hulbert in Hen. 7.'s time was compelled to be a knight: 9 or 29 Hen. 6, Rolfe, a stout serjeant, pleaded that he was a serjeant at common law, and not bound to be a knight, but he is forced to it. But why talk we of these? there ought to be a commonwealth before there are laws, and private ought to give way to public.

Again, imminent dangers and perils to a state do dispense with ordinary proceedings in law; 'inter arma silent leges.' Nay, if there be but rumours of wars, laws are silent; we must look then to the kingdom, upon rumours and opinions of wars. Pasch. 15 Ed. 1, Banc. Regis Rot. 70, dors. the Scotch army they besieged Rippon, the people they promise a sum of money to them to depart, and give them in hostages, and that money should be levied among themselves; when the war was over they would not do it, but were compelled to it. In 14 Ed. 2, Banc. Regis Rot. 60, the Scots besiege Durham, but they must have ready money, they would not take hostages to depart; while this peril was on them, they met together and swore, that what should be agreed amongst themselves every man would stand to. It was ordered they should go into the houses of others, and take what money they could find for that purpose; they took from one man 60*l.*; oh, he was not satisfied, he had a property in his goods, he brought an action, and at Durham it was adjudged for him; but when by a writ of error it was brought to Westminster-hall into the King's-Bench, judgment was reversed. And in the time of queen Elizabeth, greater things were done upon lesser occasions.

The next thing is the ships taken from time to time, and the command of persons, watches, beacons, shutting up of the ports, which are the gates of the kingdom, 14 or 10 E. 4, Pasch. m. 12, dors. 3 Hen. 5, 18. dors. A number of other things commanded by the king for safety; when the law considers what may happen, it is not material what doth happen; nay, if there be but a *vulgaris opinio*, it is enough; much more when the king, by his own judgment, foresees it. 6 Report fo. 64, Clark's case, there they are compelled to build a hall at St. Albans for the judges to sit in, much more in this case. See Clegate's case for triumphs; and if for state, shall not the king command for safety of the kingdom? Hil. 12 Jac. Hawks's case, for paving of the way, he may take corn out of the sacks of those that come by.

Again it is a Droit Royal to meddle with war and peace, subjects have nothing to do with it. Rot. Parl. 13 Ed. 3, M. 5, 19 Ed. 4, fo. 160. or 6. Brian, chief justice, saith, That if all the subjects of England do war with the subjects of another kingdom, this is no war; but if the king denounce it, it is war. 22 Ed. 1, Rot. Vas. con. M 16, or 10, they must have a power from the king: true, Henry 7, brought military discipline to the parliament to advance his own ends. Sometimes dangers are fit to be communicated to the people, and sometimes not. The king should best know what is done abroad, who hath his close council of war; he knows what is done abroad, what can the people tell of these things? and it is very fit that preparation be made before-hand. It is not good to find the kingdom without a navy, especially when such combustion is abroad. 18 Eliz. cap. 23. It is as much to prevent danger, as to remove it when it is in being. 1 Ed. 6, et 1 Mar. A desired provision to be made before-hand, and this hath been the practice of all times. Gervasius Tilburiens. Black Book Hen. 2d's time. Danegelt before the Conquest paid annually; but afterwards, when there was *bellum* or *opiniones bellorum*, 'Datum est nobis intelligere, audito rumore, '&c.' are frequent in the records; nay if there be but *vulgaris opinio*. Ay, but perhaps dangers will not come; but if they come unawares where are we then? In the case between the earls of Gloucester and Hereford, there was a great tumult between them about the marches of Wales: and this was contrary to the king's command, and exception was then taken; that there was no record to warrant the Sciri Facias [Na' que fuit pur salvatione del Royalme.] the king did affirm it, 'Et Dominus Rex in 'multus casibus est supra legem, &c. Dominus 'Rex est Recordum superlativum et præex-'cellens.' It is treason for any subject to raise an army, unless a town be besieged. Henry the 7th was a wise king, and he had his spies abroad in times of peace to see how things went, and his army prepared; and the preparation of a navy does much more good than the spilling of blood. And so hath our navy these two years done a great deal of good to the kingdom, and honour to the king.

Now I come to the authorities: but first we shall observe what an authority shall be in this case. First, I conceive there may be, and are

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direct and full examples in point, for compelling the subjects, at their own charge to guard the sea and land, though they are not ruled in particular courts of justice; nay, under favour, they are stronger than any judgment: there were then no need of suits in the courts of justice; if men would pay, what need judgments? Secondly, I conceive, that though I find not direct authority in printed books, yet records are as good testimonies, and greater than reports, that are but extracts, and second authorities drawn out of them; and those that concern 'Jus Publicum,' come not into ordinary debate, but remain 'inter arcana Imperii,' and those will speak fully. Thirdly, I shall observe that our precedents are not only in open war and hostility, but upon opinions, rumours, relations, and informations of wars.

I shall shew this in all ages to queen Elizabeth's time; and if it be not so full in the years of king Stephen and Henry 4, who were usurpers, it is no wonder. If they had had right to the crown, as his majesty hath, they would not have used compliments, but 'Fide 'et legiantia quibus nobis tenemini. Before the Conquest, I find that king Edgar had his tenants, who swore to co-operate with him, 'per terram et per mare.' King Ethelred he did command, that he that had 310 hides of land should find a ship, and those that had lesser, should find other arms, and at their own charge, for every ship eight oars, 'ut tempore 'Patris,' that was Canutus; and it was Tributum Classiale.

My lords, for Danegelt, if those kings that were called in by the people did lay this on the people, much more our natural-born king, which shews it to be an undoubted right; for it is not likely they would put that in practice which was not an undoubted right. In the Laws of the Confessor by Mr. Lambert, and the Black Book in the Exchequer, it was sometimes one, sometimes 2s. annually, *in usus Maritim';* and still the charge lies on the subject; this shews an inherent right in the crown, and it was paid for several purposes, but still at the subjects charge. And to say it should not be so because of the word 'statutum (De Regibus Angliæ statutum)' cannot be, for in those times *statutum*, as in Cicero, was a constitution, there was no parliament then; and if it now doth alter from that way, truly petty circumstances, when the substance is observed, alter not the case. There must be a defence, and it was not certain; doth not the danger 'susc 'ipere majus et minus?' and the king may say as Edward the first said, nay, I have heard him say, that he hath bought neither manors, lands nor castles with it.

After the Conquest, Danegelt is supposed to be released by the Conqueror, because he dreamed he saw the devil dancing upon the Danegelt; but the Black Book saith it was paid in the Conqueror's time. It was then quitted, till there was *bellum* or *opiniones bellorum;* neither was it released by William Rufus, or Henry the 1st. King Stephen swore that he would release it at his coronation, but 'nihil horum tenuit;' nay, it was paid in Henry the 2d's time, 4 Hen. 2, Pipe Roll; and though the name be altered, yet other things came in the room of it.

And now I will begin with Doomsday-Book, which began in the 14th of the Conqueror, and ended the twentieth year. There were divers towns and shires charged, and there we see what assistance they did give both for sea and land. In the Black Book fo. 56, he that waited on the king's revenue, 'liber non erit' for public things. And in king John's time, which was a troublesome time, 5 Johannis Pat. M. 17. and Johannis Claus. M. 9, they gave a fourth part of their revenues for defence; and there was a command for staying of all ships, and to repair to a certain place appointed.

And to come to those great things when king John was deposed by the pope; the king of France made preparation, and the king of England made preparation, and all ships were imbreviated because he would not put all upon land-forces: and so in 1588. Mat. Paris, fo. 312, it is said, the people were 'ad liberationes 'nostras;' but that voyage was to Poictou; if it were 'ad liberationes nostras;' yet the command of the persons and ships were the king's; and true, all mariners were to be paid, and no question immediately at the king's hand, but it was first raised and levied of the people.

Whereas for escuage and knight's-service, the summons was 'quod intersitis cum equis 'et armis, &c. exinde proficiscend' nobiscum;' but this was only to come with their horses and arms, by reason of their tenures. And it further appears, that earls, barons, knights and freemen, and all that had arms were to come 'ad defendendum caput suum et regis, et quod 'nullus remaneat qui arma portare possit;' nay, those that had neither lands nor arms, yet all must come, and if they had nothing to maintain themselves withal, they were to be 'ad solidatos nostros,' which shews all the rest were not at the king's charge. 5 Johannis Claus. M. 1. 'Quia ad arma jurat vel qui ho'norem poss':' if the king could command for land, he may for sea, for both are one kingdom. In Henry the 3d's time there are divers arrays. 14 Hen. 3, Claus. 7. dors. When the king went into France, there went a command to all the sheriffs of England to swear those that staid behind, as they were sworn in king John's time; all this shews they were bound to arms.

In the statute of the Conqueror, which they styled a statute, that there should be no taillage, taillage must not be understood of those kind of aids. That famous year of 48 Hen. 3, (and observe when) that year is not only after Magna Charta, but after it was confirmed by him, 20 H. 3, when he was of full age. 48 Ed. 3, Claus. M. dors. divers captains and others not able to maintain themselves, the king commands they should be paid. De Comm' Comitatus. 48 Ed. 3, M. 2, 'de pecunia levand' circa tui'tionem maris,' the king commands there, that

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they should come out of their counties: the summons is two-fold; First, of escuage, which is 'secundum debitum.' Secondly, general for defence, 'cum necesse fuerit.' 48 Hen. 3, Claus. M. 3, pro militib' Sancti Johannis et M. 6, dors. 'quod omnes qui nobis et coronæ nos-'træ jure astringant, &c.' all freemen must do this service. 48 Hen. 3, Claus. M. 3, dors. 'Nullus excludatur sexus vel ordo.' 48 Hen. 3, Claus. M. 7, the citizens of London, and the men of Greenwich, were commanded to keep the Thames that none should enter *per ora corund'*; the men of Greenwich plead, that they were distrained upon common summons for their service in Kent; and the king commanded they should be freed in Kent, and join in defence of the Thames. Claus. 48 Hen. 3, M. 11 dors. to excuse one who pretended he did attend at another place with all his strength; this shews that he ought to attend the defence: nay, 48 Hen. 3, M. 4, when they refused to come, the king commanded to seize their lands, and take the profits, and answer them into the Exchequer. 48 Hen. 3, Pat M. 5, he commands them to attend, setting all things apart. 48 Hen. 3, Pat. m. 10 or 5, like writ to Ipswich, Dover, and 'per costera maris;' nay, when some went away when their 40 days were expired, the king tells them, that 'propter inopi-'natas causas,' they should stay. Pat. 48 Hen. 3, m. 4, one hundred marks by the abbot of St. Austin's for stipends for those at sea, for defence of the sea. M. 3, dors. when they would have gone away, they were commanded upon pain of forfeiture of all they had, to stay. Bract. lib. 5, fo. 336. 'Cum fuer' in exercitu cum 'domino rege,' &c. speaking there of law suits, what may be a good excuse for absence, saith, 'ex causa necessitatis reipublicæ causa, aut 'cum rege in armis.' In the time of Edward the first, statute of Winchester, finding of arms began not upon that statute; but how, and in what manner they ought to be rated, was there appointed. 23 Edw. 1, claus. m. 4, 'de con-'tributione faciend'' to Yarmouth, a command to the collectors of money 'ad custod' maris;' and he that was in Gascoigne was discharged of grace, but not of right. Pat. 23 Ed. 1, m. 4. 'Ita quod omnes compellere possitis ad custod' 'maris cum necesse fuerit.' Pat. 23 Ed. 1, m. 6. 'pro Willielmo de Stoakes fuer' custodes 'maritimæ,' et m. 5 et 7. 'custodes maris de 'Jernemouth, and divers men taken, both archers and slingers. Pat. m. 5. 'de hominibus 'eligendis ad arma,' m. 7, 'omnibus et singulis 'marinettis,' between London and the mouth of the Thames. M. 6. De Navibus Capiendis, Claus. 23 Ed. 1, m. 5, 'Marit' faciend' in di-'versis civitatibus.' Pat. 24 Ed. 1, m. 16. 'de 'partibus maritimis inveniend' et custodiend'.' M. 6, et 17, 'de navibus et galleis inter villam 'de Lyn et Barwicke.' Trin. 24 Edw. 1, Rot. 62, Inter B. *pro rege*; there a writ issued to such and such men to find ten horsemen; one affirmed, that he had some in Scotland, and some at Cobham in Kent; the king makes enquiry whether it were so or no, and finding he had not so many as he said, commanded that he should be distrained; not only for the contempt of the king, but for the danger the kingdom might lie in for want thereof. 24 Ed. 1, Rot. 78. Power to compel men to make defence *juxta facultates*; and the county of Berks, which is an inland county, upon refusal a *capias in manus* was awarded to answer it in the Exchequer, and the form of wages to be set down. 24 Ed. 1, Lord Treasurer's Remembrancer. A writ from the barons to assess all the people without the king, news being of 10,000 men coming. Claus. 25 Ed. 1, m. 26, dors. William de Ripo. It was recited, that the people have been at a great charge; and because winter came on, the king willing to spare them, watches and beacons were commanded to be set up and kept, and the people to depart, but to return again upon notice. Rot. Pat 25 Ed. 1, M. 5, Custody of the Marintime was with six ships; by which it appears that Custodia Maris, and Custodia Marintina, are terms convertable. The abbot of Robertsbridge's case, 25 Ed. 1, Rot. 70, the abbot brought a replevin against one in —— that lies in the confines of Kent and Sussex. The officers did own, by reason of the war between France and England, the abbot was assessed three several years, at several sums, nay, the fourth time, and no hurt done; but now, if the writ goes out but two years together *(ob inauditum)* but what doth he plead, doth he deny the writ? no, he pleads he was assessed for other lands; he found a horse *ad custodiam prædictam*, so that the horse was for the land service, and the money for the sea. I conclude as Selden, 'aut 'ad ipsum mare, aut ad tam littus quam mare.'

After the statute 'De Tallagio non conce-'dendo,' Pat. 27 Ed. 1, M. 3, 'de navibus 'congregandis.' Pat. 31 Ed. 1, M. 20, 'Male-'facientibus in Marchiis Angliæ' a commission went out that all shall be in arms against Scotland. In ancient times there was such a connection between France and Scotland, that we had always a double war, and therefore could not expect all forces in one place. In the time of Ed. 2, Pat. 2 Ed. 2, pars 9, M. 26, 'pro 'rege de navigio providendo vestris sumptibus 'faciend'.' I see with what policy Mr. St. John went, and what mutiplicity of records he cited, and opened them with as much skill as ever I knew any man; but I desire to go in the path of naked truth. I shall make it appear to all the world, that the king hath done nothing but what his predecessors have done; and that there is not more testimony to prove Littleton's first case, that the heir at law shall have his patrimony, than there is to prove this the king's right. Pat. 15 Ed. 2, M. 15, dors. all between sixteen and sixty to be ready. Parl' Rot. 5 Ed. 2, M. 4. Ordinance that the king without the assent of the barons could not make war, but that was repealed and damned. Rot. Parl' 15 Ed. 2, M. 31, It is said it was prejudicial to the royal power of the king, and a blemish of his royal sovereignty. Rot. Claus. 17 Ed. 2, M. 10, when they were warned to be

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ready. 19 Ed. 2, Rot. Pat. pars 2, M. 6. to all bishops in England to be ready for the defence. Claus. 20 Ed. 2, M. 2. and 7, 'de hominibus 'qui domi remanserunt, &c.' should contribute to those that went, it was to forty or fifty counties; 'Nos considerantes, quod justum et con-'sonum rationi non est,' that those should expose both body and purse for the utility of the kingdom. In the time of Edward the third, Rot. Claus. 2 Ed. 3, 'de navibus inveniend.' a command that all ships of 40 tuns and upwards, with men, munition and victuals, should be in readiness at their own charge. M. 2, mariners are warned to come *per duos menses*, at their own charge. 7 Ed. 3, Scotch Roll M. 19, 'de 'portubus contra adventum, &c' 'et datum 'est nobis intelligi, &c.' it appears it was done 'tam per mare quam per terram;' and a direction to all archbishops to be attending, and the Posse Comitatus to be arrayed, 'secundum 'statum et facultates,' Claus 9 Ed. 3, M. 13, dors. all from 16 to 60, to be arrayed 'armis 'competentibus.'

And now I come to that famous year of 10 Ed. 3, Rot. Sco. M. 21, or 33. Men for land and sea. Rot. Sco. 10 Ed. 3, M. 21, dors. 'omnes ex debito defensionem astringuntur.' Rot. Sco. 10 Edw. 3, M. 23, 'De proclamatione faciend'.' to all inland and other counties. M. 20, to Lynne. M. 14, dors. to all 'prout 'fieri consuevit' to all counties, 'nos consider-'antes quod ratione legiantiæ suæ astringun-'tur' M. 1, dors. through all counties the like observed, especially 'nequimus resistere cor-'rectiones, &c. sine auxiliis vestris.' M. 2, 'de 'navibus supervidendis,' and in that are the very words of the writ. M. 25, 'de portubus 'custodiend'' inland counties as well as others, Berks, Wilts, Leicest. Northam. &c. M. 16, 'Navibus supervidendis nos advertentes cir-'cumquaque aut hæc tempora.' Rot. Alman. 10 Ed. 3, pars 1, M. 13, Rot. Claus. 12 Ed. 3, pars 1, M. 13, dors. Rot. Alman. 12 Ed. 3, M. 33, pars 2, 'versus boreales duplici eskippa-'mento,' and to contribute, and those that refuse, to assess them *juxta statum*. Rot. Claus. 12 Ed. 3, m. 14, Archers. Rot. Alman. 12 Ed. 3, pars 2, m. 6, order that but one bell should be rung, Rot. Alm. 12 Ed. 3. pars 2, m. 3, 'supervidend' quod, omnes arraiat' consider-'antes quod omnes, &c. se et sua exponere 'astringuntur pro salvatione.' Alman. 12 Ed. 3, pars 2, m. 10, because 'hostes nostri multi-'tudine non modica, &c.' All that have 'Red-ditus, &c.' were to attend. Alman. 13 Ed. 3. m. 1, 'de supervidend' vill' Southamp.' Claus. 13 Ed. 3, m. 38, dors. A writ directed 'Cus-'todibus terræ maritimæ.' The abbot of Ramsey lived at Huntingdon, yet distrained for sea-service in Norfolk. Rot. Claus. 13 Ed. 3, m. 24, the county of Oxon, an inland county, and yet commanded 'Custod' terræ maritimæ.' m. 17 Ed. 3, Banco Regis Rot. 15, a Supersedeas granted one, 17 Ed. 3, m. 24. Wages recovered of a town for forty days. Scot. 20 Ed. 3, m. 14, 'versus Scotos.' M. 21, Ed. 3, Rot. 4, Banco Regis 'quam, dete ne soldiers pay,' *ergo* complain, m. 31, payment of wages. Rot. Parl. 22 Ed. 3, m. 4, there the commons were at great charge for guarding the sea, and pray remedy, but not for the right but for the excess. Rot. Franc. 21 Ed. 3, m. 24, dors. 22 Ed. 3, Rot. Pat. pars 2, m. 1, Rot. Franc. 22 Ed. 3, m. 5, dors. pro Johanne Coke. Rot. Franc. 26 Ed. 3, m. 5, and 4, 'quia est vulgaris opinio;' and this recited, 'nos considerantes, &c. quod omnes 'per juramentum, &c.' and this was for the sea, and goes to all inland counties. And as they talk of kings in the field, kings use not to go into the field in person. Rot. Franc. 34 Ed. 3, m. 34, 'pro clero arraiando.' Rot. Claus. 33 Ed. 3, m. 89, dors. Rot. Claus. 43 Ed. 3, m. 1, 'de Navibus arrestand'.' Rot. Claus. 43 Ed. 3, m. 14, or 13, 'de hominibus arraiandis.' Rot. Claus. 45 Ed. 3, m. 8, 'ut intelleximus.' Rot. Parl. 46 Ed. 3, m. 20, the commons complain of their charge, and say, that the sea was so noble, that all the world called the king, the king of the sea, &c. they pray as of grace, &c. Rot. Franc. 47 Ed. 3, m. 20, for guarding of the sea-shore. 50 Ed. 3, pars 1, m. 105, 31 Ed. 3, pars 5, m. 25, the charge is not put upon the people without common consent. The king is not to do it but for the grand necessity and defence of the realm. In Richard the second's time, Rot. Claus. 1 Ric. 2, pars 1, m. 7, Scarborough. Rot. Pat. 1 Ric. 2, pars 1, m. 12, Rot. Pat. 1 Ric. 2, pars 1, m. 42, dors. Beacons. Rot. Pat. 1 Ric. 2, m. 13, dors. Rot. Franc. 2 Ric. 2, m. 15, Rot. Scot. 4 Ric. 2, m. 9, king of Castile, 'pro compellendo ho-'mines pro custod' maritim'.' 7 Ric. 2, M. 9, 'Totus Clerus apponere manus adjustrices,' archbishop of York. 8 Ric. 2, m. 5, Archers.

The Second Day's ARGUMENT of Sir EDWARD LITTLETON.

May it please your lordships; The last day I left off at the end of Richard the second: I do not love to repeat, yet in regard the records that are of weightiest evidence for the king to men of understanding, are perhaps not so clearly understood by every one that hears them, I shall sum up what hath been read. It hath appeared by the records that have been read, that the sea and the land have been guarded by the commons, when danger did appear to the king: if the danger was great, all the commons, no age, no sex, no order to be spared, all ecclesiastical persons bound to defend. If the danger were less, those parts nearest unto it to defend, no reason to trouble the whole kingdom, when a few will serve the turn: those that refused were compelled by imprisonment, seizure of goods and lands. The writs have expressed fully and significantly, that no wages ought to be paid by the king; that when there was apparent danger, it appeareth by some records, that one man should not serve for another; care taken by commission, that all equality should be used in making of contribution; and when complaint, as 25 Ed. 1, was made against it, it was remedied; yet it was not *ratione contributionis*, but *violentæ extortionis*.

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This constant usage of former kings is of much more authority and weight, than scattered judgments here and there, or judicial proceedings in any court, and these are not wanting. Notwithstanding, I shall now proceed and come to the time, wherein so many great lords did die, and so much noble blood was spilt in civil war, from Henry 4 to Henry 7; 'Henricus Rosas Regna Jacobus.' There was not then such great cause to look to preparation for sea, for the war was then in the bowels of the land; and the sea and the land make but one kingdom, and the reasons are the same for both. And for Henry the fourth, when he was newly come to the crown, it appears Rot. Claus. 1 Hen. 4, pars 1, m. 12, dors. Writs are directed to the archbishops of Canterbury and York, and other bishops; and it recites, that the French had prepared a great navy which was seen on the coasts, and intended to invade the kingdom; and that abbots and priors should be arrayed, 'sine deliberatione, &c.' 'et juxta statum et possessionem, &c. et triand' Millenis centenis.' Rot. Viagii. begins 1 Hen. 4, to 11 Hen. 4, m. 20, 'de Proclamatione faciend' to go against the rebels of Wales, 'de arraiatione faciend'' in the same, and barons assigned to the custody of the marches called Battelfield; less reason for this place of any, for they say there were lords marches to defend it. m. 14, 23, 'de proclam' faciend',' to go with the king in person against Henry Percy a rebel; and there was an army of men by the sea coasts to resist the enemies, &c. and in the same Roll, 'De Hominibus 'Congregandis,' divers other proclamations, 'De Hominibus Defensibil'.' In the same Roll, 'De Militibus infra Comit' Lancastriæ 'arraiand',' upon the instruction of the earl of Northumberland, to bring them to Pomfret, m. 10 et 27, again to go to the prince Henry the fifth. And in 1 Hen 4, this goes to Northumberland, Derby, Lancaster, by Robert duke of —— to invade the kingdom. My lords, noblemen, valets, &c. 'et omnes ho'mines defensibiles,' between 16 and 60, that was *juxta statum*, upon warning of two days, which was in 'Defensione Regni nostri,' to go with the king, m. 20, 'De hominibus levan'dis et congregandis;' and of this nature 4 Hen. 4, m. 11, dors. et 10. 5 Hen. 4, pat. m. 28, dors. pars 2. Principal men joined together to array and muster all over England. This hath appeared by the constant common law of the kingdom.

Before Parl' 5 Hen. 4, 24, the commons pray that the commissions of array should be considered, and the judges advised with, and a commission made for the future, 'ad ariand' 'et triand' qui de corpore sunt habiles,' &c. 'juxta statum et facultates, &c. et ad assidend' 'et proportionand',' with power to distrain. 7 Hen. Fitz. Her. Thorney Title Protection, the subjects of England not to go out of England with their king. This was upon the king's going to aid the duke of Flanders, Report 7 fol. 7, Calvin's Case, not to go without wages when they were to follow the king. In Henry 5th's time there were great wars with France; but when the king went, he took great care that England should be provided for. Pat. 3 Hen. 5, m. 17, dors. pars 2. 'de arraiatione faciend',' care is taken that all should be arrayed, and being arrayed, should continue so arrayed. Stat. 1, Ed. 1, it provides that they shall not go out of their counties but upon the sudden coming of strange enemies; and upon warning, they were not only to array them but to lead them to the sea-coasts out of their countries, when and where it should be necessary, 'cum 'aliquid periculum eveniat,' notwithstanding the statute, which is our case; nay, our case is much stronger: And 3 Hen. 4, is *verbatim* with the other. 6 Hen. 5, Pat. m. 8, dors. pars 101. 3 Hen. 5, 16, dors. this was upon the threatening of the king of Castile, to all the counties of England. 7 Hen. 5, *vaga regis*, divers privy-seals to all the counties of England, to inform the king what able men of ancestry there were, 'ad defensionem nos in propria 'personis suis ad defensionem regni,' and the return is 'pur defence de son roalme.' In the time of Hen. 6, Rot. Pat. m. 37, dors. pars 2, 'de aratione faciend':' 7 Hen. 6, pars 1, m. 7, dors. Rot. Pat. there is 'quia datum est nobis 'intelligi,' for the isle of Wight. Rot. Pat. 7 Hen. 6, m. 5, dors. pars 1, 13 Hen. 6, m. 3, dors. 'de militibus congregandis et ducendis 'versus Scotland.' Pat. 13 Hen. 6, pars 1, m. 13, dors. 'Contra militiam inimicorum,' a full command to array all, and to bring them 'ad costeram maris' and other places, 'et 'juxta gradus suos.' 14 Hen. 6, pars 1, m. 20, 21 Hen. 6, m. 40, dors. Rot. Pat. 28 Hen. 6, m. 11, dors. Rot. Pat. 29 Hen. 6, pars 1, m. 45, dors. Rot. Pat. 37 Hen. 6, m. 6, pars 1, dors. all arrays, a book-case 28 Hen. 6, 11. b. pl' 22. Divers of the clergy had churches to be freed from the payment of tenths for the defence of the kingdom, and the clergy did grant 2*s.* in the pound without act of parliament, and this sent by Mittimus into the exchequer, P. 26 Hen. 6, Rot. 10, et Trin. 11, for levying of money upon Sciri Facias. 36 Hen. 6, m. 2, dors. regis 1, Part. array in the isle of Thanet, and compell them by distress, 'pro 'defensione regni.' 37 Hen. 6, Pat. m. 1, et 6 dors. A writ to many counties, because of the great hurt done to the people by the sea-coasts, and the great preparation to do more hurt; thereupon command to train and array all parts of England, 'pro defensione.' And the 39 Hen. 6, Pat. 'de potestate' to array the Isle of Wight, being invaded 'juxta gradus et con'ditiones,' &c. 39 Hen. 6, m. 9, et 11, dors. a commission to Edward duke of York, who claimed the crown, and it was adjudged him. 31 Hen. 6, 'pro araiatione faciend' quæd' per son' fil' iniquitatis dissentientes, &c.' therefore is a command 'pro securitate persone 'nostræ et populi nostri ad invocandum omnes 'defensibiles' to destroy them. Pat. m. 9, dors. 'de villa de Stamford ad custodiend'.' m. 1, dors. a commission and command given

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to Edward duke of York, Ed. 4, which gave power to raise men and money at Bristol, Hereford, and other places; which was cancelled, and other commissions given in the room. In the time of Edward 4, Rot. Pat. 1 Ed. 4, m. 8, dors. for reducing Henry 6th's power, *congregare* all the people, 1 Ed. 4, m. 8. South-Wales on the marches 1 Ed. 4, Scot. Rich. duke of York, 'Custos West-Marchiæ 'ad omnes homines defensibilis,' in Cumberland and Westmorland between 16 and 60, 'sint prompti in defensionem Marchiarum, &c.' against Percy earl of Northumberland, Rot. Scot. 10 Ed. 4, there are 'custodes generales 'vers. Scot.' for arraying all men as there should be cause. Pat. 3 Ed. 4, m. 3, dors. continue 'parati ad defensionem personæ nostræ et 'regni.' 8 Ed. 4, fol. 23, a book-case, a subject hath power to make a bulwark in another man's ground; the king hath as much power over all the kingdom, as any particular man to make defence, 9 Ed. 4, Pat. m. 11, arrays 10 Ed. 4, Pat. m. 13. Arrays 'in salvationem 'regni,' when he was like to lose his kingdom. A commission to raise power against his great adversary and rebel Henry 6, who did lately enjoy the crown by usurpation. 22 Ed. 4, Rot. Pat. pars 1, m. 2, 'pro conductoribus et waffa-'toribus piscatorum,' and at the subjects charge. Pat. 1, Rich. 3, pars 1, dors. against the duke of Buckingham 'quocunqu' comitat',' and this 'juxta statum et facultates.' In Henry 7th's time. Henry 7 was a wise prince, his majesty's progenitor as well as his predecessor; he staid not till he saw the tops of the ships, or the drums beat; he provided for the safety of the kingdom betimes; when the war was denounced between Charles king of France and the king of the Romans, though he was allied to both he prepared to defend his kingdom. Rot. Pat. 1 Hen. 7, dors. a command to the sheriff to make proclamation throughout all England, that because we are informed of the war between Charles king of France and the king of the Romans, and great hurt may happen to this realm, and the subjects thereof; commanding all subjects to keep watch and ward upon the sea-coasts, and all beacons to be made ready to be set on fire, as in old times, and this after tonnage and poundage was granted to him for safety: and I am sure there are greater wars about us now, than there were at that time. Rot. Pat. 7 Hen. 7, 'Intus de po-'testate commissa' to the earl of Surrey to go to conquer France, 7 Hen. 7, cap. 1. a statute in print. 8 Hen. 7, Rot. Pat. pars 1, a command to Richard Fitz-Hugh and others, to keep all in array for defence against Scotland, which intend to invade the realm, *ut informatur*. Stat. 1 Hen. 7, cap. 16, every subject is bound by his allegiance, to assist when need requires. In the time of Hen. 8, Rot. Pat. 4 Hen. 8, a proclamation to the maritime counties to be in a readiness, considering the French king had in readiness a great navy to enter this kingdom the next month ensuing, &c. and certain captains deputed to lead them; and they were all to be in a readiness at an hour's warning upon their allegiance. Rot. Pat. 4 Hen. 8, the same commission to Bouchiers, &c. in Latin, 14th of Hen. 8, which is not in this roll, but a book of proclamations; for before Edward 4's time all between sixteen and sixty were to be ready at an hour's warning. 15 Hen. 8, the inhabitants of Stamford, Nottingham and Salop, &c. to attend the earl of Surrey upon an hour's warning. 30 Hen. 8, 'Pallace 'treasur' omnes homines ad arma,' to be ready 'ad serviend' nobis in Scotland,' as need shall be. Stat. 35 Hen. 8, cap. 13, remissions of loans, reciting and considering, 'est duty et 'honor del people,' to assist their king in body, goods, lands and substance in his wars; and there it was only for offensive wars. Rot. Pat. 36 Hen. 8, pars 2, 37 Hen. 8, in Mr. Moyle's book, 4 & 5 Phil. & Mar. commissions of array to go to all gentlemen, but now but one lieutenant of a county; and that power which the lieutenant now hath in England, was the same with the antient commissions of array in substance, for it is no new thing. These are in force by 5 Hen. 4, and common-law in queen Mary and queen Elizabeth's time; and they did not go by the legal array, but by the power of the council-board. 3 & 4 Phil. & Mar. 1557. Council-board. Calais was besieged on the sudden, the enemy making pretence of going into the Low-Countries, there went presently a command to the lord Warden of the Cinque Ports 5 Jan. to make proclamation in Kent, that all from 16 to 60 should repair to Dover to save Calais, upon pain of death, 8th of Feb. 1557. Letter of thanks given to sir John Edgecombe for diligently mustering 1,000 men. 19 Sept. 1558. Northumberland served without wages. 1 Sept. To continue watch. 8 April 1558. Whittypoole for not finding Demylance, is called to the council-table. These are to shew what proceedings there have been in former times. Rot. Pat. 7 Eliz. pars. 5. A commission to muster all men against Scotland. 11 Eliz. Rot. Pat. though not on record, yet in a book in the Crown-Office in the Chancery with Mr. Willis: A commission to array men, and to provide all things necessary, *prout necessitas*, &c. and to inform themselves what armour they had, and this to be done for our better service: but with those commissions there went instructions, amongst which, observe this one, 'We require you to consider how 'necessary this service committed to you is at 'this time, for the benefit and safety of our 'realm, wherein we think the more earnestness 'is the more requisite, because of our subjects 'long continuance in peace, and the notorious 'being in arms of our neighbours about our 'realm.' If these times be not worse, I leave it to any indifferent man's consideration. 27 Eliz. Watson Roll. A warrant to the lord chancellor to make lieutenants and deputy lieutenants, which are the old commissioners of array turned into English. And in 1588, when that great Armada came, all the realm was in arms, and at the subjects charge. 31 Eliz. cap.

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14. 15, the subjects granted a subsidy, in consideration of the queen's charge. And the subjects were then at great charge, both for land and sea, and she took it by the power of her council-table. The city of London was desired to find ten ships, and of themselves they desired to find twenty; this was the affection of those times, they did not dispute but were ready to obey. 28 April 1558, a letter to sir Robert Wingfield, whereas divers towns in Suffolk were charged to set out a ship, and that divers were poor and could not, a command that the richer should do it. A letter to the earl of Huntington, that York should contribute to a ship charged on Hull. A letter to other towns to contribute to Colchester; they refused, yet were compelled to do it for advancement of so necessary a service. The clergy in 1588 joined, and the archbishop was captain. And there were letters for demolishing of Suburbs. Statute 3 Jac. cap. 6, where the charge of the people in queen Elizabeth's time was remembered, London was charged, and foreigners and strangers were charged also to contribute, for that the charge was common. In 1588, 3,000*l.* conduct money levied for the earl of Bath; they did not stay here till the tops of the ships were seen, but they made preparations in 1587. In 1599, great troops were assembled at London, for defence of the queen, when the tumult was about the earl of Essex; and in 1598, the charge being common, the charge ought to be born in common: Nay, the Inns of Court were charged with arms; upon the apprehending the earl of Essex, a letter went to the benchers of the Inner-Temple for that purpose, and all the gentlemen found arms. Amongst these letters great levies of horse and foot at the country's charge. And where she would not have their persons, she had their purses and power to extend accordingly. 1595, Amongst the papers of the lord Nottingham, the people set forth a ship at their charge; we have the letter only to shew they did it, and how much each man did contribute. In king James's time there was not much; the times were not only peaceable but pacificous, his Motto was 'Beati Pacifici.' 10th of July, 2 Car. A proclamation issued, that all people should make speedy repair to several places, and should continue during the danger. And for a binding authority, 12 Car. the resolution of all the judges under their hands, and inrolled in every court at Westminster: a man should have thought that that should have given satisfaction, it would have done so in former times. And truly, that the king hath done nothing more, but what the kings of this realm have done before, is most apparent to all those who will read our law-books. How often have the judges been assembled by the king's command, both in the outward and inward Star-Chamber, and there asked questions? 2 Rich. 3, fo. 10, 8 Hen. 8, 190. b. 101, the king was there, and reasoned there. Is this a new thing for judges to deliver their opinions? But his majesty hath been pleased likewise to give way, that it might be brought to a public debate in a judicial way; he hopes there are very few that oppose it, do it out of any averseness from the public service, but to satisfy themselves, and so to submit.

To answer Mr. St. John's argument; before I come to answer in particular to what was objected by this learned gentleman, who hath taken a great deal of pains, and made as much use of it as was possible for a cause of this nature to bear; I shall in the first place give a general answer.

I say, that the testimony by records given on the other side, whereof many are vouched, which I am glad to hear of; and that men look into a business of this nature. To make such a search is for the honour of the king, that there is, according to law, the freest access to the records, that ever was in England; and that great lord (Holland) doth know that the king commanded with his own mouth, that free access should be to the records in this business; and I appeal to the officers that keep the records, whether I did not only deliver that command from the king unto them, but desired them myself to shew to the other party whatever I had.—I say, these records, take them at the best, they are not of such weight in point of right, as the other are which are for the king; for if a king shall voluntarily, and in ease of his subjects, or special grace, do any thing, yet I conceive that is not of such weight, as when he produces a constant use of compulsive power from the crown, and obeyed by the people: for if any of the kings have spoken in gentle language, as king John when he was deposed from his crown; I conceive that will not be so much as gentle words used in the writs.

I shall answer particularly to all the records that have been cited: it doth much concern the king, that this argument be answered fully. —The first thing that was said, was, that to seize goods without suit or cause, is void in law; but this was not used as an argument, but an introduction, But in the next place, he comes to a high objection, that in his majesty there is *voluntas interna* and *externa*; his inward will which he doth declare in his chamber, and his legal will, and withal, that the king cannot judge himself, 2 Rich. 2, fo. 10, 11, which was grounded upon that book-case.—The king cannot judge in his own person, but hath left it to your lordships, that are sworn to do equal justice between him and his people; but to say, that the king cannot judge himself, I question. Can that be wanting in the fountain, that issues in the stream? That I utterly deny. Is it not said, Coram Rege in the King's-Bench, and in the Star-Chamber, Coram Conciliis nostris? This is a new doctrine; and shall not the king judge? Did not Ed. 4, sit in person in the King's-Bench, in a trial of Rape? and that famous justice Popham sat at the king's feet, and other judges at the king's side, and therefore called 'justiciarii a latere regis?' Sure he forgot king James, who adjudged two cases in the Star-Chamber, that of Belling-

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ham's and sir Tho. Lake's case. The book doth no way warrant his inference; the book doth say, the king shall not judge, but saith, that if a man be convicted before the judges, the king shall not set the fine, because he heareth not the case. This no way concerns our case.

That no law can be changed but by act of parliament, as a naturalization, and a legitimation; nay, no writ of error but in parliament, till by the statute of 27 Eliz. and that the parliament is Curia Regis, and cited 34 Hen. 8th, Crompton's jurisdiction; the king is at no time in such state-royal as in parliament: all that was made out of this, was, that this was a change of the law, viz. the writ for shipping. We believe it is so far from being a change of the law, as that it was the custom of all ages in former times. Now he says the parliament is the highest court, and the king is there at highest both for magnificence and power; but yet out of the parliament, the king is king of England. It doth not follow, because he may do it in parliament, that therefore he can do it no where else: and it is to prove a comparison, to say, that the king should have the ordering of war as a generalissimo over his subjects and vassals; all the generals have their power from him. Oh! but the king hath provision for war. This is but a cunning insinuation, to make a survey of the king's revenue, and to insinuate, with the people; and he begins with knight's-service, tenures, and these in dangerous places, as Dover, Durham, Chester. 33 Hen. 6, Britt. that the king should not only have his wards lands to breed them up, but to maintain the wars in the mean time; and that knight's-service 37 Hen. 6, were instituted for ordinary defence as horsemen. And because the kings of England, out of their care to have men trained up had horsemen to follow them, that therefore they shall have no aid when the kingdom is in danger, is a strange inference; shall we have no footmen, no archers, no slingers to be used in war, no guard at sea, because he hath some tenures of horsemen? This doth not discharge the subject; this is but for forty days, and was instituted to suppress the sudden incursion from Scotland. 19 Rich. 2, Guard. 105. pl' Tenure; they do restrain particularly escuage and knights-service to Scotland and Wales. 22 Ed. 1, for Gascoigne afterwards discharged, but not for Mr. St. John's reasons. Rot. Claus. 5 Ed. 2, m. 27, these were discharged of escuage, because the king was not there in person, and because it was extraordinary. Rot. Scot. 5 Ed. 1, m. 27, that record doth shew the kings of England did conceive that they were somewhat less than enemies that refused it; for foreign service I never meant to object it.

Then he saith, that escuage is to be assessed in parliament, though for the defence of the kingdom.—If that were the proper question, I could shew when escuage was not by parliament, for it was by another reason. It was altered by an act of parliament, 17 Johannis Statute de Running Mead, Nullum Scutagium, for it was not so before. Also it concerneth the subject as well as the king. 9 Hen. 3, cap. 37. The true reason of assessing in parliament is this, other men were to have escuage as well as the king; now it is true that rule, No man shall be judge in his own case, but therefore not the king; that holds no proportion: and kings are said to do no wrong. The true reason why it was assessed in parliament, was because the lords would take too much. This is from the business, I pass it over.

Then he alledged, that the king is in actual possession of the Wards.

That they should go towards the maintenance of the war, he cannot shew any authority worth the valuing, neither Bracton nor Britton hath any such thing; for 35 Hen. 6, the words are 'pur ceo,' &c. The argument will be but thus; Because the king out of his especial care, out of his own land, provided some tenures for that purpose, therefore he shall have nothing from the subject. The king did never give, nor could give other men's lands for those tenures; for it is most apparent, the Normans came not in by conquest. William was no conqueror; for after he came in, men did recover the lands which were their ancestors. That was the wisdom when Henry the 4th took the crown by conquest, when he would have altered the laws; No! take our laws, and take our lives. This is an argument no way conducing to the purpose, because he hath some horse by tenure, therefore neither foot, nor provision for seafight, nor trained bands, because provision is made by tenure. This is contrary to all reason and experience: What obligation hath the soakman and the plowman's tenures, what do they pay to defend them? No consideration for it; these are rather insinuations than arguments.—Then it was said, there were like tenures for sea, and he cited two or three; one to hold the king's head at sea, and some such like, as if two or three tenures were like to defend the sea. It was also said of the Cinque Ports, that they have many privileges allowed them for that purpose, 13 Ed. 3, Par' Roll. 11. —Is the Cinque Ports service a competent provision to defend a kingdom against hostility? I know no reason but the whole body should defend itself. 13 Ed. 3, m. 9, it appears expresly, that the commons made defence at their own charge. No man can be discharged of keeping a thing, that he did not keep; so because the subject is said to be discharged, is an argument that he was charged. That of the Cinque Ports is not for the defence of the kingdom, but for intercourse of merchants, not 'Quando salus regni periclitabatur.'

Then they object, that tenures in ancient demesne were talliable without consent, and their service for the king's provisions in their house. No reason that should excuse them from the general service; for though it be true, that the king's house employs such tenants, yet the kingdom must be supported by them and the rest of the subjects together.

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Then he did object, there was another way of supply of extraordinary means, as mines in other men's lands; and here he remembered m. 3 Rich. 2, Prerogative Comm', difference taken between annual and casual revenues for Defence.

Then he objected, Rot. Parl' 6 Rich. 2, 11, 42, that the king would live of his own revenues, and that the mines, &c. should be for the defence of the kingdom. Onslowe, who argued the case, said, that the king was the most excellent person both at sea and land; therefore the royal fish at sea, and the gold and silver mines at land, were given to him, because he was able to give a stamp on money. And so 2 Rich. 2, they of London prayed that the king would not put them to charge, but live on his own, and so your authority vanisheth into smoke.

The king must live, forsooth, of his ordinary revenues. M. 3, Rich. 2, which expresseth, that the king at that time would do so; that the king, by advice for salvation of the kingdom, would use these things given unto him; that indeed was a reasonable thing for that time, but must it be now turned for a necessity? 6 Rich. 2, m. 42, pars 42, that good government be about the king; then they petition that he would live upon the revenues of the crown, and that all wardships, releases, marriages, &c. should be for the defence. The king is very willing to do and ordain in this case, as by the lords of the realm may be thought best for his honour and profit; this is not a granting of the thing, but a referring it to his lords, at best it is but a temporary desire! —But oh! he hath the old Customs, and Petty-Customs, Tonnage and Poundage; of the legality of taking of it he will not speak. If the king doth impose it on the merchants, he needeth not to take it of his other subjects. Duties to the king in this year, came to 300,000*l.* and that Tonnage and Poundage was granted for ordinary and extraordinary defence. 3 Rich. 2, 5 Rich. 2, 1 Mar. granted on condition, that by the statute of Winchester, they were bound to have arms, and no such statute for the sea.

I shall answer all this; but for Tonnage and Poundage, I shall refer it for a particular place. They say, the courts of justice are maintained by the king, the king hath a profit thereby, but the maintenance of them cometh out of the subject's purse; and the first-fruits were for the defence of the faith, that no heresy should creep into the church. Therefore, because the king is lord of the English sea, he must defend it at his own charge, and not command the body nor purse of his subjects towards it. A pretty argument! He saith, the king hath the old customs, which are the ancient inheritance of the crown, and so for petty customs, and that these must go for the defence of the sea. See a judgment in the Exchequer, in Edward 1st's time; search into the Fine Roll 3 Ed. 1, and see for what causes these old customs were. It was never said till he spake it, the old customs or lesser were for this purpose. And for this saying that the statute of Winchester, 13 Ed. 1, doth enjoin keeping of arms, and thereupon all defence comes, that statute was repealed by Philip and Mary, and set a-foot by king James, and again by him repealed. I shall shew before the 13 Ed. 1, many records for land-service long before: for that statute doth only set a form of arms, and is not the beginning of arms. So for the objection of the king's revenues, be it more or less.

Now I shall come to Tonnage and Poundage, the darling argument; which I affirm was never given nor taken, of itself simply, on extraordinary defence; I have seen all the grants of it: it may be when there have been wars abroad, and then the subjects in parliament have given Tonnage and Poundage with Tenths and Fifteenths, they have been all said to have been for the defence. Tonnage and Poundage hath been given and taken merely for an intercourse of merchants; and in that sense the king said, we do and must pursue those ends for which it was granted to the crown. I shall make that appear by reason, and out of the grants themselves and other authorities.

If Tonnage and Poundage were merely for the defence of the sea, how was the kingdom to be defended before in the time of the Saxons? At the first it was 6*d.* a year, then to 2*s.* and 3*s.* for tonnage and poundage; then 3*s.* upon a ton of wine, and 8*d.* a pack on merchandize, that was all for tonnage and poundage, the rest was for old customs. If this was for extraordinary, how was the kingdom defended when this was given for half a year? Truth, it was for defence of the kingdom, that is, with relation to the intercourse of merchandize; the recital 1 Jac. saith, it hath been taken time out of mind. Hath tonnage and poundage been given time out of mind? Then it was before Richard 1st's time: H. 6, he had it for life, the statute doth express it as plain as may be; time out of mind is beyond the memory of any man living. The very interpretation of the statute explains it to be for the safety of the sea, and intercourse of merchants. In all ages before the granting of tonnage and poundage, the kings, upon a general defence, have had other aids than this by their own power. Ordinary charge for an ordinary defence.—I could have given a legal answer, that it was not given unto the king; no act of parliament for it. Yea, but it is taken *de facto*. Shew your instruments then by which it was taken; that had been a general answer.

But I shall carry the king's honour along with his power and practice: Rot. Franc. 2 Rich. 2. 7 Hen. 4, m. 23, Rot. 11. Tonnage and Poundage granted to merchants to guard the sea for intercourse of merchandize; which sheweth plainly it was for that purpose. To put it without all manner of question, 6 Ric. 2, m. 8. Franc. Roll. pars 2. Merchants and mariners had *Custodia maris*, and the king granted them 6*d.* a pound: doth any man think that he would trust the safety of his kingdom with merchants

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and mariners? It was merely for the guard of the sea for merchandize; express exception in the very grant, that they should not be bound by this to help against invasion of enemies, unless a royal power come, 'regali potestate excepta;' therefore this was no extraordinary service. 7 Hen. 4, Rot. Parl. is in the same manner. And in the Close Roll, that the *Custodes maris* should put there a lawful power for the safeguard of the sea against the enemies of the king, except a royal power; then notice to the king, so it must be understood merely for intercourse of merchants. I can shew you a Book-case for this, 9 Hen. 6, 12. Quer. Case Title Custom. Bract. 26, he saith, That Aids and Subsidies are granted to the king, to the intent that the king, by his admiral, should guard the sea, to the end that merchandize may pass and repass; not a word of the defence of the kingdom. And in anno 11, the king was at great charge with his navy; cast up the accounts of the sea duties, and then it will appear there is not left to him a penny for the defence of the sea. Impositions and prizage of wine was to furnish his house, and not for defence of the sea. Not only upon this, but there was an ancient writer that wrote the Doctor and Student, whose name was St. Jermine, who wrote in Henry the 8th's time; he tells you, lib. 2, c. 15, fo. 153. The king, out of the old customs of the realm, as lord of the narrow seas, is bound twice in the year to scour the seas, but not against all outward enemies, but only to put away pirates and petty robbers. History of Tonnage and Poundage. 25 Ed. 3, Parl. Roll. m. 11, the commons did pray, that 6*d.* of the 2*s.* a sack of wool, and of a ton of wine granted, that the merchants might have safe conduct over the sea, if it would please the king: the merchants for that would make their own conduct. All the Rolls go in that manner. 3 R. 2, 2 Hen. 4, and they cannot shew that Tonnage and Poundage was ever granted for extraordinary defence, unless for some great defence.

Next he alledged that sea duties were borne by every man in the kingdom, and that *secundum statum;* 22 Ed. 3, m. 4, Parl. Roll. which says it was in charge of the people, 'et nemy des 'merchants.'—All men must bear proportionably their share in the charge of defence; what consequence is this? because the first or second year out of the subject's purse for their commodities, therefore their lands shall be discharged in cases of extraordinary defence.

Oh! say they, but this *may be* done by parliament.—By a *may-be* a man may answer any argument; but a *may-be* will never answer a bill. 23 Ed 1, Rot. 3, dors. the writs were in October, the parliament at St. Martin's in winter. In that to the archbishop of Canterbury, the king doth but a little compliment with the clergy, and telleth them he knoweth what dangers were abroad; the business of shipping was done before the parliament, so the parliament might consider of it afterwards. That it was done afore, appears; this parliament was not held at the day, but the king doth prorogue it till after St. Andrew's day, because he was busy in preparing his shipping; so they came about shipping when it was gone to sea before, for the writ of summons was the 1st of October, the day of meeting after St. Martin's; that to the archbishop was the 31st of September; the ship writs Aug. 28, and Sept. 31, then the rest, the 3rd and 6th of October; but all long before the meeting of the parliament, and so all grounded upon (it may be.) And to say that the king, because he did a thing voluntarily, therefore he must be necessitated to it, I know not what argument it is. Henry 7, indeed, did bring things to parliament for the advancement of his own ends; did queen Elizabeth send any of her commands out of parliament? and yet the subjects gave her subsidies. 24 Ed. 1. Summons there for the clergy to come if the truce did no hold with France. I think it not fit at all times, when it standeth upon intelligence, to communicate it to the whole people. 26 Aug. Summons to parliament, divers writs in February and April before, no money granted in these parliaments; therefore to tell us it might be by parliament is a poor argument.—Walsingham saith, Allegiance bindeth the king to protection, as well as it doth the subject to tribute.

The subject hath a double protection from injury and wrong, in times of peace by his laws, and in times of war by his power: must this be done by the king's single person? No, it must be done by the bodies of his subjects at their charges. Indeed it is fit that particular soldiers should be paid.—Oh! but they tell us, that Fortescue, Chief Justice of the King's-Bench, to shew the law of England to be better than the law of France, saith, that nothing could be taken from the subjects but by parliament. That is in the ordinary way; doth he say, that no man shall contribute to defend himself in imminent danger? 'Ne verbum quidem.' 27 Ed. 1, m. 7. Pat. there the king saith he did not buy lands, manors, or castles with it, but did it to defend the whole realm; no more doth our king, but only to defend himself and the kingdom.

In 33 Ed. 1, rot. 10. It is objected that a clerk sued for his salary, and had it allowed him: and the king supports his courts by the fines. But they came from the subject. And may not the king give a salary when he pleaseth? 14 E. 3, c. 1, and this were prest to prove, that aids, though granted in parliament for defence, should not be brought into example. These were not to be spent for the safeguard of England, but Scotland and France; and so it comes not to our case. 43 Hen. 3. When the tenants came with greater charge than their service required, 'non trahatur in exemplum.' True, if tenants by knights service at that time did no greater service than they were bound in time of danger, it is but reason that it should not be drawn to be yearly, to make their tenures higher. Plowden fo. 315. Wiseman's case. A covenant to stand seized to the use of the queen, in consideration she is head of the commonwealth, held no good consideration to raise an

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use, because there wanteth *quid pro quo;* and the king, *ex officio*, is bound to do that.—Under my lord Coke's favour, it was not in the case. The case was upon divers good considerations, and he put this in by way of admittance. I can shew when this was declared to be no law.

Next, they alledge, the king is in possession of the service of the Cinque Ports, and of tonnage and poundage, and this appears not to be expended; and of other duties for the defence of the sea, and 'Lex non facit saltum.'—*Tempus belli*, I reserve for another place, for that is one of the three things considerable in this argument. That learned gentleman, Mr. St. John, did confess that (as necessity requires) when the safety of the kingdom is in danger, the subject is bound. If it were material to make it appear whether any thing were spent or not, it should have been pleaded at the Exchequer, if he would have taken any advantage upon it.

But admitting they had been all expended, yet the property of the subjects goods, saith he, cannot be altered out of parliament. He did agree the kingdom must be defended, and did yield, that for the manner of it, it did not belong to the people. 6 Ric. 2, 2 Ed. 1, men and money belong to the wars; the commons did acknowledge it belonged to the king for ordering in all times; the caution of former ages was to demand it in parliament.

We shall shew in all ages, the king did it without parliament. This is a pretty thing, that the king is to direct the war, and yet shall have neither men nor money without asking his subjects leave. And for that of property being taken away, in the opening of my argument I cleared it, I shall not trouble you with repetition of it.—Oh! but they tell us, the king hath borrowed money to spend in the wars, and promised to repay it, and that without a Salvo of his right; this is an argument they think worth consideration. 48 Hen. 3, 16 Pat. I know no law that barreth the king from borrowing of money, as he hath occasion. Is it not of necessity that the king must borrow, notwithstanding both ordinary and extraordinary? Must the king carry millions about him? His occasions may be such as he must borrow, and also fit it is that it should be paid again. Doth any man think, that if the king doth borrow 10,000*l.* of any particular man, he must not be repaid again? 48 H. 3, m. 15 or 16. Power is given to the earl of Leicester to resort to the city to borrow money. Great reason, because it is the chamber of the king.—But the king's money not coming in, he desireth to borrow so much of the city, and it shall be paid when the other money cometh in; the end was for the defence of the kingdom. But that therefore the king cannot command aid from his subjects, because he borrows of his subjects, is no good argument.

Then he saith, the law delights in certainties, as in the aids 'pur file marier,' and to make his eldest son a knight; these are certain, 25 Ed. 3. All defence is uncertain, till we know the offence; certainly he must be a wise man that can do it. How shall a man know how to defend, and not know what the defence will require? whether ten or twenty thousand? and must it not be proportionable to the offence? Is not this *suscipere majus et minus?* Where is the argument, that because aids, which were uncertain at common law, are made certain by act of parliament, therefore must this be certain, for which there is no act of parliament?—Oh! but the Taillage in ancient demesne and burgage, they are certain; and Mr. Hampden he was assessed at 20*s.* it might have been as well 20*l.* this is uncertain, it doth rest only in the king's mercy.

The writ taketh care they shall not assess unequally: if Mr. Hampden be too high assessed, Mr. Hampden might call the sheriff in question; but the sheriff of Bucks is rather to be fined for setting him at so low a rate as 20*s.* We know what house Mr. Hampden is of, and his estate too; for any thing I know it might have been 20*l.* well enough.—But to the legal part, some must be trusted with it, and who should be but the sheriff? and the parties not without remedy if over-rated. Then they come to authority by jurisdiction, and that they that have privileges are not talliable, 'nisi pur 'grand cause,' and that escuage must be set by parliament, which is by act of parliament; 17 Johannis, that it was called Magna Charta; and so it was in Matth. Paris, and confirmed by Hen. 3.—He speaketh of it as a thing of story, and these were for foreign wars, as so not to our case. Oh! but it was admitted every man was to keep arms. 13 Ed. 3, 11 H. 7, cap. 18, and whilst they are in their own counties, to be drawn out of their own charge; but not to be drawn out of their own counties without wages.

Henry the seventh, afraid of his own title, makes a law, that no man should be questioned for being with the king in arms: this was to take away the occasion of the people's talking, whether they went upon just ground.—That many armies have been paid by the king. 2 Ed. 6, cap. 2, 28 Hen. 8, the rebels in the North the king promiseth satisfaction. 11 Hen. 7, cap. 1, the duty of the subject is recited in it.—What argument is this? We shew in all ages where the king commanded his people to attend him or his lieutenant, and you tell us that he paid other armies. 19 Hen. 7, doth extend to wars without the kingdom, as well as within. 11 Hen. 7, this last did expire with his death, this doth appear plainly, this was by especial gift by the king. 4 Eliz. Dyer 211. Expressly it did not extend to the service of any other king but him.

25 Ed. 3, cap. 8. None constrained to find men at arms, but those that held by such service. This must be understood with relation to the tenure, they were not to come upon common summons for escuage; but when the whole kingdom was in danger, that they should not come, was no excuse.—Oh! 26 Ed. 1, Reygnod de Gray durst not levy men without pay.* The

* Baronibus elegendis pro hominibus Scot.

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marginal note clears this, and so no part of our question; and it appears by Walsingham, fo. 74, 75, that the king was actually then in Scotland, where he fell from his horse, and lost two of his ribs.

In the next place they say, Trin. 31 Ed. 1, there is a refusal to go without pay. The wardens of the marches of Cumberland and Westmorland writ to the barons, that whereas the Scots lay near the marches with a great army, that the people would not march out of their counties without pay.—This is easily answered; there were the East marches, and the West marches of Scotland, several counties belonging to each: what reason had they to go out of their own marches, unless they had money for the keeping of them in their absence? Rot. Pat. 10, or 11 Ed. 2, pars 2, m. 26, for war of Scotland, 9 Ed. 2, the same discharged in the county of Norfolk. 13 Ed. 3, m. 38, the abbot of Ramsey, because he remained in his own county, discharged; it was no absolute discharge, but *dum se intendit*. 21 Ed. 3, Rot. Franc. Some are discharged from the custody of the sea, because they were *prompti* at home; some for finding hobellers and archers, and this was by reason of a grant in parliament; some were discharged, because of their stay at home to guard the coasts. This proveth the right of the personal service, and of the contribution.

Another objection is that of 21 Ed. 3, Rot. Franc. that they should not be kept continually in array, but suffer them to stay in their own counties; but they were to go as soon as there was any notice of an enemy.—This was for the wars of France, and not for the defence of the kingdom. Oh! but 20 Ed. 3, m. 6, Rot Scot. there were 'Exploratores et vigiles,' which were 'Incolarum;' but how 'de assensu et voluntate?' But this was nothing, for it was with assent in the Northern parts, and had been done in former times against Scotland. Then the 100 Roll of Feversham, which I conceive rather maketh for us, than against us; for the castle of Tunbridge is to levy 15*l.* for the king, *pro salvatione* of the castle, and to levy it by distress. 14 Ed. 4, cap 19, the king could not compel the subject to sell victuals for wars, nor to provide for the castle in the town, 29 Ed. 1. That was for Scotland for payment of victuals, and who can command a purveyance but the king? and that of the castle, it was the victualling of his own castle, and subjects were bound to victual their castles, 8 Ed. 2, rot. 99, the marches provided for victuals, and particular men paid for victuals, but they do not shew from whence that money came. The next is horses for the king's service marked, that if they were lost they might be satisfied for. 24 Ed. 1, Robert —— lost a horse worth 20 marks, and received satisfaction in the Exchequer, somewhat also for wages, m. 26, Ed. 1, rot. 105, 106. That is only a Concordat how men should be paid, what the horsemen should have, and what the footmen; for Yorkshire, Northumberland, and Cumberland, were to have no wages from the king, but to go against Scotland: yea, that is another thing, 'si contra Scotos;' and that distinction, upon stating of the case, will go throughout 14 Ed. 3, 34. for castles. 24 Ed. 2, 72, 78, dors. John de Sandell. Berwick was taken from the Scots, and for furnishing of Berwick castle, the people are compelled to trust him. Oh! but the prisoners taken in the war, and hostages, were at the king's charge. 8 Ed. 3, allowances in the Exchequer for it. 5 Ric. 2, cap. 11, examined in the Exchequer.—The king, if he hath a prisoner taken in the war, he is to have his ransom; shall not the king pay for his charge? 4 Ed. 2, Rot. 12. Roger de Salvage, a Scotish prisoner, the king bore his charges; so because the king payeth the charges of a prisoner for which he hath benefit by his ransom, therefore he is to defend the kingdom.

Dyer 162. A man in execution cannot be forced to go to war.

Our writ doth not desire to send men in execution to go to war, for there are enough besides them. Then they object the borrowing of money, and the king paid again for it, *pro negotiis urgentissimis*. The king may have occasion to borrow money, and reason he should pay it; nothing to the question.

But the case is, whether all the people, for their wives, and for their families safety, and for the safety of the whole kingdom, may not be compelled to contribute to it? The abbot of Gloucester gave money to maintain a damsel, the king took his money for the present, and paid it back again. This was *ad exonerand' conscientiam*: that for things taken away without warrant, the minister should answer for it, not pay and repay, but shall hold themselves satisfied with reason. But they object, that 26 Ed. 1, a commission went out to inquire, 'de 'rebus captis, sive pro custodia maris, &c.' and the king saith, that 'il fera taunt que se 'tenderont a payse pur reason.' True, 'se 'tenderont a payse, &c.' which is not to be understood, that the king will pay or repay; but that they should hold themselves satisfied 'pur reason,' that is, he would give them reason why they should be satisfied.

The Third Day's ARGUMENT of Sir EDWARD LITTLETON.

May it please your lordship; I shall go on where I left; only inform you of one Record, 1 Hen. 4. The writ that went for the array of the bishop of Canterbury, which doth recite, that whereas there was danger upon the sea, he and all his clergy should 'manus apponere 'adjutrices.' I speak of this, because it was at so low a time as Hen. 4, and it was, 'pro 'salut' populi.'

Coia' Pl' 14 Jac. Between Weaver and Ward, command came from the king and council, that the Train-bands in London should be mustered for the training and making of them ready to defend the kingdom. One in the training hurt his companion, and he thereupon brought his action against him: and this was pleaded in bar, that he was mustered by

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pecial command; and this was adjudged a good justification, because it was for the preservation of the land: 28 Hen. 8, which recited that the king did pay them in Lincolnshire; but for the other, he saith, that he shall remember their pains.

I shall now go on. It was objected, that by the statute of William 1, the people should enjoy their lands freely, 'sine omni injusta exactione sive tallagio.' This was for money to be received for a general thing; but that it was not for this thing appeareth in one chapter, that knight-service tenures should do what belonged to it. The rest 'sunt fratres conjurati ad monarchiam Angliæ defendend': 14 Ed. 3, chap. 1: 25 Ed. 3: 1 Ed. 1, Walsingham 184. All these are set aside by the statute, and concern not our question. Ours is rateable and proportionable, according to old practice. And it is one thing to compel a particular man, and another thing to set an equal rate upon the whole kingdom.

Ult. Feb. 3 Car. A Commission of Loans for the Defence of the Kingdom. They mean the commission, which was a consideration to levy monies, by reason of the necessity of the times. It appeareth in the Journal Book to be for impositions, or otherwise to raise monies not concerning this question. It appears by that, that the king gave a gracious answer unto it; and that it was done for the present time only, a warrant for advice only. It was done to raise money in general; but no determination of right, and said, at your desires it shall be cancelled. Then there was a commission for Loans, 5 Feb. 2 Car. and this they say was for the defence of the kingdom. It appears it was for the defence of the Palatinate and Denmark, and for that a bishop was sentenced for his mistaking; Mr. Pym brought up the Articles against him.

I shall now come to an objection, worthy the making by Mr. St. John; and because it is a thing not truly understood, but taken at random, I shall crave your lordship's patience: and that is the statute De Tallagio non Concedendo, 25 Ed. 1, made after the king went into Flanders, and agreed upon here by the prince as viceroy, and afterwards sent into Flanders to be sealed by the king, as it is put in some books. The words are general: no Taillage to be taken without the consent of the lords in parliaments. For this I desire the liberty to inform you of the story of the times, to make a better answer. This is not all, in some Statute-Books it is not mentioned; in others, no king's reign mentioned. And in Ed. 1, no year of it, and now they would apply it to the 25 Ed. 1, and this they would ground upon the compelling of Aid, 23 & 24 Ed. 1. And the commission in 24 Ed. 1, did issue upon that, and consequently that this aid was the aid complained of, and then redressed.

Walsingham, a monk of St. Albans, they rely upon for this, that wrote some seven-score years after the thing was done. Sir Edward Coke saith, Chronicle Law is not much to be regarded. True, he saith, Chronicle histories may shew us the times, but if it tell us what the law is, we are not to believe them. No historian, that I ever knew yet, ever read the Records, and therefore no true history; for the most part they are taken up in Paul's, or the street.—To take something in consideration, by way of stating the case, upon the statute Confirma. Char. and the other De Tallagio non Concedendo, that is, that no aid shall be levied but by consent in parliament.

The first statute is, that no such aid shall be levied, the nature of it, and the acts themselves rightly compared, there remains no scruple against the case. Three things for the true understanding thereof must be considered. First, What kind of aids had been in use before 25 Ed. 1, and for what they are taken. Secondly, How and what remedy was given by that statute. And, Thirdly, How far that statute De Tallagio non Concedendo is in force and authority in this case.

For the first, it appeareth in the common story, that in 21 Ed. 1, the king of France had seized all the duchy of Gascoigne, upon pretence that he did not appear at his parliament at Paris upon a summons. Thereupon the first took a course for the regaining of his duchy, and the war continued with various success, till 25 Ed. 1. And he had also war with Scotland and Wales. For though Wales was taken 12 Ed. 1, yet there was one Madox who pretended himself to be of the blood of the prince, till 23 Ed. 1, and till that year they were not quieted. And he having all these wars against Flanders, Gascoigne, Scotland and Wales, some at one time, some at another, and most altogether, divers aids and supplies were taken upon these occasions of several natures; some were by voluntary grants of the people, some were by impositions and levies by the names of taillages or taxes to be paid to the king, some by assessment of lands, as the abbot of Robertsbridge, 25 Ed. 1. All this appeareth by the commission to enquire of extortion. And besides all these, some by prizes of goods and money taken from the possessors without any payment, rates, or taxes. Nay, there was then ransacking of the monasteries, and taking of the monies found there; Mr. St. John's case for money taken out of their treasury: and besides all these, there were some by way of ransom, as Mr. St. John rightly observed, and shewed his learning and industry, that the clergy upon their denial were put out of the king's protection: and they did ransom themselves by giving a fifth part of their goods. Pat. 25 Ed. 1, m. 11, pars 2. The people being thus grieved with such aid and prizes so extraordinarily taken for the maintenance of foreign war, obtained that it might be enacted, that such aid in a relative term may not be granted nor taken without their consent, by the statute of 25 Ed. 1, and Confirma' Char. Observe this one thing, the markets of England three years before had granted the king *subsidium pro*

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guerra, upon every sack of wool five marks; three marks upon woolfells; upon every pack of skins five marks: and this was granted of their own free-will, and this was to continue for two or three years: 22 Ed. 1, m. 2, Sine Roll. where it is there relicted. Next year, before Confirma' Charta, all the laity, except cities, boroughs, and ancient demesn, had granted to the king in *subsidium pro guerra*, the 11th part of their goods, 24 Ed. 1, m. 2, Pat. pars 2. And the summer before Confirma' Chart' an 8th granted by all the laity, except the cities and boroughs; and they granted a fifth, and this was still for the war, 25 Ed. 1, m. 11, Pat. The application is this: Those many aids of these several kinds having been granted for the war, divers men of that time did doubt and fear, that however they meant it but for a certain time, yet being not so clearly expressed, it might bind them for the future; and that they so doubted, appeareth by Confirma' Char'. And forasmuch as divers of our realm are in fear, that the aid and taxes which they have given us before time towards our war and other business, of their own gifts and good-wills, might turn to a bondage to them and their heirs; and likewise for the prizes taken, we do grant for us and our heirs, that we shall draw no such aid, taxes, nor prizes, into a custom, for any thing done heretofore, be it by rule or any other precedent that may be found.

Then my lords, for no occasion such manner of aids, taxes, or prizes shall be taken but by common consent; but it endeth not so, saving the antient aids and prizes due and accustomed. This being the state of the case, be pleased to observe the complaint of the people; this kind of aid, it is plain, was never meant there, when 'salus populi periclitabatur,' and may be levied notwithstanding the statute: for the act is only against such kind of aids as had been voluntarily granted by the people, some by merchants, and some by others, that they should not be taken against their wills hereafter, but by consent in parliament. *Such* is a relative, it is not general no aids, but no *such* aids.

Secondly, it refers to those that were voluntarily granted to the king for Scotland and Wales, and his other wars. And another reason why these aids that had been for the custody of the sea, could not be said to have come of their good-wills: for observe the abbot of Robertsbridge's case, it appears plainly it was done against their wills, for the custody of the sea, by virtue of the king's writ.

August before Confirm' Char' those that had given an 8th part, they did obtain expressly letters patents, that such their free gifts, hereafter might not be *in servitutem*, 25 Ed. 1, that is the very thing doubted in Confirm. Char'. Now those that had granted an 8th had no reason to do it, for they had a charter to free them, but the other had not: and therefore the statute might well say, some did fear. So upon the whole matter, there are no other aids but these voluntarily granted at that time, none in the body of the act but those granted with a good-will, for those foreign wars; and the forty shillings received by the king upon every sack of wool, with three marks granted 22 Ed. 1, was by the merchants only for the war in Gascoigne; and thereupon it was enacted, that the king should not take such things but by consent.

There is also in the statute Confirma' Char' an exception, that all antient aids due and accustomed were excepted; and therefore what kind was meant in the body of the act, the exception makes clear, antient aids excepted; this was an ancient aid; and therefore never meant there to introduce a new law, that no aid should be taken, but no *such* aid. No imposition should be taken; but the practice of all ages shews this hath been levied ever since, from time to time, which is an interpretation of the words of the law. This I do open, to make way to the statute De Tallagio non Concedendo. Thrice in the statute is this word (such) but that they should make use of that statute De Tallagio non Concedendo, of itself, without relation to that; whereas it will appear it is a mere extract out of this, and no statute itself: for debate of that; this De Tallagio is the same with that Confirm' Char', it is a plain extract of it, or some other thing at some other time. Sometime in some printed book, 'nullum Tallagium,' no aids shall be taken by the king: sometimes without notes of time when made, and at the best it is no more, but it is said it was made in the time of Ed. 1.

If we shall compare Confirma' Char'. and the articles that were in this, we shall find it to be nothing but an extract out of that statute, and that it was no act of parliament. And to make it appear it was an extract taken out of it, observe the general heads, De Tallagio non Concedendo. First the charter against prizes. Secondly, Another against wool. Thirdly, A general confirmation of the laws and liberties. Fourthly, A pardon to divers lords there.—These are the things in which they would make it a statute of itself, all expressed in Confirm' Char' they do not differ in substance. A sixth head is the very year of the 25 Ed. 1, for the pardon of those lords was made 5 Nov. 25 Ed. 1, this same was sealed by the king word by word, proved by the statute-roll, the very same roll that hath Confirm' Char'. the next fol. The monk did mistake this statute. No man will believe a monk, that wrote sevenscore years after, against a record.

I shall shew what was sent over into Flanders, and that was Confirm' Char. and did bear date the 10th of October, the king being then in Flanders, and was there sealed by the king himself. That it may appear, there is no manner of question of it, here is the very copy of the statute-roll; and the whole Confirm. Char'. is recited *verbatim*, in witness, 10 October 25, of our reign: whereas Walsingham saith, that this very charter, word for word, was sealed in Flanders, under the great seal of England, 5 Nov. 25 of our reign, and sent back into England. For the statute-roll

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against that time, doth expressly say, that this was the charter that was sent over into Flanders, and hath the same teste, word for word: and this was sent back into England to confirm it further. The next thing that followeth upon the same date and roll, is the pardon of the earls; this was dated 5 Nov. after this Confirm' Char. was sealed.

They have not yet shewed that this statute De Tallagio non Concedendo was ever entered upon the roll; nay, it could not be entered: who would think that an extract of an act of parliament should be entered upon the roll? If they can quit Mr. Walsingham, they are wise men: they must carry the practice of all times. Where did any man see that this act of parliament was ever shewed to discharge men of the defence of the kingdom since 25 Ed. 1? Did no body know this mystery to plead, not to defend the sea and their land? Did no man hear of this till now? Shall this, against all the practice of the times ever since, take away such a flower of the crown, as to compel people to grant aid for the defence of themselves? A harsh construction!—If this should be true, it would destroy even acts of parliament: to what purpose is that statute made of the 25 Ed. 3, if that were totally taken away before? and if no aid, these aids 'Pur fille marrier, &c.' are taken away also. Nay, if this be an act of parliament, when was it made, before the 25 Ed. 1, or since? It appears not when: it is *indivigum vagum*, I know not what, but in truth an extract. Nay, if this be an act of parliament under these words, no taillage is equivocal as well as aid; that is proper taillage that is laid upon villages. 25 Ed. 3, 100 Avowry. Entries 406. b. 8. Ed. 2, Execution 15 Ed. 3, 106 Avowry. A rent may be released by the name of Taillage: no mention of this in all ages.

Then it was objected, that 25 Ed. 1, m. 7. pars. 3, expressed in the king's proclamation 12 Aug. before ever he was going into Flanders, that he was sorry for the aid demanded of his people.—Let him remember for what reason he did demand those aids which he was sorry for; they were aids granted not for the defence of the kingdom alone, but for the defence of the kingdom mixed with foreign defence by reason of wars with Gascoigne, Wales, Scotland, and elsewhere; for that it was for foreign wars. Upon this followed the commission, 26 Ed. 1, Pat. that went to all the kingdom, which makes for us.

There are three parts in that commission: 1. To observe if the officer did any thing without warrant, they should return it. 2. If done wrong, the king would answer it. And, 3. They should be satisfied with reason if the king did warrant it. The answer thereunto given was upon another construction made of the words of the record in the parliament 2 Ric. 2. The cause was this: the chancellor declaring the cause of calling the parliament, he doth shew, that the king, in the end of the last parliament had assigned some lords to be of his continual council for the year following; the number was seven that were assigned, and they were sworn to give good counsel for the aid of the kingdom. These counsellors treating of the peril of enemies from all parts, and the matter requiring dispatch, they durst not undertake the ordering of so perilous a thing, therefore ordered a grand council to be assembled. The grand council was assembled, to whom was shewn the great peril and mischief of the kingdom apart, by war, by land and sea; and that nothing was remaining in the treasury for the maintenance of war: For a final conclusion, that they might remedy this mischief, they say, that it cannot be done without parliament; this was the English of it, and in the mean time an army might be landed: And for the present supply of the charge of such an army, they lent the king great sums, which by great security and other things, he did engage himself to pay; Upon this the lords did advise how it might be done with the least charge to them all, and how the king's right of his crown, and other inheritance beyond the seas might be safe, and the king, kingdom, and themselves defended, to the confusion of all their enemies: To this purpose the treasurer was directed to be ready to shew what was expended the next parliament, to be bestowed for the marches of Scotland, Wales and Ireland; and said in that great council, they could not remedy that mischief without charging of the commons, which cannot be done, say they, without parliament. —It is plain, by the story of that time, and the words of the chancellor, that it was for the maintenance of the war in France, Scotland and Ireland. And though the defence of the kingdom be mentioned with these wars, yet the main supply was for these foreign wars.

In the next place, a little before in the parliament, the like aid for the like occasion was desired by the king, 2 Ric. 2, m. 24, 25, Parl. Roll. What did the commons say now? They ought not to bear such foreign charges. The king gave them a fair answer, admonished them, for Gascoigne concerned the kingdom of England, for that is as a Bulwark to the kingdom of England: Burbacon is an old Fort de Hors; for the aid demanded in that parliament was with this relation as consonant; both together concerned the defence of the kingdom, that they might be bulwarks for the kingdom of England.—In the next place, who spake these words? The lords, said they, could not remedy the mischief without a parliament. The lords assigned by the parliament, they must not do it; it is dependent upon the other part, the lords could not do it that way.

But shall we come home, and speak plain English? We know this was 2 Ric. 2, a young prince. It doth appear expressly, that these things were brought into the parliament for advice, which were fit for royal authority, for expence for wars, and for counsel, and for governing of this realm. It appears further, by the very chancellor's speech, that the council had been heretofore ordained for the guarding

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of the kingdom, 2 Rich. 2, Rot. Parl. This parliament taking notice of the king's tender age, they took much power unto themselves. There was to be a council for the governing of the kingdom in general; but the counsellors should be chosen to govern the state for two years, and these counsellors not to be removed from the king without the parliament; and more than that, his treasurer was to be governed by the parliament, and his counsellors chosen in parliament.

At the end of the Petition of Right, neither lords nor commons, jointly nor severally, can make a new law without his consent; and that your lordships, and none but you, are the interpreters of the law, wise king James did declare.

The next thing considerable is, *tempus belli* to defend it. It is when the condition of the time is such, that the current of justice and law is by such violence stopped, as judges do not sit, nor sheriffs dare execute their office, nor any court is open, especially the Chancery, which is Officina Justitiæ. It was said there was a time when the king might command this levy, to which they did agree: They did agree the king might command this levy when he hath proclaimed a war, though no stroke strucken, no danger, nor armies, nor opinion of any force coming; this doth put it into the king's power by their own consent. And by all reason, 19 Ed. 4. 6. Brian's Opinion. How many wars have been proclaimed in this latter age? No war denounced in 1588, though consulted of in Spain; and they did not think fit to denounce a war, saith sir Walter Raleigh; those days are past. Now they begin by the sword, not by the trumpet or herald.

In the next place, they say, if the king be in the field with his banners displayed; this they say was *tempus belli*. Cannot the course of justice sit then, but there must be a peace? 39 Ed. 3, Rot. 10. Did not the court of justice sit then? Our ordinary printed books shew what causes of law then were. And in Henry 6's time, in all our civil wars, and in Henry the 7's time, they sat then. But the true time, to make it *tempus belli*, is to make a war against the king.

In the North, towards Scotland, when the enemy approaches, is it necessary that it must be a time of peace, because the court of justice sits at Westminster-hall? There may be then a strong war in the North and West, as ever was in England, when the court of justice sits here. That *tempus belli* may be in some places of the kingdom, and in some places not, appeareth 33 Ed. 3, and who shall discern if there be any danger?—They agreed in general, the king may do it, and that the power of discerning is in his majesty: I shall leave it in the king, till Mr. St. John finds a third person to do it. 13 Hen. 4, for the murage, they say that this doth only charge those things that are *venalia*, for men are not compelled to go to market. How shall they then live? True, it is not compulsory to go thither, but it is compulsory to pay the money.

1 Ric. 2, m. 176, pars 2. A petition from the city of London, to have all owners of lands to be rated with them in the danger of wars, not having lands in tenure to do it.—This doth make for us; that not only merchants, but every man in the lieu of tenure to do it. The lord St. Albans saith of Henry 7th, that kings may fall from their absolute power when they see cause, but not be compelled to do it. They say supplies are called those things, *sine qua non* the kingdom may not be defended: And because there is a way by parliament, therefore no other way.

They say, it will not be affirmed that the king hath the same power for an offensive, as defensive war; I affirm, nor defend nothing; the parliament is a great body, and the kingdom may be lost in the interim. Then they alledge there is forty days for essoinage, and the like for parliament. Many times things are impossible, and inconvenient to be done by parliament.

First, impossible; the necessity may be such that it will not brook the delay of a parliament. 48 Hen. 3, summons to the Cinque Ports. They come day and night to the king when any danger is. It hath been said, that there are seven months between the teste of the writ and the ships being at Portsmouth; in that time a parliament might have been summoned. The great one, and the true answer is, that this resteth still in the king's judgment. If the king hath intelligence that foreign states will set out the next spring a fleet, and for conveniency of his people sendeth seven months before-hand to raise this aid; hath the people any cause to complain of this? Mr. Hampden hath not paid the money yet, being two years after.

If they should have gone by parliament, see what rubs in this case might be. Forty days are spent before the parliament sits: Then when they meet in parliament there is a ceremony in choosing of a Speaker, solemnities in these take up time: Then the lords take things into consideration, then they must have conferences and dispuses with both houses; before they agree, the kingdom may be lost: In the mean time, suppose this comes in some reasonable time, to make assessments first in the cities, then in the burroughs, then particular assemblies, then divisions; and after all this, there must be collectors appointed to levy the money; what a great deal of time is spent in all this, every man may see.

Our county, say they, is an inland county, and they cannot find a ship suddenly; and therefore the greater the king's mercy and favour to lend them his ships instead thereof. When all this is done, and ships provided, reasonable time must be allowed to sail from the North to Portsmouth; but this doth solely rest in the judgment of the king.

31 Hen. 8, cap. 8, an act of parliament not to take away any of their inheritance or lands. Here is no lands or goods taken away; only let them contribute to the defence of them-

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selves, and all is done. Mr. Hampden hath had none of his goods touched. They say, for shipping it was done in king John's time at the subjects charge; but they do not meddle with land-service at that time. 15 Johan. 13, dors. Rot. Claus. king John had business beyond the sea. That this was rather for beyond sea, than the kingdom, appeareth thus: The writ saith, to have such ships as would carry eight or six horses, and that must needs be for some foreign service, and not for land-service at home. And it appeareth, Rot. Claus. m. 1, dors. the king was well landed at Rochel.

For the terms of the law, which concerns hidage and other things, Bract. 37, and some services introduced by common consent, I will not trouble you with it. To come to the case of the abbot of Robertsbridge, that arms was laid on by the statute of Winchester. That will not serve, arms was long before that time. They say the assess was in time of war; the French had burnt Dover, 23 Ed. 1, and that the assessment was not made by the king's authority: but it appears it was by the king's authority, by virtue of his writ, 25 Ed. 1, Lo. Treas. Rememb. Leybourne was admiral of all the kingdom; and was Custos Maris et Maritim' for some parts: but that it was for land-service, and not for sea-service. Custos Maris et Maritim' are terms convertible; he that doth one, defends the other. They have left no stone unturned to take away the force of this case. They tell us now, the clergy was put out of the king's protection this year, and so it appears in the Exchequer; but they have not shewed any such writ delivered into the common-pleas, only Spencer's word of mouth, that they should have no privilege there. Suppose it were so in other courts: 25 Ed. 1, it appears plainly, that the clergy came all to be in the king's protection, and gave ransoms: and this cause was not till Michaelmas after. And whereas it is said, this abbot's case did only concern the land-service, it proveth both the one and the other; money for the sea-service, horse and man for the land-service.—Oh! they say, 29 Ed. 1, Mag. Char. was not observed; and instanced John de Gray and Philip's case. Whatsoever was the practice of that time, is not material. And for that of the Charter of the Forest, they say, though it be there said, 'Nullus emittat vitam vel membrum 'pro venatione nostra,' yet one was beheaded.

But what is all this to the safe custody of the sea? Nay, they have not shewed your lordships, that there was any thing in that great charter for the custody of the sea. 51 Hen. 3. fol. 84, Britt. 117, Flet. et Fitz-Her. Lord Coke on Littleton. Perhaps question might be about this in the exchequer at this time, the case of Shoreham discharged of land-service, because they found shipping. They that were nearest danger most fit for that defence; as the king, in the tenth year of his reign, sent only to maritime towns. 2 Ric. m. 42. They say Beverly was discharged, because it was an inland town, therefore no inland town ought to pay. A writ directed to William Russel, admiral, commandeth only the sea coasts.

13 Ed. 3, m. 35, Rot. Claus. Part. 1, afterwards discharged, because of other service. And for that of Beverly, a complaint that they were to contribute to such a town to find a ship; they say they have privileges, but the special reason why it was freed, was for reverence the king did bear to St. John de Beverly. Mr. St. John knows it; 120 ships granted to the two admirals, North and West, for service beyond the sea. 31 Ed. 1, 'de inveniendo' horses, because of great business in his wars abroad, he bound them to make galleys for foreign service. True, the king at this time was in Scotland, and kept his Christmas there. Then come to 31 Ed. 1, as though he should do it by service of the Cinque Ports: Newcastle upon Tyne at their own charges: but when into Scotland at the king's pay, then they came to this. 10 Ed. 3, m. 6, Rot. Claus. sent for ships into North-Wales and South-Wales; the writ did say, that wages used not to be paid for such service; and did express in his writ, satisfaction should be given unto them, not of right, but *de gratia*: and reciteth that clause, that the people were bound unto it. 2 Ed. 3, 16 dors. That there should be three hundred pounds to relieve the fishermen, the king should not have it of the people of that town. They say all these records being matter of fact, did occasion the making of many statutes of redress. 14 Ed. 3, cap. 1, great aid for Scotland, France, and Gascoigne; 15 Ed. 3, m. 9, contrary to Mag. Char. 22 Ed. 3, m. 4, 36 Ed. 3, m. 9, no goods to be taken without consent: these are things comprehended within the Petition of Right. 37 Ed. 3, m. 2, speaketh only of the great aids. 23 Ed. 3. Galleys made; they say the king paid for them: that is, upon the king's own promise; but they say that is *nudum pactum*. Then they say, is the king's word nothing? 13 Ed. 3, m. 9, called a parliament, propounded as on the king's part; they are not liable to the defence of the sea. If the commons have nothing to do with the guard of sea, why is it propounded unto them?

20 Ed. 3. m.—That the guard of the sea henceforward be made at the charge of the king, as hath been promised, and there the people discharged. They do not affirm in their own case there was any right. 21 Ed. 1, rot. Franc. m. 9. 2*s.* on merchants wools, and 6*d.* poundage for a certain time, and to cease *tam quam*, &c. 22 Ed. 3, 2*s.* upon a sack of wool may cease. All these things were granted for foreign wars; and if the cause should cease, then the thing should cease. 2 Hen. 4, commission for building of galleys, the king would confer with the lords about it: then 19 Hen. 4, 17, 21. touching the guard of the sea, not bound unto it.

4 Hen. 4, 28 m. Tonnage and Poundage not to be taken without common consent. A protestation of the commons doth not bind the king, and concluded with *nullum tempus occurrit regi*.

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of the kingdom, 2 Rich. 2, Rot. Parl. This parliament taking notice of the king's tender age, they took much power unto themselves. There was to be a council for the governing of the kingdom in general; but the counsellors should be chosen to govern the state for two years, and these counsellors not to be removed from the king without the parliament; and more than that, his treasurer was to be governed by the parliament, and his counsellors chosen in parliament.

At the end of the Petition of Right, neither lords nor commons, jointly nor severally, can make a new law without his consent; and that your lordships, and none but you, are the interpreters of the law, wise king James declare.

The next thing considerable is, *tempt* to defend it. It is when the conditio time is such, that the current of justic is by such violence stopped, as ju sit, nor sheriffs dare execute their o court is open, especially the Ch is Officina Justitiæ. It was s time when the king might co to which they did agree: T king might command this proclaimed a war, thoug no danger, nor armies, r coming; this doth put by their own consen Ed. 4. 6. Brian's have been procla war denounced in Spain; and nounce a war days are pa not by the

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1 Ric. 2, m. 176, the city of London to be rated with not having lan make for us man in the St. Alba fall fro cause sup th

areth for the e date of the it charge the of a ship o. rt, hath bee the king fro- d preservation ssarily and un- commanded by such an aid b serving of the I confess there ight. de, I shall take ings taken in not argue if I ast, in the king's judg- d preservation of the king- ngered 4 Aug. that is, that the as in danger to be lost. If it be so e kingdom was in such danger, and that danger was so instant and unavoidable, that it necessarily required this aid by this writ; that is, it required a present change of shipping presently, 4 Aug. 11 Car. to be forthwith commanded, and that occasion could not expect a parliamentary consideration and supply; these be things wherein we differ. And, lastly, for the truth of it, the certificate was sufficient in a legal way.

My lords, to find out whether the record doth warrant these three things of great importance. First, I shall seek for them in the writ 4 Aug. and next in the Mittimus; there is no other elsewhere to look for them. To open the writ rightly will clear these differences, as I humbly conceive, without any great argument. As to first, for the writ dated 4 Aug. 11 Car. I shall read the words, wherein the danger of the kingdom is expressed, and then explain what words give that sense that is taken out of them.

'Quia datum est nobis intellig' quod pra-
'dones quidam pirati et maris grassatores tam
'nominis Christiani hostes Mahumetani qui
'alij congregati, naves et bona et mercimo-
'non solum subditorum nost' verum etiam
'ditor' amicor' nost' in mari quod per gentes
'Anglicanam ab olim defendi consuevit nefa-
'diripientes, et spoliantes: ac ad libitum su-
'deportavere homines; in eisd' in captivitatem
'miserrimam mancipantes. Cumq; ipsos cu-
'spicimus navig' indies præparantes ad merca-
'tores nost' ulterius molestand' et ad regn' gra-
'vand' nisi citius remedium apponatur, eorum
'conatui virilius obvietur. Et considera-
'etiam periculis quæ undique his guerris' tem-
'poribus imminent, ita quod nobis et subd-
'nostris defensionem maris et reg' omni fe-
'natione quam poterimus accelerare convet-
'nos volentes defensione reg' tuitione ma-
'securitate subditor' nost' salva conductione
'navium, &c.' Here are the causes and oc-
sions; all that comes after is not material to the stating of the question.

My lords, in the opening of this writ, it is true, there was mention of loss by merchants, some particular members of the kingdom. As-

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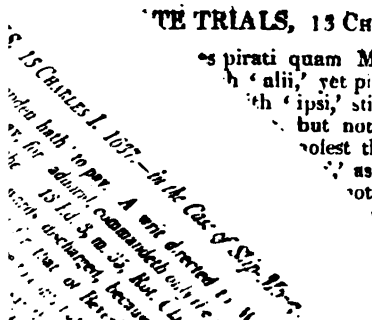

es pirati quam Mahume-
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parliament, even in the king's
ight have been called, and conside-
aken for a defence. Here be all the
ises upon which the conclusion must
arise; and hitherto nothing material to make
a danger to the safety of the kingdom, and so
instant, that a supply *nunc aut nunquam* must
come in.

Although the premises, I conceive, are only considerable, yet the conclusion will be but this, *convenit accelerare;* but it is fitting to hasten: but no such necessity, though it be 'convenit 'accelerare pro defensione reg'.' If that were material, it cannot be construed, but with relation to the premises on which it is built. And whether in fear of trouble, or danger, or loss, *non constat:* and though it be 'cum omni festinatione,' yet it is '*qua poterimus*;' and that is 'possimus quod jure poterimus;' that is, with all the haste that by law you can make: which way this is, your lordships have heard. Now, my lords, it appears on the record, that there was no such instant necessity, but that a parliament might have been time enough; for that it was observed between the test of the writ and the rendezvous, there were 200 and odd days, whereas a parliament requireth but 40; in the remainder of these 200 days, the parliament might have considered of the means of defence. But I leave it to your lordships to judge, notwithstanding those expences of time cunningly reckoned up to your lordships by Mr. Solicitor; and though it be true, that things are oftentimes long in deliberation, yet nature tells us they can be sooner. If there be a necessity, we know that will force.

I have but opened this writ 4 Aug. I am now come to the Mittimus: The only doubt which I conceive in the Mittimus is, that where the case stands but thus, in this writ is recited the tenor of the writ 4 Aug. and then the writ goes on, and saith, 'Quia salis' reg' periclita-'batur,' and that is all the clause in the record that gives colour to the case so to be made. And to the whole record we have demurred.—Here it hath been said, we have confessed all by the demurrer; and if that hold not, the king, who is the judge of the danger, hath said so, he hath certified so under the great seal: and on these depends the weight of both these processes.

To this I have many answers, but I shall select a few from many others, on which I shall 'v. My first answer is this; here the words that 'Salus reg' periclitabatur.' These 'n shew seem to be positive, but in sub- but relative; and are rather but a com- nt on the writ, or an abstract in point of those dangers mentioned in the writ, for the clause was brought in on the return of the writ; and if we have the writ itself, the comment thereupon, or further explanation thereof, is not material. My second answer is; I doubt, I say no more, if the king put particular reasons into the writ 4 Aug. whether the law, I speak of legal course, doth permit any after writ to put in further clauses of the same nature with the former, to the same end. If the case be thus, then our demurrer will be no confession of any such danger.

In the next place, admit the words in the writ had been positive, and materially expressed; yet, according to our rules of law, it cannot make use of that sense they are now applied unto: For the best, the word 'salus,' being only proper to a physical and natural body, is applied here to a body politic. It is but a metaphor, which the law will not endure in writs, for it would bring in great mischiefs. In writs and in pleadings, metaphors are dangerous: We know not how to take issue upon it, and therefore it is not regularly allowed; but I leave it to your lordships judgments.

There are no words of the danger of the loss of the kingdom, that is, such instant danger; for apply the words to a natural body, as *salus* J. S. is in danger, it doth not presently imply, that he is in such instant danger of death. A doctor will say a patient hath not his health, yet no danger of death, it is the common speech; the same sense it must have in a body politic. If the words were good, and did imply a danger, yet not such a danger as may hazard the loss of the kingdom; for the words are only 'Salus reg' periclitabatur,' and the thing may be never in action, which twenty years hence may lose the kingdom. A man may say, that the safety of the kingdom is in danger. At the best, the words will not make the case as it is put.

Mr. Solicitor, out of his great care, searching into every hole where he thought we might peep out, doubting our demurrer would not be a confession sufficient, he takes in another help, which is this, that if this be so declared by the king's opinion, and under the great seal, that this alone had been sufficient. For this there hath been urged, the legal weight of the king's

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affirmation, and of a certificate under the great seal; and both be concluded in this case.

My Lords, before I answer to this matter, I profess, for my client and myself, that we make no doubt of the king's word, and believe there was danger, though not so apparent to us; but only loth to allow it as sufficient in a legal proceeding, lest what his majesty, in his own worth deserves, by after princes might turn to a disadvantage. That which we urge is, how far in form of law this may be allowed, we shall argue, and that briefly, for the case needeth no help. For this point I take it for leave, under your lordships favour, that in legal proceedings, and regularly, his majesty's opinion, and certificate in things of fact, is not binding. Yea, but they say, it is matters of state and government. For that, to ask the question, whether or no raising forces thus is left to his majesty, that stands and falls on the main cause.

My Lords, I do agree, in divers cases the king's affirmative shall be conclusive in matters of fact, that is, when it is not so triable elsewhere; as in a writ De Rege inconsulto, to stay proceedings, when the king certifies matter of fact, the writ must be obeyed, but then, withal, the matter is triable elsewhere. But these cases will not match ours. As for that great case 20 Ed. 1, concerning the lords marchers, that the king was 'Recordum superlativum,' to say no more. it is but an allegation of the king's counsel.

My Lords, the reasons whereon I shall most rely, to avoid the sense of the writ, 'Salus reg' 'periclitabatur,' is thus, That though it doth now appear by the Mittimus, that 4 Aug. the kingdom was in danger of being lost, yet it is not sufficient in law, nor can our demurrer hurt us; because it must have so appeared in the writ, 4 Aug. itself; for the writ and declaration in law must ever contain precisely so much of matter as is necessarily true to warrant the demand.

In this to see the mischief, if a danger now declared makes the case, how shall the subject know by the writ, 4 Aug. whether to obey or no? The law binds not a man to divine: And if this subsequent declaration shall mend the case, then the subject shall be a wrong doer, *ex parte facti*, which is against the reason of our books. I shall remember the cases put by Mr. St. John to another purpose. A commission sent forth without cause expressed, that commission is not good; and it is not denied by Mr. Solicitor, that a cause must be set to make it good in law. And if your lordships be pleased to look on the precedents, as I know you will, which the king's side shall bring unto you, your lordships will find the danger turned from the first writ to the last. Nay, in the writ of this year I am told it is so, out of their opinion, fearing the writ 4 Aug. was not so good as they would have it. They put it into the Mittimus, which they knew could not do good; but they did it only to cavil.

But lastly, admit the king had said the kingdom was in such instant danger of loss, and that there was an instant necessity of the command this way, and that this could not have expected consideratiou in parliament; yet if the contrary appears in the record, then neither was the demurrer a confession, nor the certificate conclusive.—I could stand on many other things, as that the danger should be more particular, for so are all the old precedents. To say, 'salus regni' is in danger, is too general; as in a protection, they must alledge, in what place the party protected is employed. 2ndly, In the Mittimus it should not be that 'Salus 'reg' periclitabatur,' but how 'Salus reg' peri-'clitabatur,' I believe it is meant so; but we must now look to rules of law. True it might have been in danger before, but not *tunc*; as in the case of indictment upon the statute of 8 Hen. 6, for an entry upon Whiteaker, 'existens 'tenement.' J. S. the laws will not take notice of the time, without saying, 'tunc existens,' at the time of the entry.

My lords, in the conclusion upon this discourse, it appears, I have so spared the case, that in the writ, dated 4 Aug. there appears no danger of the kingdom being then lost; and that in the Mittimus there are no express words of danger to the kingdom instant or unavoidable. If it were so, it cometh not time enough; for it should have been in the writ dated 4 Aug. And if there had been such expressing of such instant danger in the writ 4 Aug. and in the Mittimus, yet not material, if otherwise on record. And lastly, this certificate doth not conclude us.

Thus then to shew what the case is, and what it is not, I have put out of the consideration of the case, all considerations of such danger to the kingdom, as are unavoidable.—I have left nothing in the case but consideration of protecting merchants against pirates, but for ordinary defence of the sea. If the case doth fall thus, I humbly conceive, that in this place, I might, without further argument, with some confidence, venture my client's case upon your lordship's judgments, notwithstanding any thing objected on the king's part.

Then, by your lordship's command I shall proceed: having laid aside the Mittimus and 'Salus regni periclitabatur,' and taking the case only on the writ 4 Aug. which, as I take it, is nothing of danger to the kingdom, but for protecting merchants, and for common defence. The case stands thus: That though there be no actual invasion, no known or declared enemy; yet the king out of his judgment, 4 Aug. 11 Car. apprehendeth and foreseeth danger to the kingdom in point to be lost; and that the danger is so instant and unavoidable, that it requireth this aid. Whether the king out of parliament by his royal power can command this supply?

I have endeavoured not to mistake Mr. Solicitor; it were an injury to requite him so ill. In my argument I shall desire leave to hold his course, because the two main questions are both of one nature, though different in degree. Our question is, in case of common good against pirates. Upon the whole, my end is to shew,

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that by the fundamental policy of England, the king cannot out of parliament charge the subject, no not for common good, unless in special cases, and of a different nature, or upon different reason; nor for a necessary defence, though in the king's judgment the danger be instant and unavoidable.

My lords, in the debate of these two questions, I have learned of Mr. Solicitor not to say all that I could, but so much as is necessary, and as he hath chalked out the way. I shall inquire of this power by arguments upon practice constant and allowed in time of good government, when the liberty of the subject was not trampled upon; and shew it by acts of parliament, reason, and authorities in both.

My Lords, I am now come close to the arguments on the main: before I begin, give me leave to profess that I am in a dilemma. The question will be, what the king can do in these cases, by his royal power? it much concerns him. And I have learned out of a speech of his late majesty, what it is to debate such questions. Not to argue it were to disobey the assignment of the court, and to desert my client and his cause. For my part, as your lordships see I have laboured to decline the main question, I should be glad it might so sleep.—I shall not offer it, if happily the case falls off in the penning of the writ, and not of the king's power. I doubt whether the way of argument shall do the crown a dis-service.—Out of my duty to his majesty, and service to your lordships, I humbly offer, whether your lordships may not think it fitting to determine the question upon the framing of the case, before it be further argued; and here I shall rest, or upon your command am ready to go on.

[Here the Lord Chief Justice *Finch* said, 'We do not use to judge of Cases by fractions.']

My Lords, since it is your command I shall obey, and go on, notwithstanding the *bicorne argumentum*, which on each side threateneth, I hope his majesty will excuse us, for arguing of that which cannot else be determined. And as he hath given way to an argument, I hope his goodness will excuse us, while we do our duty for our client. And if I err in my materials, or in the way of my arguing, it is from the defect of my wisdom, I cannot be wiser than God hath made me, and not out of any disaffection to the service.—My Lords, I hope neither his majesty nor your lordships will think it a point of a higher nature: yet thus far I assure your lordships, that if any matter or consideration of state come in my way, I shall tread as lightly as I can; yet I must crave liberty to pick out some to refer to your lordship's consideration, and shall forbear those things that are unfit.

[Here the Lord Chief Justice *Finch* said, 'Keep you within the bounds of duty, as befits 'one of your profession at the Bar at Westmin-'ster, and you shall have no interruption.']

My Lords, I shall be very wary and tender. I shall now open the division and parts of my argument.

My negative part is this, That the king cannot out of parliament charge the subject, not only for the guard of the sea against pirates; but also not for the ordinary defence of the kingdom, though the king judge the kingdom unavoidably in danger to be lost. And in this I must take in the defence; as well the defence at land as sea.

My positive part is this, The king regularly is to be at the charge for guarding the sea against pirates; and for the defence of land and sea against enemies, so far as he is able: and that the king hath provision for both, especially for the sea service.

In the prosecution of these two general parts, I shall not only propose my own considerations, but join them with Mr. St. John's as I can further infer them, or justify them against Mr. Solicitor's denial or evasion. And this course will necessarily bring in many of his arguments, which I would be glad to spare, if the cause would bear it, because your lordships should not think that I do nothing but repeat. In this way I shall humbly endeavour to clear each part, by giving a reply before I descend to other particulars. And where I conceive a new objection, which will not fall within any former answer, I will raise it, and endeavour to lay it. Into these general questions will fall many others of great consequence.

First, such as not being the main, I will not draw upon particular debates. Where there is any thing concerning state or reverence, I hope to admit such, and save my client's cause. Having thus unfolded my form of argument, I descend to my negative, that the king in none of these cases, without parliament, can charge the subject. I will prove it from reason, which is the master of all authorities, as Mr. Solicitor said. And from reason drawn from the fundamental policy of the frame of this English government, in the necessary attendance of the public advice in parliament upon the royal power. And secondly, from the absolute property the subject hath in his lands and goods. From these two things I shall draw my reason. For the political advice in parliament, I shall humbly decline all school-disputes. The spider may make poison out of that which the bee makes honey. I shall omit the consideration of some points.

I shall take my rise from the judgment of king James 1619, in his speech in parliament; wherein his majesty agrees, that the king *in concerto*, can do no more than the fundamental laws of the kingdom alloweth: and I assure myself his majesty desireth not more.

Before I enter into the argument further, Whether the law hath intrusted the king out of parliament in either of the cases put: I here profess for my client and myself, that while we speak of political advice, and how far a governor subject to error and will may use a regal power, we do always with thankfulness to God acknowledge our present happiness to be blessed with so just a prince; and we fetch it from our hearts. And were his majesty so

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immortal as he deserves, and sure that his successors may be heirs to his virtues as well as to his crowns, we should wish the royal power might be free from political advice, and unlimited.

[Here the Chief-Justice *Finch* said, 'This 'belongs not to the Bar to talk of future govern-'ment; it is not agreeable to duty, to have 'you bandy what is the hopes of succeeding 'princes, when the king hath children of his 'own that are like to succeed him in his crowns 'and virtues.']

My lords, for that whereof I spake; I speak as looking far off many ages, five hundred years hence.—My lords, because I might run into further error, if I should not take your advice, I shall slip over much; and the sum of all is, First, An argument from the policy of England, is the necessary attendance in the particular advice in parliament. Secondly, It will be from the absolute property that the subject hath in his goods, taking that for granted, against the book of Cowel written in the time of king James, who under the word Parliament, speaking of the king's power out of parliament, saith, the power in parliaments is but a pious policy. But this was complained of, and by proclamation the book was denied. Your lordships also know of another book that was sentenced upon the same occasion. The use that I make of it is this: if the frame of English government stands in the royal power, and the subject hath property in his goods; then the adequate reason of both from these is, that therefore the king can without parliament charge the subject in his estate, though in pretence for common good, no more than a prince 500 years hence, if subject to error or will, may if he will, upon any occasion or no occasion, at what rate he will, charge the subject to the height. As to the advice political, if the king can do this alone, what is become of the policy for which the political advice was made attendant to the regal power? 'Ne respublica, &c.'

Secondly, If the subject hath a property in his goods, how is it in the power of any one alone to charge that? This reason I must not leave, for on this the case stands or falls; though there be many books and cases, yet all are from reason, but especially when these stand together. The reason seems so strong, that it ever holds in ordinary power. It holds 'pro bono publico et pro defensione,' he cannot make a charge in ordinary things; and Mr. Solicitor did not deny the force of this objection. The answer stands thus: Admit it be agreed, that by the policy of the kingdom the king cannot charge the subject, yet the king may, without advice in parliament, in cases extraordinary; where in his judgment, the safety of the kingdom is in instant danger, and that the business will not admit of the calling of a parliament. He fortified this part of his distinction, with strong reason; for in such cases property must yield, for 'salus populi 'suprema lex; et necessitas, lex temporis, et 'quod cogit defendit,' all are true; and to this some home cases were put: as for building of bulwarks upon another man's land, and burning of corn in 1588. And then foreseeing the incounter of a reply, he saith the subject must not say, that although the power be in the king, he will inlarge his power, for the king can do no wrong.

This *prima facie* hath a fair shew, and may go far; yet I hope to give it a full reply. By this distinction the whole frame of political advice, is, under favour, destroyed. I shall shew the contrary by reason and experience. For the distinction between danger, ordinary and extraordinary, where the king doth think a danger and a parliament cannot be called: that distinction, I say, must needs destroy the policy in the whole; for as I conceive, the end of that policy was but this; for else, what could it be? As it will ever be in the will and desire of a good prince to do all good for the subject, to whom this advice by parliament can do no hurt; so what case soever should happen many ages after for that posterity will look upon it, it should never be in the power of any governor to become subject to will or error, if he would so do to hurt the kingdom. That policy was not made so much for a good king, but looking what might happen many ages after.

If you allow such a prince power extraordinary, and make him judge of the occasion; then in substance, though provision be made, yet after his declaration we must make further provision. Yet may some say, here is a *posse* and *esse*; because he may, so he will. True, it is unmannerly to say so of any ordinary man; but under favour, it is allowable to say he may, if he will: then if we leave him that liberty, in such cases he hath no restraint, but his will. But it is said, the law will not presume any such thing. The law doth not presume a will, but the law looks on things that may be, as well as on things that will be. True, the law-books say, the king can do no wrong; which proves, that it is possible for a governor in his inclination to incline to wrong, and therefore the law hath taken a care that he should do none; for he cannot make a disseisin nor discontinuance. There may be an inclination to entry; but the law, because he should do no wrong, hath made this act void: which is not a disability in the king, but a prerogative, to make him come the nearer to the divinity in the attribute.

I shall offer the judgments of several ages in England; they ever thought it a dangerous thing, when they thought any restraint fitting, to allow any exception whatsoever, though cause for it, lest the party, that was meant to be restrained, should be judge, and then go out when he would. Thomas of Beckett, he would not sweat to the laws of Hen. 2, unless he might put in this expression, 'Salvo honore Dei.' The king never meant to violate any of these; but if that had been allowed, the clergy had been judges of that, therefore they would

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not be satisfied: at this day we have an experience of the opinion of kings themselves in this case.

I shall proceed to the practice of our kings. In all acts of parliament, where they had ever a desire to declare the king limited or restrained, if they did admit of any exception, they would have it in words so punctual, that they would not admit of any matter of evasion, for fear hereby his proceeding might be at large. In the Grand Charter of king John, 'Nullum scutagium imponatur,' there was a clause of exception; true, there was a reason to except how all (not as Ed. 1, would have done) saving the aid due and accustomed; but the 'faire fitz chevalier, &c.' and so was Mag. Char. though not in the roll, so careful they were to have no words that give any such light.

I come to the statute of 25 Ed. 1, against aid, saving the antient aid due and accustomed: no doubt but in these words there was no more saved than law must allow the king, and the parliament did so mean; yet when that same act came out, the subject was not satisfied, and therefore the statute De Tallagio non Concedendo was made to take away the exception in that act. The statute 28 Ed. 1, after the confirmation of two charters, and divers additions, there comes at last a 'salvo 'jure coronæ.' Your lordships will find in history how all this was satisfied. And 29 Ed. 1, at a parliament held at Lincoln, the king made a confirmation without a salvo, and yet none will deny the right of the crown; the lords did intend to preserve that. Thus your lordships see the opinion of this kingdom, from time to time, how careful they ever were in all their acts, to leave any way whereby that which they did intend for their good might be avoided. Now whether in this case there might not be an avoidance, I humbly leave it to your lordships' judgments. But before I go further, it may be demanded, how came in those savings into those acts, if the parliament did not like them, and if they were put in here was a trust? I shall give a double answer in the case; though a salvo, yet it will differ from our case: the king was not judge there, but your lordships are judges between the king and his people: but in this case the king is to be judge of the necessity.

But to give you the true answer, the exception never came in originally from both houses, but from the lords themselves; this may seem strange. It was the difference of those times and ours in making acts of parliament; those were not times of granting all, or denying all, but to answer some as to some part, and sometimes an exception. And this being read, the act drawn up upon the whole by the king's council; and this mischief was found out 5 Hen. 4, and from that time all petitions were wholly granted or denied. So your lordships see how these savings came in, not by the subjects, but by the penning of the acts by the king's council. The last example is in late times in the late parliament, in the Petition of Right now printed, which was long in debate in parliament against loans and billetting of soldiers. After the Petition had passed the lower house, that those things were against the law, there was a proposition in the upper house concerning the addition of a clause of saving. Upon the Journals it appears, that there were several conferences between both houses, where the reasons are mentioned, and do appear. And in the several conferences the commons did not yield, but the Petition passed absolutely; and the reason was, because to put in that Saving was to undo the Petition.

To conclude this, to shew the experience of such an exception, *sine assensu*, what it hath wrought in former ages, as that of Normandy, though foreign; yet to shew what such a thing did work there. It had the same privileges we claim, and much of their law came in here with William the Conqueror. Lewis the 11th taxed them high; they made complaint, he, on the complaint acknowledgeth it, and would tax them no more but on great occasions: what followed, those histories plainly declare.

Having, as I hope, taken off the bulk of that distinction, I shall further shew how it doth not stand with the practice of the common law. It is a fundamental rule in our law, rather a mischief than an inconveniency: for when nothing can be so absolute in government, but that there may be one case or other wherein there is no provision made, all the care men take is to chuse the least. Now his rule is rather a mischief than an inconvenience. Now mischief is that which perhaps may fall out never; or if it doth fall out, yet seldom; for if it were a thing that might commonly fall out, it were an inconvenience. On this fundamental rule, the law concerning lands and liberties is thus grounded. True, there might be a mischief for want of this power in a case extraordinary; but the mischief perhaps never, or seldom falleth out. But to allow the other, would be an inconvenience daily. I desire your lordships to cast your eye upon a learned writer, Comines, fol. 107, 131, 180, 181, where in the whole, putting them all together, speaking of the danger that might come to a state for want of power to raise supplies for resistance, giveth a commendation of the government of England: true, he doth go so far, saith he, "it is hard in a defensive war, that any preparation which must be great and long about, can be so acted, but that princes may take a timely notice, to call together, and advise by parliament. In the Low-Countries, where they have wars, though they have an excise for ordinary, yet they do it not for extraordinary, without consent in parliament."

My lords, I go on: admit an enemy ready to land, no possibility for a parliament; see how the case will now stand. I shall leave it to your lordships consideration, whether there be an absolute necessity, *infra et extra*, to command, and then to shew there is a command, and by what law; and by that law that is more strong than the positive law of the kingdom;

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and doth work more in point of fear. I do put this by way of admittance. In that case there goeth out a writ, a Mandamus Rogantes; but it is in 'Articulis necessitatis et quatenus a mandamus rogantes,' not 'sub pæna forisfact,' of all you can, but for your own preservation, and safety of the kingdom. These writs have gone forth in such times, when there hath been a near danger, and that hath served the turn; for that instinct of nature, that did make some part of the kingdom desire government for preservation, the same instinct of nature, doth infer to contribution for defence: nay, that is a stronger law than ours; for that law which ariseth from one's own breast, as it doth command, so it doth compel: there need no law without, when there is a judge within. Now in times of necessity, there is a law that doth compel; nay, there is a stronger penalty than our laws can imagine; for our laws can make but a penalty of all that you have; but how? To the king. But when there is a danger from an enemy there is not only a danger of losing all that one hath, but of losing lives and lands, and all that we have; and all into the hands of the enemy.

Put the case an enemy was landed, to shew what the powers are by our laws in that case for defence; when there is particular appearance of instant and apparent danger, in that case, particular property must yield much to necessity. These cases our books warrant, as building of bulwarks on another man's ground, and burning corn. In 1588, there was an actual danger, and then it was just to take corn or grass, or any thing to raise supplies. But where do any of our books say, that upon fear of danger, though in the king's case, a man can, without leave, make a bulwark in another man's land? I do not read. As your lordships may observe in this case, of apparent danger, the power of the king; observe withal the power of the subject, and out of what principle this doth grow; whether out of a form of law, or out of necessity. In these cases of instant danger, and actual invasion, it is not only in the power of the king, but a subject may do as much in divers cases. For if there be an actual war, the subject may, without any direction, do any act upon any man's land, and invade any property towards defence: it is the law of necessity that doth it. Nay, in that case, the subject may prejudice the king himself in point of property. If an enemy be landed, and a subject take away the horses of the king, he may justify it in any action; as in case of a castle or city, if they can justify there was a necessity, they may pull down the walls or blow up the city. In this case there is no manner of mischief if subjects' goods be taken by the king, or any man; and in that instant necessity be imployed to the public good. *Levis timor* will not serve; for then a man cannot enter for fear of force, but for such a fear as ariseth from an actual and apparent danger; then there can be no loss to the subject in that case. Secondly, on the other side I shall shew, what goods were taken for public use, were taken by way of loan, and satisfaction was made for them.

The Second Day's ARGUMENT of Mr. HOLBORNE.

May it please your lordships; To remember the question whereupon I left off my argument the other day, whether the king of England can charge the subjects for finding of ships at their own costs, only upon the king's judgment of an instant danger. First, whether for defence of merchants against pirates. Secondly, for ordinary defence of the sea: and, thirdly, for defence extraordinary against an enemy, only out of the king's apprehension of an instant danger, which cannot, in his judgment, expect a supply elsewhere.

Not to repeat, yet in a word or two, I shall open my proceeding on this question; and the rather, for that I find some misapprehension, as if I had granted more than I meant, which is fit to clear.

The sum of all was but this, that the king could not charge the subject in any of these cases. The reasons I urged were but shortly thus: that the subjects of England having an absolute property in their goods and estates, and the policy of parliamentary advice being to prevent charge only, then on no occasion one might err by weakness, by evasion or will: that therefore the king could not charge in any of these cases, without parliament; for that so he might charge, if he would, as on occasion so on no occasion, as to 7*l.* so to 17*l.* That if this held in ordinary charges, you may not exert extraordinary occasions, though instant in the king's opinion; for so a king intending to do nothing by his policy without parliamentary assistance, he may, if he would so declare, charge at pleasure, on no necessary occasion, or beyond all proportion. This distinction I endeavoured to take off, shewing it did destroy the end of the policy.

That there was no necessity of such a distinction here, I shewed. There was one thing which I forgot, for destroying of the distinction from necessity, and leaving the king judge of the necessity; that in judgment so to do it, is all one as to leave it to him arbitrarily, if he will, which is that only which was intended to be prevented; if he will, was part of the Charge, if not the principal, in the lower house of parliament, against the Divine for his Sermon. I have seen the charge for holding the king had a power in case of necessity, and leaving the king judge, and so at liberty and pleasure if he will. This I do but touch here; for I must make use of it in the main; and under favour shall make the case somewhat like.

For the other two matters, that when danger is apparent, there was no need of positive laws, I urged it thus; not admitting any thing, wherein I desire not to be mistaken. Admit no writ of positive command, yet the subject will be then under a stronger law, which as it doth command, so it doth compel, that is the law of

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necessity, which is the strongest of all laws; with which the judgment carrieth an execution, and that this law commandeth under a greater penalty: for though not under pain of forfeiture to the king, which as to the cause of forfeiture, is but *ad terrorem*; yet under the true pain of forfeiture of all to the enemy, from whom we must look for no mercy.—Lastly that of an actual invasion, and necessity withal, that not by any positive law of the kingdom, but of the general law of necessity, which is above all laws, for the public good private good doth yield on all parts. Of these too last I have but touched here, to shew what I mean; I shall speak further of them both towards my conclusion, in my answers to Mr. Solicitor's objections.

I shall now proceed to make good out of our books of law, that the law doth not leave it in the power of the king (in respect of such a king as possibly may be) to lay any charge upon the subject but only in such cases where the law hath made such provision, that if he would he cannot miscarry.

In this place, because it is taken for a maxim, that the king can do no wrong; and therefore the law doth repose this trust in him, of charging without any danger at all: I shall shew, that the same law doth take notice how, and in what cases the king can, as much as in him lieth, do amiss; and where the law is sparing to leave the king any power to lay a charge on the subject, even in small things, when the *quantum* rests in his judgment. It is true, the law doth allow the king to command payment of monies in some cases; yet where the *quantum* or occasion is subject to a trial; the ground of all this is, that the law sees the king may incline to mistake, though as a king he can do no wrong.

This may seem a nicety, but under favour it is clear. This resteth in the distinction of a double capacity of a king, as a natural man; and to say in this respect he cannot err, is strange! human nature is not capable of that prerogative at the best; and they are subject to natural infirmities of the body, and must die: even so of the understanding and will. And so you see the law must take notice of possible mistake in government; and this possibility in another is no injury to a good prince, but sets off his merits with a greater lustre. This is not only true for smaller things, but even in the greatest. How many acts of parliament have we in print (of which your lordships are judges) declaring the king's mistakes in the acts themselves by way of complaint, and providing remedy for the future, yea, in their own times. To instance in one long since, cast your eyes upon the beginning of the acts of parliament of Edward 3d's time, where we find a statute for the government of the realm.

As the law saith, he may incline to mistake in his natural, so it hath taken care, that in his politic capacity he shall not. And therefore, lest possible errors of the natural body should reflect on the body politic, the law hath provided ancient means to prevent it, which was a writ of *ad quod damnum*. Na. Br. saith, that if any damage be to the king's subjects, the patent is in law naught: As if the king grants a fair, and there is an *ad quod damnum* brought, to enquire what fairs were kept by it; if found a damage, the patent is void: The books are full of such cases. It is true, that in some cases, the books do allow the king to lay a charge upon the subject, yet not in every case for public good; but only in some few, which indeed have been antient, and indeed of the very essence of necessary traffic and intercourse, between one part and another of the kingdom; as murage, to keep the commodities sold the safer; toll, for a fair or market, towards the maintaining of it: pontage and paveage, for the bettering of passages. And in all these cases the king may grant a sum of money to be paid; yet as it is in this common good, somebody must have the power to grant, and that can be none but the king. So if the king should grant on no occasion, or howsoever, which is enough for me, a sum too great, greater than the benefit the subject shall receive, it is void in law. If the subject hath not a *quid pro quo*, then no charge; 5 Report: and in this case there is a judge of the justness of the proportion, besides the king: And this is when a patent cometh to be questioned, if the toll be laid too high, then the same patent is nought. Thus then you see how far it is that the law doth agree, that the king shall lay charges upon the subject, only out of common and ordinary necessity, there must be somebody to have power. But then there is a further remedy of a mistake.

Here, before I leave this, I will make a double use thereof. First to shew, that if the law doth not permit the king any absolute power in this trifle, shall the king do it in so great a matter where you shall have no judge but himself of the occasion and proportion?—I next observe, where the law permits the king to charge in any case arbitrarily, it is but where this power doth arise by original contract, and precedent consideration and agreement for land; and then not *quatenus* as a subject, but *quatenus* as a tenant, only as 'ratione tenuræ,' in respect of the particular signory and dependance, not in respect of the general signory of the kingdom.

My lords, it is true, at the common law the king had a power and liberty to charge, till he was restrained by statute, which was aids 'pur 'faire fitz chevalier, pur file marrier, pur ran-'some,' and taxing of antient boroughs: and these aids, too, were in respect of particular signory, 'quatenus tenentes.'

The next thing that I observe is, that the policy of the kingdom so little delights in these incertainties, though it ariseth of contract and consideration, that in case of these aids, the law would not allow that inconvenience of leaving them to an arbitrary charge, but in some case settled a proportion. It is true, in

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case of ransom, because no man can tell the certainty of that, it is left at large.—This I further observe, by the common law, where the charge is in respect of the tenency; yet if the charge comes often, as the king pleaseth, there the law did not leave it to the king's judgment; as in escuage, which is a profit arising to the king in respect of the signory. Though the law allowed the said aids, 'pur faire fitz chevalier,' and 'pur file marrier,' because they could happen but once; but escuage that might happen often, the law would not allow that to be uncertain; it must be assessed in parliament, as in the charter of king John, which was always held to be no more than the common law.

My lords, upon the whole, I desire your lordships to consider how unwilling the law is to leave the king a liberty to charge, even in the king's case, at common law; and how restrained by act of parliament, where the common law before did give liberty. Next observe that the law, in none of the said cases, nor I believe in any other, doth permit a power to lay an immediate charge upon the subject, but only in laying a charge to be paid in respect of the benefit which he hath received, which is fit to pay, and none are compelled to receive it or pay it; for if he will not have the benefit, he may refuse to pay it even in cases between king and subject. In the case of toll, pontage and paveage, it is not laid so on the subject, that he shall pay it whether he will or no; but as there is a benefit by the pontage, &c. which cannot be maintained without charge, it is therefore just that those that have the benefit should bear the charge. Lastly, I shall offer, that even in cases where the king doth lay a charge *quatenus rex*, it is not so left unto him, either for the occasion or proportion, as that if he will lay never so much, he may; for if it be unreasonable, the law doth make it void, as in case of toll, if unreasonable.

My inference is this: if the law be thus careful in small things, as penny matters, whether or no the law will make no provision in the main, but leave the subject to the absolute liberty of the king, to charge the subject when he will say the kingdom is in danger, and where there is no judge at all? I will conclude with book-cases, in the point, that the law doth not leave a power in the king to charge, though it be in the king's judgment? *pro bono publico;* as in the case of granting an office. The king cannot at this day regularly create an office in itself with a fee, but in law it is void; though the office in itself hath a shew, nay, it may be *pro bono publico.* P. 11 Hen. 4, 15, 16, and in 14, a grant of an office of measurage with a fee void; and that very thing, 13 Hen. 4, was complained of in parliament, that it was against the law, because it was in charge of the people; to which the king answers, let the laws and statutes be performed. In the Roll, amongst the Adjudicates, the reason is expressed, 'quia sonat in præjudicium populi.' 16 Ric. 2, the king grants to one a rate upon every barge that passed the bridge, in consideration that the patentee had taken upon him the scouring of the river, in that case the patent was repealed. So in the case of rights to be kept for the benefit of seafaring-men, this was in charge of the people. This patent was complained of, and your lordships know the order upon it. I omit many cases, and conclude with that of Fortescue de Legibus Angliæ, cap. 25, speaking of and commending the policy of the government of England, he prefers it before that of France; and shews the good fruits and effects of it; and lays down this for one, That the king cannot charge without consent in parliament. And he was a man allowed for extraordinary judgment, who sheweth instructions for a prince for future government, being trusted more with the government of the prince than any other. I conclude these cases with this observation.—This denying of power of laying charge on the subject, is not only in the case where the king would raise benefit to himself, which a man may call 'tallagium vel auxilium;' but in cases of charge which lie on the subject, though not for the king's own benefit, though also it be in cases *pro bono publico,* as in the cases put before.

I shall now come from the books, by which I have shewed what is the common law, that by these grounds the king cannot charge the subject. I shall now offer the consideration of some things, which are acts of parliament, or have the force of acts of parliament.

I shall begin with that of William 1, for a Conqueror I shall not call him, for that name came in about Ed. 3, his time; for there being an Edward before, because they could not tell how to give him a distinction from the Confessor, they called him Edward 3, after the Conquest, by direction of sir Roger Owen, the great antiquary. That which I shall urge is, that which he granted anno 1, of his reign, that all freemen should hold their lands 'ab omni injusta exactione seu tallagio,' nothing to be demanded but that which was by tenure, as in Eadmerus by Selden. Now whether or no this be an act of parliament, I shall not dispute; yet in those times when a thing was granted between the king and the subject, though it had not all the formalities that now it hath, yet it was binding: however, this is called the Conqueror's laws, and I take it for a law.

Then it resteth to examine the words, whether the words will serve the purpose, to clear the subject in point of sess. It is said, they should be free 'ab omni injusta exactione seu tallagio, ita quod, &c.' By this all charges, but such as were by tenure, are called exactions. The rule is, 'ubi lex non distinguit nec nos debemus.' This is a grant, if not of right, yet of grace, and must be taken largely, 'favores amplificandi.' The subject could not have demanded of him, especially that of 40s., if it had not been the law of the land before.

I shall humbly leave it, whether this be not the law by which Edward the Confessor laid down the Danegelt; for the Danegelt was not only against pirates and sea-robbers, (they were indeed pirates and strong at sea) but also against

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all other enemies. These called the king of Man, Archipirata, that is, a powerful king at sea; and that these pirates were only strange enemies; and it was to raise men, not 'obviare erup-'tioni,' but 'irruptioni,' not so much to keep them within their own kingdom, as to keep them from falling on the land. And by the history of those times when this was raised, it was by reason of the Danes landing in Northumberland and Essex; and so upon that irruption of the Danes, Danegelt was raised. It is called by Camden, in his Brit' 'irruptione 'hostium;' and Lambert, in his Saxon laws: but let it be 'irruptione,' or 'eruptione,' or be it Danegelt, to keep them from coming out, or landing here, both of them were for the public service. When this had been so much complained of in Edward the Confessor's time, it is clear he damned it. And Ingulphus is an author without exception, and Tilburiensis not to be compared to him. Ingulphus was a great courtier and favourite of William the Conqueror's; and to think that he had not a better knowledge of what the Confessor did than Tilburiensis, who wrote many score years after, is much. And it is strange that Ingulphus, who was so much bound to the Confessor, should carry a law down to Edward, so much to the prejudice of the Confessor if he had not been sure of it. Tilburiensis was urged, as if he spake, that it had been paid to the Conqueror; he wrote in Henry 2's time. And, my lords, observe that he was an officer in the Exchequer, and for the rules of the exchequer he teacheth them well; but for history against Ingulphus I leave him.

If this were laid down by Edward the Confessor, then I conceive, this law of William 1, was but the law of Edward the Confessor; and there was no ground for him to require a law to lay any charge but what was before. Tilburiensis makes this good, for he himself saith, that the Conqueror laid it down, and took it up again. If it were laid down, I would know by what law or particular direction it was laid down, if not by this; for nothing in all the laws of the Confessor can cause to lay it down but this; and thus far he standeth with Ingulphus.

I shall further shew these aids and taillages were meant here. It is a clear ground, that, 'exceptio format regulam in non exceptis,' an exception often doth enlarge the meaning of the word beyond the ordinary sense. As if I do grant to J. S. all my trees, here my apple-trees pass not; but if I grant all my trees except my pear-trees, there my apple-trees do pass, because this sheweth that meant all my fruit-trees. In the word trees I apply it, that here is a discharge of all taxes, except by tenure. Now I shall shew that tenures were for defence and service of the kingdom in the proper place, when I shall shew what provision and means the law hath allowed the king for defence.

My last observation is this, This was not a charter between the king and his tenants, but betwixt the king and kingdom; and so something must be laid down that was due to the king. There are two kinds of aids, one from tenants, the other from the commons; one was by command from the king without any more, the other by act of parliament.

But here Mr. Solicitor hath taken that grounded argument, of which I have found a contrary sense, that is, 'Sumus fratres conju-'rati ad reg' defendend',' wherefore these aids not possibly meant here; but this is contradictory. By inference to overthrow a thing express is against the law. The words are express, that there shall be no taillage; then by an inference to say, that the defence of the kingdom is not meant, is hard. True, all by their allegiance are bound to defend the kingdom, all are to fight for it. Acts of parliament tells us, where and how we do it, and when; but that we must give aid, is another thing.

It is one thing to supply with the body, another thing to give or pay money; and if there be any invasion, 'pro posse suo,' every man is bound to defence; but whether for every defence of the kingdom we must give an aid, is another thing. Acts of parliament will be the best expositors of things so long since; for as custom and use will make a common law, so likewise it will declare an antient act of parliament.

Now I shall come to that of king John, 'quod nullum scutagium vel auxilium ponatur.' The credit of this statute I shall first clear. It is not only in Matth. Paris *verbatim*, who wrote in Hen. 3's time; but the original was shewed under seal the last parliament by Mr. Selden, and these very words were read, 'nullum scu-'tagium, &c.' And, my lords, though this be no where on the roll, yet that no ways lessens the authority of it. It is no part of the essence of a statute to be found on record; if all should be burned by mischance, what would become of the laws? Though the rolls are all burnt, yet the judges know what are acts, and what not, though they have nothing to make it good by, but their own manuscripts or printed books, or traditions. A man cannot plead against an act of parliament, *nul' tiel record*; and that is the Judgment in the Case, in 8th Report, Prince's Case. The duchy of Cornwall stands supported by an act of parliament, not upon record. That which I shall shew to make this an act of parliament, appears out of the words: there are two things, Scutagium and Auxilium; and Scutagium riseth from the tenants, and Auxilium from the subject. To shew that Auxilium is laid down by this, it appears, that he could not assess scutage without parliament. I hope to shew that scutage was for the defence of the kingdom, and is such a provision, that no king hath a better, and such an one as will raise in England above 40,000 men.—Ay, but saith Mr. Solicitor, not assessed but by parliament, that is, not meant to bind the king, but the subject; the king can do no wrong. Doth any man think that the commons did come to the king to bind themselves, and leave the king at liberty?

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I come now to argue from the exceptions, 'Exceptio firmat regulam in non exceptis.' This exception shews the latitude of the words to be a discharge of all aids, that there had not been care had of the particular aid, 'quatenus 'a tenentibus;' they were afraid, even those were swallowed up. True, I do not conceive that was a thing of necessity; but as the king may have it in if he would, so the subject had no reason to deny it him, for it was but just, and was never meant to be taken from him. Nay, the lords themselves had reason to take care themselves, that this was not discharged; for in all these cases the king hath no more than a common person, for he hath his aid 'pur file 'marrier,' and 'pur faire ransom,' and that appeareth, 21 Ed. 1. A release from a lord unto his tenant: so that there was reason that the king and lords should have care of this; yet they were afraid those words would be so strong against public aids, that they would take away private aids.

Last reason that this Auxilium must be said public; look in all the king's desires, when they did desire aids, still their introduction is for the defence of the kingdom; which is a cause of calling the parliament; which appeareth by speeches there on record. Nothing can be intended of these private aids for himself. I have done with the charter of king John.

I next come unto Mag. Char. 9 Hen. 3. For Magna Charta, I humbly conceive that this charter, at the first, when it was granted, was no more than *verbatim* the charter of king John, and originally had in it this very clause of Nullum Scutagium: my reason for it is this.—First, upon all histories, that after king John had granted a charter, the pope would have discharged him of it, as far as in him lay, but that still the lords and commons made claim. He died, Hen. 3, cometh in. A difference ariseth between the king and the French. Then it was proposed, that this charter should be confirmed; histories say, that at his coronation he gave his oath to confirm the charter of king John. Then in the 9th year of his reign, the lords demanded it; he was unwilling, because it was gotten *per duresse*: But the king said, we are sworn to do it, and therefore must confirm it. And in Matt. Paris it is said expressly, that the lords did call for the charter of king John, and there it was read and confirmed *verbatim*. And Matt. Paris lived in the king's court, and was *edeo familiaris*, that it is said, he eat with him at his table; and at that time he wrote this book, and sure he durst not have written it, had it not been true; but we find it not now upon record: how this might possibly slip, I shall tell you.

First, we have no original enrolment of Mag' Char', no Mag' Char' but that of king John's. If it be true, which histories say, that Hen. 3, did revoke his charter, it is possible these Rolls might perish in that time: the authority of the king at Oxford did enforce them to bring in their records; doubtless they would not leave the enrolments. The next step to look for it is 28 Ed. 1, confirmed there, and is exemplified; the original may be lost in so long a time: what became of all Parliament Rolls, till 4 Ed. 3? All perished by fire or some other mischance; things were afterwards put together, and upon the roll. This was not the original enrolment of 8 Hen. 1, and written in the roll where acts of later time are written, and with the same hand. If it were once in king John's time, it must be left out somewhere. Observe this one thing more, that is, as this of Scutagium and Auxilium doth concern the subjects in their lands, there is a clause also that concerneth the subjects in their persons, 'Nullus liber homo 'imprisonetur,' that might be taken for ordinary imprisonment; then there cometh a provision for the king that he should not do it, which is 'non super eum mittimus,' such words as that a man knoweth not what to make of them: but in the charter of king John, it is 'nec eum in carcerem mittimus.' In this great thing we see the mistake, and how the other happened, I cannot tell.

I now come to Ed. 1.'s time, wherein I hope to make good those acts of parliament that we have vouched; and here lieth a main endeavour. The first was of 25 Ed. 1, which is not denied to be an act, nor cannot. The other is De Tallagio non Concedendo, which is so full, that it cannot be evaded, and therefore is denied to be an act. First, for the act of 25 Ed. 1, which is against aids and taillages not to be taken without consent of the kingdom, I humbly conceive, that by these words Aids and Taillages used in former acts, that these were meant of things for a public defence of the kingdom, complained of, and not denied. I shall bring home the roll of the 25 Ed. 1, that the king doth not promise to pay them 'pur reason,' to have words for their money; but that they must have a reasonable satisfaction: I will shew that was the sense given upon the record.

First, for the practice of the times, that there were ship-writs went out, these writs went forth in a more terrible term than any I ever saw, 'sub pœna forisfacturæ vita et membror'.' 24 Ed. 1, was the writ. I am sure that such a writ, by the common law, would not have been mentioned, that if they did it not, the king should hang them. This writ was the grievance upon the subject, and this act refers to that. True, there were other grievances, 4to. and 5to. but this was one; and that these aids, which were then for the defence of the kingdom, were included within the rest, appears. The king, in reading the articles, speaketh, that what was done was for defence; though true he had wars in Poictou, and in other places beyond the seas, yet as true that it was a war to be kept from hence by defence. That part was for defence cannot be denied; and yet no distinction to be made between a foreign war and defence, and both equally a grievance to the commons.

After this act of 25 Ed. 1, there cometh out a commission, and this was in pursuance of the promise that the king did make at his going

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into Flanders, and that was to inquire of those grievances in the articles, and among the rest there was 'de lanis et coriis' taken away 'pro defensione maris;' and to that the king saith there, 'pay pour reason.' There hath an answer been given unto this, and much stood upon, that the king should say upon this commission to inquire of grievance 'pro custod' 'maris,' if it were so 'il ferra taunt ils teneront 'appayer pur reason.' [Veu le Parol del Record.] That this should be no more, than that the king would give a reason why he did it, I question. As if he should send forth commissions, and afterwards dispute it, or if he did do it, whether lawful or not, that is not the way of sending out commissions. Suppose that the king should say he would give them a reason for it, this commission did go forth to enquire of those grievances. And if the king had not said he would have given any satisfaction, yet it is enough that it is inquired of as a grievance. It is a wrong upon the subject, princes may lay taxes, yet the subject doth not call for satisfaction. A princely word that it should be done. —But when the king doth say 'pais pur rea-'son,' to think, that that is no more than that he would give some reason for it, is a very strange inference. In a bargain they use to say, you shall hold yourself content with reason, you shall not have your own demand, but he is satisfied one way or other; so here.

To begin with a record. 21 Ed. 1, Parliament Book. A petition of the commons, and they did desire restoration of all their monies. 25 Ed. 1, there were two 'de lanis et victualibus' within that commission; so the monies and the things taken were inquired upon by that commission, 26 Ed. 1, were for defence, and here 'Ordinatum est per concilium quod 'rex satisfaciet eis quam citius poterit.' Upon this petition they desired satisfaction. For goods taken upon the aforesaid commission, 26 ordered by parliament, that the king should satisfy them so soon as he can, so that they should hold themselves content, 'Ita quod se 'contentos haberent.' So that you see, not satisfaction by reason, to justify them, but the king should satisfy them one way or other. It is that they should have something for it, and not that they should have reason shewn them why they should have nothing.

But I rest not here, there is one parliament-roll remaining before 4 Ed. 3, and that was 8 Ed. 2. 'Pro priore et fratribus Sti Johannis 'Jerusalem.' It is there set forth, that Ed. 1, did command his treasurer and barons of his exchequer, to make satisfaction for wages taken in Scrutinio to the clergy and laity, 'veluti pro 'lanis et coriis;' and that satisfaction should be part by money and part by releasing of debts; so as thus the king had no meaning, 26 Ed. 1, to pay back money presently, but would give them satisfaction one way or other, by payment of debts, or releasing of debts, as was explained by that of Ed. 2. Another record P. 27. Ed. 2, Rot. 36. Satisfaction was there given for an eighth and a fifth.

Those things which were taken before 25 Ed. 1, complained of, and that confessed by Mr. Solicitor; so as I conceive, though it had been enough that there had been an inquiry of these things as upon a complaint, though there had been no more answer. If any answer make it better, it is no answer to say, that they should have satisfaction by words, but either in money or releasing debts; if none at all, confession had been enough.

I shall now come to talk of Mr. Solicitor's exceptions to the 25 Ed. 1, where he endeavoured to shew that this money for shipping could not be intended within the body of the act; and if it was, yet it was excepted in the saving of the act.

The objection stands thus. No aids were charged but such as were granted, and we do not shew that these were granted; and there is a word beyond that, (prizes) and how far that extends, I leave to your lordships judgments. But if in the body of the act, yet excepted in the saving all antient aids due and accustomed; for the saving such an aid due and accustomed surely was meant there.—In this answer lieth this question, whether these were the antient aids due, or not, by the common law? this will stand or fall on the body of the argument. I shall tell you what these aids were, and they cannot be these; there were other aids mentioned in the charter of king John, as 'pur 'faire fitz chevalier,' &c. That which takes off all, is, If these aids were part of the grievance, though for the defence, they cannot be meant in the saving, for that destroys the purpose of the act. And for that saving, it never came in by the commons, nor the lords; but the form being so, to grant in part, and as the king would grant it so they must take it: Histories do say they did not like it, and so they desired an absolute act. It was said, that aids and defences were meant of foreign ones. If the king and council were so wary as to put in such a saving as before was not in the act, it shews what care they had to have that they could not have. If by the laws they might have them for foreign defence and not at home; they that put in the saving would have put in a distinction. I shall leave the consideration of this act to your lordships, how far it shall extend to aids for the defence of the kingdom in that case.

I shall go on, and conclude with the statute De Tallagio non Concedendo. That act of the 25 Ed. 1, was indeed so well penned, that it gave Mr. Solicitor a very probable colour to make those plausible answers. The lords did desire a better act, not with these words, 'No such Aids;' for 'such' is a relative word, and those are dangerous words.

Next, if no more be meant by the saving than 'pur faire fitz chevalier,' &c. and yet to have left these in the general, and not in the particular, had left a way open to question what they had been. And in Walsingham it appears the lords were not contented with it, though it was signed and had passed the great seal. It is true, that at this time a pardon did

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pass to those lords; the words are so strong, that this was denied to be an act: and much said, and very colourable too, to that purpose. It is true, that this act is no where on record, that we find; but for that an answer hath been given before.—It is said, that is no act, but only penned as a charter; that exception was once made by the king's council on another occasion. Acts of parliament were then penned so; Mag. Charta, and Charta de Foresta, are but in form of Charters.—Yea, but we cannot tell when it was. How many acts of parliament are there which we know not when they were? Historians best tell that. It is hard to find it when the records are lost. But this will appear to be in the time of Ed. 1. There is the pardon to those earls in 25 Ed. 1. We know that the rolls of those times miscarried and were lost, and sure it must be after the statute of 25 Ed. 1.

But then there is an exception from the diversity of the penning; sometimes 'nullum 'tallagium ponetur,' sometimes 'ponatur.' We know, upon the entering of the rolls, there have been divers mistakes in the entering of 'pona-'tur;' if it be with a dash, it may easily be mistaken, and so only *vitium scriptoris*, and nothing else.

Then let us enquire what it was if it be no act. It is said it is no act, but an extract out of 25 Ed. 1, and that he urged several ways upon several occasions. By the penning of it, it doth appear, that he that wrote it was a scholar, and not mistaken, to make a thing absolute that was relative; for *nullum* to make it *tale*, and to make that without a saving that had a saving, is a strange kind of saving. Yea, this cannot be an act; for at that time there was a pardon granted to several great lords.—If that be true, which history saith, when this act was published, the lords were not satisfied with it; and these were the lords to whom the pardon was granted that were not satisfied. And to make their pardon the stronger, they did weave it into the very body of the act: and for Walsingham, he is of great credit among the historians. They say further, that this is no act, for this takes away those three aids, 'pur faire fitz 'chevalier, file marrier,' and 'pur corpus redi-'mend'.' This is not so, acts of parliament speak of it, and practice speaks of it, and therefore no law; and practice of ship writs ever since, and for defence of the kingdom. For the aids, that is a good act; yet those were not intended nor included within that act, and therefore that practice is not contrary, because it is not within the words of the act, nor in the meaning of the act.

For the aids therein questioned, the question was between the king and the commons, and not between the king and tenants; then that being the question, there must be a consideration according to the occasion and the doubt made. But to take thus 'nullum auxilium po-'namus,' these are not aids put on the tenants, but fruits of a signory, as the duty riseth not from the king's command, but from the laws, and so not within these words 'nullum auxilium 'ponamus.' And so all the practice ever since will well stand with this act.

And to say shipping is not meant, because of the practice since, is nothing. Let me establish once the laws, and no matter for the practice. If the laws be once settled, we must reduce precedents to laws, and not laws to precedents.—And for the practice yet, still the subject makes a continual claim against them.

My Lords, to prove this is an act, Walsingham entered it in his time, who did not write very long after it. Though it hath been said that he was a monk, and what he wrote he took up in the street and market place; yet I will not think so of Walsingham, who was ever held an historian of very great credit. And no historian whatsoever durst set down any thing for an act of parliament, if he had not a sure warrant for it. It had been little less than forgery.

In the next place, it hath been said, histories are no good authorities in law. True, they shall not tell me what the law is, yet they are good to tell us of *res gestæ*, whether or no there hath been such things done. He tells us, not that this was for shipping, or not for shipping, but tells us there was such a thing. I have searched after this act, and I have found in an antient manuscript in Hen. 4.'s time where it is, and it goes there under the name of Statutum de Tallagio non Concedendo; and I find it mentioned no where, but still find it mentioned as a statute. I have an abridgement of Hen. 8.'s time, and there it is put in as a statute. I will not urge positively, but probably, and that an act in Hen. 4.'s time. 13 Hen. 4, a complaint of laying taxes on the subject; the answer is, 'let the laws and statutes 'be observed:' this is that positive act that doth reach it more than any other.

But the main answer that I rely upon, is, that if they deny the truth of an historian for *res gestæ* as this. If from time to time it hath been conceived an act, what more strong? what makes our common law, but general opinions and allowances? And should we doubt of many things, whereof we find the acts of parliament themselves, I am afraid we should shake many things done by the common law. That which I rely upon is, the judgment of the late parliament, to which your lordships will give all reverence. This, my lords, did not pass *sub silentio*, but was made a question, and something proposed on the king's part, whether an act or not? in the conclusion it came into the Petition of Right. The very statute mentioned in that Petition was this, De Tallagio non Concedendo, made in Ed. 1.'s time. How far this question passed at the committee, it is better known to your lordships, and is the thing whereon it is built. If this had not been an act, it had been dangerous to have put it into the upper house; but it being there read, your lordships know what was done upon it.

The Petition being thus debated in both houses, I shall leave it to your lordships consideration, how far you will make this question to

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go in this case. And his majesty did not deny the same, but both king and council agreed it is a law.

The Third Day's ARGUMENT of Mr. HOLBORNE.

My Lords; As the other day, so now again with your lordships' favour, I shall be bold to sum up my last day's argument in a very few words; and by the way clear my meaning, wherein I was any whit obscure, as also add where I was defective, yet briefly in both.

My lords, the general question the other day, being concerning the king's power to lay a charge of money upon the subject; and my general ground against it being but this, that though the laws did intrust the king in many great powers in government, and with the whole government, according to the laws; that yet by doing of acts, which charge or prejudice the subject in his estate, the law did see that it was possible that kings, as men, might err, and therefore did make provision, that their acts, if against law, should be void, as in case of a disseisin or discontinuance, or where they were to pass grants, that there should go before an *ad quod damnum;* and also, that if they were passed, and were to the prejudice of another, that regularly in that case, the law did make them naught, and that they were to be repealed.

And I shewed how this did hold, especially in laying charges upon the subject. I shewed that the law was not willing to leave the king power to charge in any case, notwithstanding where the occasion might be common, and did require, for the maintenance of traffick and commerce between them, so to hold them still as within one body. The law must leave in somebody a power to charge, which would be left in none but the king as supreme governor. The cases for this were the monies to be paid for murage, pontage, paveage, ferriage, and the like. That in those cases, though the king was trusted with a power to lay a charge; yet the law did not leave the charge arbitrarily in the king's breast, so, but that if it were unreasonable, the grant was naught, and the proportion was to receive trial by another, upon whose judgment it must stand or fall, which were either the judges or a jury; like to that case which I might have put, but did not, of a fine uncertain upon a copyhold. I also shewed, that in some cases the law did allow to demand arbitrarily upon some subjects, sums of money, yet that was not upon the subjects, *quatenus* subjects; but upon some subjects, *quatenus tenentes,* which did rise upon the *jus rentulare,* as to marry his daughter, to make his son a knight, or for ransom, or upon those who were little better than villains, the king's burgesses, whom the law did not so much regard; yet the policy of the kingdom, in those cases, did afterwards restrain the king to a certainty, by act of parliament.

Afterwards I went to the cases which were in point, that the king could not lay a charge upon the subject, though for a public good; and instanced in the case of the grant of the office of measurage, with a fee, adjudged void, 'quia sonat in oppressione populi:' 22 Ed. 3, Pat. 31. The king granted to one Pawley, an office of alneage of worsted; and because in charge and burden of the people, and a new grant, adjudged void, and was repealed.

I begin with that of 4 Will. 1, which I now find more clearly to be an act of parliament, out of an ancient manuscript of the church of Litchfield, mentioned to this purpose in Eadmerus. Here I endeavoured to answer to Mr. Solicitor, when he said, that there was another law of the Conqueror's, which explained this; and shewed, that the charges for the public defence were not meant, because it is said in another place of the same law, 'quod omnes sunt 'fratres conjurati ad regnum defendendum.' To this my answer is, that they are so for their bodies, 'fratres conjurati,' to serve, but not to be charged. Yet I must confess it is 'pro vi-'ribus et facultatibus' to defend the realm; where 'pro facultatibus' may seem to imply, that they were bound to be subject to charges, 'secundum facultates.' Under favour, 'pro 'viribus et facultatibus,' are but words of like nature; *viribus,* that is *facultates,* natural powers, not substance; for it is not only that they should be 'Fratres conjurati ad regnum 'defendend.' but also 'ad pacem dignitatem 'coronæ, &c. et ad judicium reg' et justitiam 'faciend.'

I went next to the charter of king John, which I observe to be but common law; it is inrolled, remaineth under seal, and is recited *verbatim* in Matth. Paris.

I went next to the acts of parliament, 25 Ed. 1, against aids and taillages; there I laboured to shew, that the act was made against aids and taillages, though for the public defence; and that was out of the Articles, whereupon the statute was made, and upon the king's answer to the Articles: next out of the commons, which was after the statute, to enquire of the grievance mentioned in the articles, to the end there might be satisfaction, which was promised upon the Articles; where, in the commons, the whole inquiry was *de gravaminibus.*—It is enough for me that this commission was grounded upon the former articles, and that here this very thing, 'pro defensione reg'' was 'inter grava-'mina.' It had been strange, when the king had confessed upon the articles, that he would not legally justify them, and upon the commission, in pursuance of the articles, had called them Gravamina, and so to be inquired of, that now when they were found he would justify them in any point, and say, 'a pais pur reason,' give them a reason for what he did, as Mr. Solicitor saith.

Next I did conclude with the statute De Tallagio non Concedendo; and there my labour was to prove this to be a statute: and I am sorry I spent upon it so much time, if that had not been denied by Mr. Solicitor to be a statute. But now I understand, by the king's

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side, that this was no statute, but made and sealed at the same time with that of the 25th, and meant to be no more than that of the 25th.—This seemeth strange: for why should they be both at one time? Next, how came they so much to differ, if made at the same time? Why are there some things in the statute De Tallagio non Concedendo, which are not in the statute of the 25th?—But the Teste will clear all. First for the Teste of that of the 25th, it was *Teste Ed' principe*, and sealed by no more than the king: To this the archbishops and lords put their hands and seals. But, however, I am glad to hear it now confessed to be a statute; for then we have no more to do, but to see whether the charge of the defence were within the meaning of these words, wherein sure the words are general enough; and what reasons have been given, why by the expositions of these, charges of defence should be excepted, you have heard; and what my answers have been unto them, I leave to your lordships judgments.

I come now to Ed. the 3d's time, 17 Ed. 3, Parl. Roll. Whereas commissions have been awarded to the people and shires, to prepare men at arms for Scotland and Gascoigne, or elsewhere, at the charges of the shires, contrary to law; the king hath not, before this time, given wages, whereby the people have been at great charge, and much impoverished. The king wills, that it be done so no more. Ay, but it was said, this was to Scotland and to Gascoigne; and that this was foreign war; and that was denied, though not admitted.—I answer, that in those times, Scotland held in fee of the seignory of England; and in those times the king of England was 'Dominus directus Scotiæ: and so Ed. 1, when he determined that quarrel between Bruce and Baliol, and gave judgment by writ, settled Baliol king of Scotland, and did justify it; and it is remaining in the rolls of Scotland, in Mr. Squire's office. When there was a treaty of peace between Baliol and Ed. the 1st, he refused to acknowledge the signory of England; and there the parliament resolves he should rather have a war than lose this. So see Selden upon Fortescue. War in Scotland, not foreign war, but like to that in Wales: and so was it ever since held, since the conquest, to be within the signory of England. By the statute of 12 Ed. 1, and by the statute of Hen. 8, it appeareth to be within the fee of England. War against one another, cannot be called a foreign war; as in the war to Scotland, Wales, and elsewhere, which is not meant of foreign parts; for then it would have been expressed where, as well as Gascoigne. And by the histories of those times, we shall find there were armies carried to no other place. Nay, to shew this elsewhere is meant in England, see the 1 Ed. 3. Parliament-roll before this parliament. The Scots invaded England, as appears by a writ of Ed. 3, where is mention of an invasion, and thereupon reqaires aid. If there be wars in Gascoigne, and if occasions to Scotland, and in England too where the Scots are, and this a defensive war. Further for the wars of Scotland, if that should be called a foreign war; if the king should go thither and make a war, yet by the rules of the king's council, if a war in foreign parts is but to prevent a war at home, this war is not foreign, but for defence.

Another act made on this occasion, that the king wills, 1 Ed. 3, c. 5, that no men henceforth shall be charged to arm themselves, otherwise than formerly in the kingdom of England; and not to be compelled to go out of their counties, unless upon the sudden coming of an enemy, and in case of necessity, and then to be done as in times past: this statute coming in the same year when the complaint was made for carrying men out of their counties at their own charges.

Here I observe that the subject shall not go out of his county, not only at sudden coming of enemies, but likewise on necessity, and both together. And when it is said, it shall be done as formerly, it as an allowance that they had formerly been paid. So then, if this be a stronger case, admit here an actual coming of enemies, nay, sudden, nay, here is a necessity, and the subject is to go out of his country, *pro posse suo*, yet he had his allowance.

Perhaps it may be asked, why should not the subject pay? Is not the kingdom in danger? are they not to defend it, *posse suo*? They are so in their counties; and if they go out, the law hath provided a supply. Parliament-roll, 13 Ed. 3, there was a time when there were known enemies, actual wars in France; they intended to divert the war by bringing it home to our own doors: the enemies threatened much, nay, did much hurt; yet did not Ed. 3, command these supplies this way, but called a parliament, and there consideration was had in parliament for supply, and that the kingdom has ships enough, if they were willing; and this was in way of Defence.

From all this I conceive that it is strongly inferred that he could not force them: and when the lords and commons did meet, to take consideration for the wars against France and Scotland, the commons laid the whole charge on the Cinque Ports, they disclaimed to have any thing to do with it. And for the land-service, they said, let those of every county reside there, but no charge on the subject in pursuance of this. Claus. 13 Ed. 3, m. 11, et 14. dors. The town of Bodmin doth shew the execution of this judgment; it being agreed, that the sea-towns, and bordering-shores, should look unto it.

I shall agree that some inland towns are bound by use and tenure, but no otherwise, 4 Ed. 3, c. 1, that the people are not compelled to make any aid out of parliament; and that the aid granted shall not be drawn into example; and that the aid granted is for the defence of the sea. But it hath been said, that they are aids granted for foreign wars, for the wars in France. True, they were in part granted, some for the wars in France, and part also for

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defence on this side. And where there is no distinction, why not for the one as well as the other? It must, under favour, be conceived for either or both. And between this time of 14 Ed. 3, and 25 Ed. 3, your lordships have heard from Mr. St. John, some complaints in parliament, for charging the counties with Hobbellers, and going out of their counties, which are not really compleat, only for proportion in regard of their success, but also for the thing itself.

2 Ed. 3, m. 21. The commons pray to be discharged of the guard of the sea; and that the king would keep it at his own charge. This shews the judgment of both houses, and the weight of it is very great; for when there is any difficult point concerning the liberty of the subject, it is referred by the judges to the parliament, to be there decided: of that reverence is the parliament.

But it hath been said, this is rather a matter of prayer than right. Under favour, the matter shews that they claim in point of right: and it is to be supposed, that they would not make such an unreasonable request, as to lay that wholly on the king, if they of right ought to do it. And if words were put in a fair language, it was but a fit and humble language for so great a prince as Ed. the 3d was. But Ed. the 3d gave no relief; yet that doth shew the judgment of the two houses; and as there was no granting, so there was no express denial. A handsome prayer, and a handsome answer. 14 Ed. 3, Parliament-Roll, there it appears there was a charge of 2*s.* on all woolfells, and this for defence of the sea; and in the 15th taken away in the parliament.

I shall conclude this with the 25 of Ed. 3. No Hobbellers were to go out of their counties, unless by common consent. This statute is general for defence; there is no exception: if an enemy do invade, the parliament believes the kingdom is provided for. Yea, saith Mr. Solicitor, the subject is not charged to go out of the county, that is, upon summons, *ad exercitum*; for summons is twofold. First, a summons *ad exercitum*, and then a general summons. By the summons *ad exercitum*, only those were to go that did hold by tenure; and they say it is *encounter droit*, to be charged out of their counties. It is true, about this time there are some records of 16 and 18 Ed. 3, in the Exchequer, where charges are laid on the subject for bobbellers, and such things: but you shall find in the Exchequer that the money came thence, which was before the statute; these things were the grievances complained of. So the practice there will not expound the statute, for the contrary practice did beget the statute. But the last of these, in 24 Ed. 3, who was an active prince, and maintained wars, and so had great occasion for moneys, and so charged the people higher than they would endure; for which he did afterwards repent, and desired to be prayed for, and therefore there were divers impositions on merchants; all which I pass over, only this out of the Roll, 50 Ed. 3, m. 24. It is the lord Latimer's Case, a privy-counsellor and chamberlain to the king; there was a complaint in parliament against him for divers things, whereof one was for laying an imposition upon merchandize. In his justification he pleads the command of the king; and for that particular he was sentenced, imprisoned, fined and ransomed; so careful were they to revive that law. And that sentence of his, 2 Ric. 2, made the great lords so unwilling to talk of the defence without parliament.

And so I come to that of 2 Ric. 2, upon which I must insist, for that it is of great weight. It doth appear, as well by the consultation itself, as by history, that the realm was in great danger from several parts; as from France, Scotland, &c. and that the danger was so instant, that it could not stay for a parliamentary supply: therefore the council of the king were to consider of it; they know not what to advise; they meet together, they had no time to call a parliament; but the lords, both temporal and spiritual, and sages of the realm, considered what to do, when the safety of the kingdom laid so at the stake. The resolution of these lords and sages, who were, as I conceive, the judges, *propter excellentiam*, conclude that there was no way but by parliament, and all this was for defence, and against an instant danger, which could not expect summons of parliament. And the lords themselves rather lend money out of their own purses, than adventure that which Latimer did; which indeed was the ground which made them wary.

To this there were many answers, yet all will fall off. It is true, that it is no act of parliament; yet such a resolution, that had it been 300 years before, would have done much. The weight of this is thus: if this had been a parliament, there is little doubt what this resolution would have done: for the matter we have the resolution of the upper house; and how the commons would have resolved in a point of liberty, we may easily conceive. Here we have the judges opinions in point of the legal power of the king, what the king would do, as well as what he should do; and in things of this nature, the judges are the king's council. And as in the great council, (the parliament) they sit there for counsel in things that belong to matters of law, so at this time in this assembly, which was instead of a parliament, these were not left out, being best able to declare the rule; and this was about two years after Edward the third's death: he could not then have any other than the council of his grandfather; and of their resolution was that the king could not charge the subject out of parliament: and though it was no act of parliament, yet it had the honour to be so accounted, else it had never been entered upon the parliament-roll.

But it is said, by way of objection, that Richard the second was then an infant. True, he was so, but he had a brave man for his protector, John of Gaunt; and he had doubtless a select council, and they were as fearful as might be, that nothing should be done that might

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wrong the king in his prerogative. It is true, they had a power of doing things by parliament, yet that was no act to restrain the king, but an act of necessity: the king was an infant, and therefore it was requisite, that during his minority nothing should be done but in parliament, especially that concerned the kingdom; which was not a usurping of the regal power, but a provident care of the kingdom and him: and they do protest in that roll against incroachments upon the royal power; and to say that is good, which is to an ill intent, is a strange construction.

They say that this consultation was for foreign wars; for that Brest and Calais were in danger, and to be provided for: and for foreign wars it is agreed the kingdom could not be charged. To this I answer, admit a mixture of wars, yet every one looks home first: we have a care of ourselves first: but they would have made no such difference, if the debate had been for both. However, the lords conclude the king cannot charge without parliament.

But I cannot leave this objection, but shall give a particular answer; though Brest and Calais might be in danger, yet that was no part of this consultation; for it is said in that consultation, that in a former parliament, sufficient provision was made for them. True, they were in danger, but provided for in parliament before; and that which clears all, under favour, there is not a word in that consultation, but is merely for the defence, and no relation to a foreign war. I end this king's reign with the 8 and 9 Ric. 2, rot. 10, where is a consultation with John of Gaunt for foreign wars, and others mixed together. It appears the subject is not chargeable out of parliament.

And so I come to Henry the fourth's time. 2 Hen. 4, hath been urged, and an answer given to several commissions for Calais, and for the defence: there was then a complaint, and a desire that those commissions might be recalled. It is true, we find not this granted expressly; but as no grant, so no denial; and as we take it, it was granted. This time of Henry the fourth did yield many instances that the king cannot charge, though for the publick defence. I shall remember a record which the other day I vouched. Par. Rol. 13 Hen. 4, m. 43. It was upon an action of the case which we find in the books, 11 Hen. 4, which was pleaded in 13 Hen. 4. There was an office of measurage erected and granted, and a fee granted in it; this was complained of in parliament: first, an action was begun at law 11, and in 13 Hen. 4, a complaint in parliament; and they complain that this was against the statute, that no taxes nor taillages should be laid upon the subject; and the answer is, let the statute be observed. This use I make of it; this doth not only shew the confession of the thing, that this ought not be laid, but that, this statute, De Tallagio non Concedendo, was to be a statute: and this statute was not for aids that come to the king in particular, but against any charge laid by the king upon the subject, though it be *pro bono publico*; and upon the record, the judgment was delivered so, because *sonat in præjudicium populi*.

I shall remember the grants of tonnage and poundage to Hen. 4, and the grants usually to him were temporary and upon occasion, and not for life, until afterwards; and in his time they were for the defence of the sea and kingdom: and it was granted upon condition, that it should be confessed it was granted of loan, and not of right. 9 Hen. 4, m. 16, and 11 Hen. 4, m. 45, and 13 Hen. 4, m. 10, which is the fullest; they make a protestation it shall not be drawn into example; yet all that time were imminent dangers.—But it was said, we cannot shew that purely, and simply, and solely, it was ever granted, but with a mixture of other things, as that of tenths and fifteenths.—But the parliament was so wary, that they did sever them, and lay the tenths and fifteenths by themselves, and tonnage and poundage by itself; for though they are the same acts, yet upon the matter they are several.

I am now come to Henry the 5th's time; and for him there is not much, but like Henry 4, Parliament Roll, 1 Hen. 5, m. 17, a grant of tonnage and poundage for the defence of the realm, and safe-guard of the sea, with a protestation that they should not be charged for the time to come. I think after this time we find no more protestations or grants upon condition. But that which I argue from these grants made in this manner, is, sure it was the opinion of the parliament, that they were not bound; and the king by his acceptance doth acknowledge so much: no landlord accepts that from the tenant as a gift, which he may command as a duty; and to take it on terms so advantageous for the subject, and not only give an acquittance for it, but put it on record as in point of right. But here is an affirmation of the commons; and though they cannot make a law, yet that which they do, and the king accepts, shall be of a strong proof. Again: It is true, you shall not charge the subject with tonnage and poundage without parliament; but shall not the subject be charged another way?

To what end would that protestation have served, that the king should do it another way? And it is all one, if the commons bear the charge of defence, whether they bear it by tonnage and poundage, or otherwise; for that which falls on the particular, falls on the other. To charge them thus, were as if the king should say, though I cannot charge you this way by tonnage and poundage, yet I will charge you another way.

In the time of Henry the 6th there is little.—I come next to the time of Edw. 4, wherein, though there is not much upon statute, yet there is a speech of his that shews much of this. 7 Ed. 4, Parl. Roll. 1, there was a speech made and cited. The king first protests, which was not immediately upon his coming to the crown, that he will live of his own, and not charge the commons but in cases extraordinary, and those burdens too should be *secundum morem majorum*; and that he hopes they will be as tender

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of, and kind to him as to his predecessors, saying that he would lay no charge upon them, but in extraordinary things.

This shews, that what was granted by the commons, though upon extraordinary occasion, was not out of duty, but out of tenderness; and this was a good while after his victory, and could not upon the matter be called a brokage. And this falls not under the answer of Mr. Solicitor, that money was borrowed of the poor men, and reason that they should be paid again. —But those loans were by way of commission, and not to some poor men, but they did concern the general. And though Rich. 3, had reason to bring in good laws, because of the defect of his title, yet my lord of St. Albans called it a kind of brokage to get the people's good will; yet, however, this must be a declaration of both houses of parliament; and it was not so much offered by Rich. 3, but because Edw. 4 had made many borrowings.

I come now to Henry the 7th's time. That which hath been pressed, is the 19 Hen. 7, c. 11. Provision that the king's servants that were to attend upon him in the wars out of the counties, should be paid; then if they were to have it, then *à fortiori*, they that were not to attend. This shews that the king is to be at the charge, and not the subject. The answer is, this extends to foreign wars, and then no reason but that they should be paid; and so will not serve our turn. If there be such a difference between foreign and home wars, why do not the acts of parliament make a difference? the words are general, and extend to wars out of the realm and in the realm; and where the laws do not distinguish, neither, I hope, will your lordships.

Now I come to Hen. 8, who was as unwilling to beg, as powerful to command. 13 Hen. 8, cap. 20, the king desires for some necessity of government, and against an instant occasion, to have power to make a proclamation for government, and to do it under penalties: A law seasonable for that time, though it continued in Ed. 6.'s time. As he would have liberty, which he could not have without parliament, to lay these kind of penalties on men; so the parliament was as careful to give him no liberty to lay any charge upon their estates, lands, or goods. So as, though for the natural government they leave him a power to lay penalties upon others; yet to lay any thing upon their goods, that which is *meum et tuum*, he had no liberty; which is a declaration of the opinion of the parliament, that by the common law he could not do it.

But in the preamble of the act it is said, that there is some intimation of the power of the king, if he will; and upon that preamble indeed Cowel would have built the royal power of the king. But Cowel was mistaken, and had his reward. It is true, there is something in the act that speaketh of the regal power in necessity, but not absolute; and that too came in by the penning of it on the king's side. And 21 Hen. 8, your lordships know his power, and how he was not to be resisted in small things. If he could pull down those abbeys, what could he not do? Therefore it was not for them to question with the king upon the penning of his preamble, but a dutifulness in them to conform themselves. And when there was provision enough made against that in the act afterwards, it had been a weakness of the house so to do.

Yea, the act was that the king could not charge the lands nor goods; but there is no such thing in our case. It is true, there is no immediate charge laid upon the lands or goods, but in substance and consequence there is a charge. It is all one to me in substance, where my life and benefit is the same in either way. And if I am taxed *secundum statum et facultates*, I must pay the money out of my estate; and in the penning of an act 'non litigatur de 'verbis sed de intentione.' And if I am charged and pay not, my goods are taken away and sold; so it is all one to me, as if it had been laid upon my goods.

For the times of E. 6, queen Mary and queen Elizabeth, and his late majesty king James, I shall put my observation of all these into one. I find not much upon the Parliament Rolls for these four; few statutes were made, yet in every one of these is offered one act of parliament, which is a stronger proof than any of those which have been urged, and such proof as doth only come home to the defence of the kingdom, in case of extraordinary defence, in case of necessity, and in case of invasion. All this ariseth out of the consideration of the penning of the statute of tonnage and poundage, in the beginning of every of their reigns. The act that I mention, is 1 Jac. where it is said to this effect, that there may be times of necessity where treasure is not to be wanting; and it is unfit the treasury should be unprovided at any time upon necessary occasions; and therefore they grant unto the king, tonnage and poundage. But how? not for *quid pro quo*, not merely for defence, but towards the defence of the kingdom. Then by the judgment of the parliament this being not granted formerly, but towards this defence, and towards his great charges; therefore, by that, the charge by the laws ought to lie upon the king.—Now, my lords, if the king were not bound to the defence of the kingdom, whether or no would he accept it on these terms; and whether it seems not more than probable, that in case of necessity the charge may not be laid on the subject. 1 Ed. 6, c. 13. Mariæ cap. 18, 1 Eliz. cap. 19, 1 Jac. cap. 33, are the several grants of tonnage and poundage.

I conclude this part with the times of his majesty that now is, which in the point of defence have been stronger and greater than before, both in point of laws, and in matter of example. I take my beginning in this upon that parliament 3 Car. upon the Petition of Right, and his majesty's Answer and Judgments to that are something home.

The Commission of Loans and Benevolence, the necessity of the time did require an instant

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supply; and it appears by the Commission, that there was a necessity which could not stay for a supply another way, and your lordships know what was done in this. This Commission was not to borrow of a few, but it was general, with an equal and proportionable weight; and this, as it appears, was for the defence of the kingdom. It hath been said, that mention is made of supply for the Palatinate, and to send aids to Denmark. True, it is so; but that of the Palatinate, and that of Denmark, do upon the matter concern us; for that war being upon our resolutions, there was a kind of engagement laid upon us.

In that Commission, there appears more than a possible danger to the kingdom; there was a necessity, yet this was laid down, it held not; and in pursuance thereof there was an Order, whereof we have a copy; it is in the Exchequer moved by the king's Attorney for staying the proceedings for money spent about Loans, which was by his majesty's gracious command, wherein his majesty did prevent the commons desire.

The Petition goes on, that there were soldiers billeted in several parts, and there was a charge; and this was after a late foreign war, an enemy then known and declared; there was a necessity for instant defence, and to stand upon our guard; the enemy might in a short time have been upon our coasts: yet your lordships know what was said to that. And as the Petition looks back to those things that are taken off their hands, so it looks forward, and provides, that no such things should be taken hereafter by the power of the king alone, although upon matter of necessity. And all this was a Petition not of favour merely, but in point of right, according to our laws and statutes, which are the statute 25 Ed. 1, the statute De Tallagio non Concedendo, and Magna Charta, the ground of all. And to all these his majesty promiseth such things should be done no more. And they not content with this, his majesty gives this answer, 'Soit droit fait.'

I cannot leave this great strength thus, but bring it home to this very case. The substance of this Petition being for charging of the subject out of parliament by the royal power, when this Petition had passed the lower house, it came to the lords; and upon some motion, there was a proposition of a Saving to be put in the end of the Petition, saving the sovereign's power, which his majesty is entrusted with for the defence of the kingdom. All this your lordships know, that after several conferences, in the conclusion the Petition passed without any Saving.

My lords, upon what reason this Saving was left out, your lordships may see by the record, which your lordships and the rest of the house best know, and whether upon this reason or not.—That the laws the Petition went on, whether the Saving would stand with those laws.

My lords, it appears that the first Answer was, that the laws should be put in execution; yet in the close there is put in a saving of the prerogative: but this Answer did not satisfy; and therefore there was a general Answer, 'Soit droit fait.' But now what was granted by the last Answer more than by the former, only that the law was left more absolute?

As to that commission of advice for consideration of means to raise supplies, and it was for defence, and a necessary defence, and that did not bear delays, that commission was laid down by his majesty; yet in that there was no more than this consideration, how supplies might instantly be raised, which could not endure delays by impositions or otherwise, that is still lawful ways. If there had been any to lay a charge on the subject by way of loan, then that commission had not been excepted against; yet his majesty was pleased to lay down this upon the desire of the house.

I conclude with that which I conceive to be the judgment of both houses in point. It is the judgment of both houses against the Sermon touched upon by Mr. St. John, which I shall press as far as it will be applicable to our case.—The Sermon was to shew the power of the king in case of necessity to lay a charge on the subject without a parliament. When this came into the lower house, this was the main and principal charge, I say not the sole charge. When it came into the upper house, there it was pressed against that divine by the king's counsel; and it appears by the journals of the upper house, that the crime was, that he should shew the king's power to charge the subject without parliament. It appears by the said journals, that the Doctor's excuse was, that he meant nothing but to shew what kings might do in extreme necessity of danger. And your lordships may read in his Sermon, that he speaks of necessity, not attending the slow motion of parliamentary advice; so that it is pinched on extreme necessity: but neither one excuse nor the other did serve his turn. The offence is acknowledged, submission made in both houses, and the Sermon called in by proclamation. Ay, but, saith Mr. Solicitor, this Sentence was for other matters. I say not, but that the Sentence was for this thing alone: there were other things, but they were only by the bye; only occasioned by this. Now how far this case comes to our case, I leave to your lordships judgments.

The Fourth Day's ARGUMENT of Mr. HOLBORNE.

May it please your lordships; I have thus far gone on in my proof from reason, books, cases and authorities, all being of highest nature, that is, by the laws of England; that the king cannot charge his subjects without their consent in parliament, though it be *pro bono publico*, or for case of necessity. It now remaineth that I offer, what either the practice hath ever been in the best times, and the contrary practice decried from time to time.—In this I shall do a work of supererogation. It is not material what the practice is, if the laws be once settled. A law once made, over-ruleth

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all practice afterwards. And as a law is law before practice, so it is law against practice: yet because practice may be an expositor of law, especially where the words may seem general, I shall shew from age to age, that the subjects without their consent could not be charged.

From the practice of the kings themselves, even in all ages, that on extraordinary occasions they have resorted unto parliaments; and when they could not do good by that, they have made many borrowings, as appears by the Parliament-Rolls. What other courses they have taken, your lordships have heard upon the former argument. And when the king received these supplies, it came voluntarily, and with protestation, that those things should not be drawn into example.

I shall go now to the practice of the subjects part. First, I shall go as high as the Saxons time. That of Danegelt did begin by a common consent: and in the very laws in Mr. Lambert, it is said *statutum est.* Though it always did not signify a statute, yet when it was written by one that knew the laws, and writ of the laws, it must be so taken. Tilburiensis saith, as it was the act of the king, so it was the petition of the commons; 'Statutum est a regibus,' still the king. It is strange in that time of Ethelred, when Danegelt was so great and common as it was, the subject being easily drawn unto it, that the king should not ask it, when he might have it for asking. But this Danegelt being raised by Ethelred upon emergent occasions, as it was not like to be always, so the provision was not for all times. After him came in some of the Danish kings, and they continued the Danegelt. And what became of those that were the collectors of the Danegelt between Ethelred and the Confessor, doth appear in Huntingdon, and how the people did decry it in general; then it was laid down *ut gravissimum,* as appears in Ingulphus.

Edward the Confessor he laid it down. At the Conquest, still they go on with the Danegelt. It was part of the terms made by the people with several kings, that it should be be laid down: and king Stephen did promise to lay it down; though notwithstanding they did now and then take it up. In Hen. 2's time yet still more complaints, and that was left out of the charter of king John.—The use of all this is, That though there were a practice under pretence for defence of the kingdom, yet the people did decry it; it was not such a practice as could bring in a law.

When Danegelt was thus laid down for the time of king John, Hen. 3, and Ed. 1, in which times practice for shipping will not be material, for in all those times the very shipping itself was decried, parl' 25 Ed. 1, there the very charges of the subjects for shipping were the complaint, the complaint is the thing I am upon. After the 25 Ed. 1, and the statute De Tallagio non Concedendo, the course of these proceedings did alter; for before in 24 he sent forth writs under a great penalty, and 29 Ed. 1, m. 10, he contracts for his ships, and they go at his charges. P. 76, Ed. 1, Rot. 35, Reginald de Grey, when the Scots entered the kingdom, he was commanded to bring seamen out of their counties, and he durst not without money; and thereupon he had money out of the exchequer.

But the answer was, This was for Scotland.—For that no doubt this war was at home, for in the 26 the Scots had entered the kingdom. Br. Trin. 32 Ed. 1, Rot. 11.

I come now to Ed. 2's time; there is not much against us, but for us. This I shall observe, that the first writ that went out was 9 Ed. 2. It is true a Mandamus went out for shipping, and against an enemy, and for defence of the kingdom: but how? Not a 'Mandamus 'firmiter injungentes,' nor 'sub pœna forisfacturæ,' but a 'Mandamus rogantes,' and the means of compelling 'quatenus honorem 'nostrum et salvationem vestrum diligitis.' So you see how the course of the law altered in that time.

I come to Ed. 3, for I will but touch upon every time, and offer but one thing to shew the practice in it. As I find a statute in the beginning of his reign, concerning provision made for wars, so I find an execution, Rot. Scot. 1 Ed. m. 8, there went out two writs, and they were concerning raising of shipping, and in respect of the Scots entering that year. This is that I put it for, to shew that upon that occasion 1 Ed. 3, soldiers were paid, although for the wars in Scotland. It doth recite that the Scots had entered the land that year, and did make further preparation; and if they could not have their peace on their own terms, they would proceed. 'Consideratis etiam periculis,' for it was in *articulo necessitatis;* he giveth a command that there should be ships, but it is a 'mandamus rogantes,' nothing at all by compulsion or forfeiture in the writ, 'sicut 'honorem nostrum.' It appears by the writ, that he said, he sent money at that time for the victuals for the soldiers; and this very writ was 'pro salvatione regni,' and that we could not be safe without shipping: and this was in a pure and innocent time.

I will not say, that in all the actions of Ed. 3, he never broke this rule: your lordship know what wars he had, and what necessities, and what those necessities brought him to; but he was so far from justifying of himself as it appears by Daniel's History, that he sent to the archbishop of Canterbury, to pray for him, and desired the people not to think ill of him for laying those charges upon them in case of necessity. 12 Ed. 3, Rot' Alm'. Your lordships shall see upon that acknowledgment, how he began to alter his course. Parliament Roll, 13 Ed. 3, though he laid charges before now, he calls a parliament, and desires supplies for shipping that way; and that acknowledgment 12, will answer home that famous year of 10 Ed. 3.—Next, my lords, to shew the decrying of the people in this time of shipping itself in the rolls of 21 and 51 Ed. 1, there the people

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said they were not to bear the charge: so it was no practice, for the commons did decry it. That for Hobbellers, they were at the charge of the county before 25; but that they were complained of in parliament, wherein the statute of 25 Ed. 3, was made. But all that I aim at in this is, whatever the contrary practice was, to out-balance it by the contrary opinion, and claim of the kingdom; and the practice I hope shall not be able to make it law.

I come now to the time of Richard 2, for his time I shall remember but one, Tr. 7, Rich. 2, m. 15, 'de contribuendo ad custodiam maris,' there is a recital of Danegelt; and that the subsidies that the king had were not sufficient, and therefore commanded an aid, but to do it *gratuiter*. I do observe, that all ship-writs do end in the time of Ed. 3, one or two perhaps may be after, and therefore I do end with the practice of those times; but from those times downwards to Hen. 8, this was offered, and not denied; That there are several records, how the kings of England, both at sea and land, did bear the charge of defence; and all the answer was that it doth not appear how the king doth raise the monies.

For the time of Hen. 4. 2 Hen. 4, Parliament-Roll; a complaint of the commons, of a commission for building of galleys for defence: And their complaint was, that it was done without consent of parliament, which ought not to be done; and this commission is repealed. This shews the decrying of the subject, and that the practice hath been, that the defence was at the charge of the king.

I have thus finished the negative part of the argument, that the subject is not compelled to find shipping for defence at their own charge.

Next for the positive part, that the charge both in cases ordinary and extraordinary lies on the king, and that by the common-law; and that the king hath provision and consideration for it.

My lords, for provisions regularly, whatsoever estate is in the king in the politic capacity, is in him as *Rex*, and not in him in his natural capacity; and what is in him so, is for the benefit of the kingdom: and that hath ever been the ground of the acts of resumption, and some of resumption made by Hen. 7, where lands were aliened by him, he made a resumption; and those many privileges that the king hath in him, are as *Rex* in his politic capacity. All which cases are put together in Calvin's case in the 4th report. And not only in England, but in all Christendom, all estates in princes are held for the benefit of the kingdom, as well as for themselves; and that is not denied by king James in his answer to Perron; he would have it absolutely to be to that purpose. All that is to the advantage and honour of the king, is for the benefit of the kingdom.

My lords, from the consideration of the interest of the kingdom in the estate of the prince, the parliaments have so often offered their service to the king: And the parliament in former times did require a hand in the naming of a treasurer; they called it *antiquus mos*. And it was 5 Ed. 3, in a parliament, but repealed 15 Ed. 3. And for ancient land of the crown, they were not devisable out for that reason: and that none should buy the land of the crown, for it was not alienable in that time.

My lords, in the form of our government, the king in the supposition of the laws had all these. By the books cited by Mr. St. John, all were in the crown, and being so, they were for the service of the kingdom; and that is the reason that all land is held immediately or mediately of the king. As a lord of a manor, when he hath a circuit of ground, he letts one part to one man to plow in knights-service, and part he keeps for himself. So the king when all was in him, he disposed of some for the service of the kingdom. Hence ariseth the tenures originally. As they kept in their hands palaces and demesn, so for public service they made distribution of certain lands for public defence; some by Knights-Service, some by Scutage, some by Cornage, and some for Castle-guard and Grand Serjeanty, all for the service of the kingdom; and tenures *per baronagium*, which was an eminent service, as appears by the books of the Knights Fee; Petty Serjeanty for meaner offices, and Grand Serjeanty for greater offices. Divers lands were given to find ships, as in Doomsday-book, besides the Cinque-Ports, which were to find a certain number; and so some inland towns did find ships, but how? As by tenure, not generally as subjects. And though Mr. St. John did urge one or two precedents by way of example, yet he said not there were no more.

Mr. Solicitor did give an answer, that all those came out of the estate, what was that charge to the public?—It is true, if the king had that for himself orignally, he said well; but if it was in him originally *pro regno* as well as for himself, then it is otherwise.

But it hath been said, what are a few men, or one ship? But it appears in Doomsday-book, the king hath a great navy. There were 60,000 Knights Fees in the Conqueror's time: and though divers serjeanties are turned into rents, yet the revenue is the same. I shew it for this, that there was a provision made in the institution of our frame of government, but for the guarding of the sea more particularly.

The king for the guarding of the seas hath all the natural profits thereof; as all great fishes, whales, sturgeon, &c. and all other profits of the sea, if the king would take them; and so letters of marque; and though some of them are got into the subjects hands, yet originally they did belong to the king. So the old Customs by the common law, *antiqua consuetudo*: and so holdeth sir John Davies in the customs of Ireland. So Prizes and Impositions are for the defence of the sea. So Tonnage and Poundage, which was originally granted for ordinary, but oftentimes upon emergent occasions, it appears it was granted

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pro salvatione regni, and not granted amongst other things, but by itself. But in latter times, when it was settled upon the prince for life, then it was for extraordinary defence, and to have money in readiness for an instant occasion: for it is said, in the very grant to king James, that the king must not be without money; and therefore, towards his charges upon an instant he must have it. And though it was granted on particular occasions, yet that is enough that it was granted on great occasions; and this was granted out of their love to him. The words of the act 1 Jac. speak of a sudden invasion; now whether this is by sea or land, it is general.

My lords, I shall now upon the whole observe what I have made good, either upon those general statutes, that the king shall lay no charge, or rather by the books, that the king cannot charge for little things; or upon the practice of times, wherein every time the king hath been at the charge, and when it hath been on the subject they have decried it. How you, my lords, believe it in point of right, I leave it to your judgments.

My lords, I shall go on to the answer of Mr. Solicitor; I have made a reply to all his answers to our positive part. It remains I should offer an answer to his positive part. First, I shall give a general answer to his whole argument; for if the case be, as we conceive it is, that the point of *salus regni* is not now in question, the argument will fall off. How far *salus regni* is in the case notwithstanding, I shall argue over, and examine the nature of his proofs.

I am sure he had none from parliament, either act or declaration of both houses; what there is, is against him. The answer of the king, with the judgment of both houses, is a main thing in point of right. I did not receive any legal material record, but that of the abbot of Robertsbridge, nor any book-cases in point, where it is said the king shall charge, but the books 13 Ed. 4. I shall answer these first, practice next, and reasons last.

To begin with the case of the abbot of Robertsbridge, which was opened by both sides. It was 25 Ed. 1, the abbot had land agisted *ad custodiam maris*; and in an action brought, the abbot pleads that he had found a horse for the same land. Here is an argument, that the abbot doth admit that the king might agist *ad custod' maris*: now if that admittance in this case should be of any authority to alter your judgments, I shall leave it. The abbot's counsel did no more than a discreet counsel would have done. If an action be brought for words, and it appears the action will not lie, what then? If the abbot had a plea that he was agisted to find a horse, what reason had he to put himself on matter of law with the king? So the authority can be nothing against us; and at the best the case did rest there, and went no further.

For the book-case, 13 Ed. 4, where it is said, that the king can lay a charge, that book is with reference to toll; and such things are nothing to our main case; and that book will prove strongest against the king. The main case was concerning a new office of measurage erected with a fee: this was *pro bono publico*, yet an action brought; it began in 11 Ed. 4. Then cometh the parliament in 13, and this was complained of to be against the statutes, that provide that no taxes should be laid. The answer is, let the statute be observed.

To the case of toll, which for common necessity to maintain traffic, and because there must be a power in somebody, and without a fee not possible to maintain the charge, it is allowed it may be done by the king: but in our case here is no common necessity, here is a thing that may seldom or never happen. The ground of granting toll is this, because it is *pro bono publico*; yet if not for common necessity, the king could not do it.—Next, the toll is not so much a charge, it is *quid pro quo*: in the 5th Report it is said there, that it is no charge; for the benefit in the thing itself will quit the charge. Again, toll is but *inter minimum*, this of weight; and though an argument will hold *a minori ad majus* in the negative, because a man cannot do a less, therefore not a greater; but not in affirmatives, because he can lay those, therefore greater, *non sequitur*. Next, for toll; no man is forced to pay toll, because no man is compelled to come to the market; if he will come voluntary and receive the benefit, then there is reason he should pay it; but this is not our case. Lastly, the law doth allow in this necessity, in case of toll, to the king a power to grant, yet the law doth not leave the king absolute judge of the *quantum*: for if the toll be not proportionable to the benefit, the patent is to be avoided, as in case of a fine uncertain. Now, my lords, in our case here is no judge of the proportion but the king; so the argument is thus: If the law admit not the king to charge but in common necessity, then not in cases that may happen but seldom or never; if not in small things, then not in greater.

I come now to practice: and for practice, where there is no opinion, either for records or books to warrant it, it is something weak, especially when there is no urgent occasion. For the practice, I shall give this general answer: if I can satisfy your lordships by authorities of parliament, how the law standeth; the contrary practice, either before or after, is not material; and for that, I must leave it to your lordships.

Your lordships have heard us read the words of the acts of parliament, and explain our meaning thereon, and we have brought them home to our case. It will be hard to make an exception if the act be general.—For, my lords, the practice, it consists of two parts. First, arrays of men. Secondly, of shipping, and for shipping; 'de navibus congregandis,' or 'munitendis' and 'inveniendis.'

For practice of arrays, I shall lay them by, and give them a general answer: for there were

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very few, if any, that went from the beginning of Rich. 2, but only to see if they be armed, *et prompti*, and that is made by the statute of Winchester. It is one thing to see that they be armed and in readiness; and another thing, at whose charge they shall go: that appears not out of those arrays. There is no doubt but the subject, on the statute of Winchester, ought to be ready with arms, and in his county to make defence; and upon occasion he ought to go out of his county, but at whose charge, that is the question. And if those writs of array were the same with the commissions now to the lieutenant, yet I know not how; this is my argument in the case: and so your lordships see that a great number of the arrays falls off this way.—But if arrays had been, and at the subjects charge, yet against the statute; I leave it to your lordships to judge, how far practice shall be an argument.—But for shipping, for writs 'de navibus congregandis,' those are nothing; for the matter is, whether they shall be paid before they go, and many of the ship-writs are of that nature. No doubt but the king may command 'ad congregandas naves,' to use them upon occasion; but the matter is, at whose charge they shall be. And for all the writs that are to find ships, I hope those writs are not concluding.

My lords, for those writs that are *sumptibus propriis*; a writ, and no more, without execution, is not a practice sufficient to make a law, no more than a common evidence, when to prove right by usage. Now whether or no they have shewed a general execution, by obeying and doing it at their own charge, or money levied upon them, I leave it to your lordships; I see no proof. It may be, such writs might be; but that there was an execution of them at their own charge, or money levied on them, we see no such thing. And if writs were to find shipping in these times, it is like the monies were returned by the counties, and so the receipt might shew it, especially if inland counties, where nothing could be had from them but money.

But, my lords, to examine on those grounds, whereby a practice must make a law: if this charge be within the words of the law, no practice can take this out of the way of exception. The practice must either shew that was the common law, and so *generalis consuetudo*, or must declare the meaning of a statute by constant consent; which must be of those that could consent, and those which did not express a disassent.

We are now upon inquiry as on practice, though the king cannot generally lay a charge, yet whether he can do it in this case, to make an exception of law; it must be done by use and practice; as to make a law practice doth not make common law, but as it is a proof of common consent: for all laws are made two ways.

First, By express consent of parliament: or, secondly, by use, from time to time, whereby it doth appear this was excepted, and the use becometh a common law: so as still, if an use doth make a law, such use it must be as doth prove a tacit consent.—Next, as the use must bind the kingdom, so it must be general over all the kingdom; it is not enough to be at some times and seldom, but it must be *semper eadem*. And, lastly, it must be reasonable.

I shall examine on these rules, for these are undoubted rules to examine a law by, the writs of Hen. 3, Ed. 1, and Ed. 3. In all these times the practice, as to this, will not make a law; here will be no proof of a consent.—First, For Hen 3, to 28 Ed. 1, here the subject, as before the complaints, which begot the charter of king John, was upon the charges imposed on the subjects; so afterwards, until the 25 Ed. 1, the law of the liberty of the subject was not settled: for though king John did grant his charter, yet the pope did dispense with him, and he broke it, and so it rested till 9 Hen. 3. So all this time the subjects of England were under power; and what in that time he might do by duress, was not by consent. Then, 9 Hen. 3, he made a charter, yet from time to time he broke it, though he desired to be excommunicated if he did it; and so it rested until 25 Ed. 1, and then with much ado was gotten a Confirmatio Chartarum: yet this satisfied not at all. Till 28 Ed. 1, Mag. Chart. not observed. I could shew divers cases point-blank against these.

The statute 28 Ed. 1, saith expressly, that this charter was not observed; and it was once a punishment for those that were the breakers thereof. Now when acts of parliament declare that the law of the liberty of England was not observed, I shall not need to shew any record how it was broken: so that all the practice in Hen. 3's time, though much, yet that will not serve the turn; for that government was more of force than law. But for that of Hen. 3's time, I shall give a further answer; the very courts of justice were shut up, then it was in *flagrante bello*.

And for Ed. 1's time, all the main ones considerable were immediately before the making of that statute; if rightly apprehended, they did particularly occasion that statute; so the subject did deny it, and it is a dis-assent.

After 28 Ed. 1, little considerable; and Ed. 1, when he made 28 Ed. 1, when the charters were confirmed, yet he had his *salve jure coronæ*, which did not please the subject; and afterwards, notwithstanding he made some grants in parliament, yet sometimes he did revoke. Your lordships know what a great renunciation he made; but as some of our historians observe, when he had occasions for moneys he did grant, but otherwise did not; so that in all his time the subjects did not consent, but as much as they could, did dis-assent: and in the 25th, you see how the practice did alter for commanding of ships.

Next for Ed. 2, for his time, we see how he went. In the beginning of his reign he sends but a *mandamus rogantes*. In the end of his reign, whether his government was more of law

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than power, I leave to your lordships; that little practice that way, if it doth come home, is not sufficient to make a law, who was under will.

Next for Ed. 3, for him in his best times, you see how he went, he laid not the charge on the subject at the first; afterwards there is no age wherein there were so many complaints as in his time, from the first to the last; and not only in this of shipping, which, as often as it was, there was still complaint, but in impositions on merchants, whereupon lord Latimer was imprisoned: so that in point of charge, the subject did inforce him upon it in time of necessity. So that in those times the practice will not be any argument against us.

That of 10 Ed. 3, he confessed that he had laid too heavy charges on the subject, and did ask forgiveness; so here was no consent, but a several dissent by their several complaints. And if I take off these three kings reigns, I take off all the force of practice concerning shipping; for from that time afterwards you will find very little, for what cometh afterwards is but for matters of arrays.

The next thing is, that every practice that must bring in a law, must be constant and continual, so long together as may bring it into a custom.—Now out of what your lordships have heard, if you conceive in the times of those three kings, that they had one way and the subject another, then there is no constant practice to lay it on the subjects: And for Arrays, I conceive them to be no part of the case.—And for the next; if practice make a law, it must be general through the whole kingdom; for that is our case, we are in an inland county; and observe how few writs we have that went over the whole kingdom: Nay, have you any that proveth it indeed? That they went to some inland counties it is true, but that they went to all throughout the kingdom, you shew not.

Now if you will have a practice to bring in a law, you must not bring your practice by pieces; at one time in one part, and at another time in another part: for that in one part of the inland counties alone will not be justifiable, for that was to lay a charge on the one, for the maintenance of the whole; and that is against reason, and the reason of this writ. So to charge the whole kingdom, you must shew they went over the whole kingdom, and were obeyed by the whole kingdom; for obedience in some parts, will not bind all, so once or twice will not do it; for the writs that have been produced, many of them went to the sea towns only.

Next, my lords, admit that the practice had been constant from king John's time down to Hen. 3.'s, so to this day; under favour, as the case standeth, your lordships could not find such a practice as could now introduce a law. The custom, which must be of a manor, you must not shew the beginning of it, that within time of memory the thing was not so. True, if the time had been long, and I cannot shew when it hath not been, that is time out of mind.

To examine this upon the rule; it hath been said, that from the time of Hen. 2, Danegelt was taken: True, it was taken, *de facto*, but not *de jure*. The subject was not at that time charged both with Danegelt and shipping too. Then our course of charging the subject to find shipping, must begin since that time.

But peradventure it will be said, as sir Henry Spelman in his Glossary, that when Danegelt went down, this other came in. And peradventure it will be said, this is enough to shew this begun, though but in memory; then it is but to see upon what warrant of law this began.—If Danegelt had not been legal, then this to come in instead of that which was not legal is not sufficient. Now for Danegelt it was not legal, and so *fallit fundamentum*: if it had been legal, yet not so pursued in the course as is legal, so that there is no ground for it on right or wrong. That Danegelt, when it went, it went over all the kingdom, and in a proportionable way to all; yet these writs for shipping were commonly to the sea-towns, and but sometimes to some inland towns. If Danegelt were on the land, and certain, this is on the person, and uncertain; this respects both lands and goods, the other not. There is no such assurance of equal charging in this, or in the other, if Danegelt had been legal; yet whether this coming in lieu of Danegelt, being of a far different nature, be legal, I leave it to your lordships judgments.

Next to examine it upon another reason, upon the reason of the practice. If the practice went over the whole kingdom from time to time, there was the more equality; but if the practice went over the kingdom but by degrees, sometimes to one part, sometimes to another, though over all the kingdom at times, yet this is not sufficient to make a law. For that act which is unreasonable in itself, and not agreeable to justice, will never make a law: for a law will never arise out of an act illegal. Now, my lords, when a charge is laid upon parts of the kingdom, which the whole should bear, it is unreasonable. I will not deny, but in manors, where you are to have a custom, sometimes on one piece, and sometimes on another; this may be good, though it goes not over the whole manor; because in this act there is nothing against justice, for here one man doth not bear the charge for the whole; but it is otherwise in our case.

My Lords, I shall go further; as for the inland towns, so for the sea-towns, we do not find a general practice of all sea-towns together, sometimes to one, sometimes to another; if any to all, yet not to all oftentimes.

My Lords, admitting arrays would be material in this case, as I conceive they will not; yet under favour they will be no precedent for the defending of the sea, the case doth differ.—For though the king be lord both of sea and land, and hath in them both the sole dominion; yet in the sea he hath the whole property, and in a manner all the considerable profit and privilege; the subject hath but the passage of the

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sea, and the *minima* to take fish, not considerable in point of benefit: But for the land, that is our own, and the land of the kingdom is the house of the kingdom. As for the charge of the land to find shipping, there will be a great deal of difference between sea-towns and inland towns: As those that live in sea-towns are in more danger from the sea, so they have more profit and privileges; and that is the reason that in the parliament 13 Ed. 3, the sea-towns should do it in regard to their profit and privileges.

And for the command to find ships, the positive law is to make those to find ships which are chargeable, as your sea-towns, and for inland towns to find arms; because both are not fitted alike, there is no reason that they should be charged alike. Upon this reason is the case of Beverly put before, 2 Ric. 2, where the complaint is, that they are charged for shipping, being a dry town; they say they were charged *indebitè*. 10 Ed. 3, Shoreham, they plead they never found arms but shipping, and a good discharge. And in Mat. Paris, upon wars with France, the sea-towns complain and desire help; so that the burden lies on them, if on any. My lords, I have gone over in a general way, as well as I can, and endeavoured to answer the practice; to have gone over all in particular would have required longer time than your lordships can spare.

The reasons now only rest to be examined; for if no full authority, nor sufficient practice, reason alone will not argue against a fundamental rule: for we are not now to examine on reason what is fit, and what not, but to see what is the truth.

The first is, that 'salus populi suprema lex:' the question is not, what we are to do by necessity, but what is the positive law of the land? The question must now be as before; what power is in the king, and did our forefathers in that time of peace and government leave in the crown, not in case of necessity and public danger; when, with them, 'salus populi' was 'suprema lex,' and upon that they did ground the rule of government? In this case, whether or no, in their consideration, they did conceive for the public good, to leave the power in the king or not, to lay a charge on the people; there the rule came in, 'salus reipublicæ suprema lex:' and that which they looked on most, was the benefit of the multitude. So that now, my lords, it is not to dispute, whether it be better or worse, but that it was. And to shew there was no such great necessity as can countervail the possibility of prejudice the other way: if there do come such a danger, then the subject is at that time under a law of preservation of life; and all which makes the subject as willing to obey, as to submit to government in the creation. This law is of an higher force than any positive law can be. But admit that this cease in this case, and all positive laws of property yield to the law of necessity; yet I admit nothing, though I might admit much, and not prejudice the case.

Though no positive law doth charge, yet in case of imminent danger, if I should say my private property is become public, it is no mischief, for so it is in some cases: for in this time of imminent danger, the king and subjects are under a law of absolute necessity, and public safety. In all human reason, when the danger is in *proxima potentia*, we may prevent it; thus if another man's house be on fire, mine may be pulled down to stop it: so that we may see by what grounds we do go in case of absolute necessity. If the king doth command any thing concerning the property of goods, in respect of danger, the execution may not be by any positive law merely, which in such cases do cease in *furore belli*; for those are acted by formalities, and *inter arma silent leges*. And in these cases, as the king may command my property, so may the subject command the property of another: the books are so, 8 Ed. 4. For hindering the landing of an enemy, bulwarks may be built on my land without consent. So the power is not only in the king in these cases of necessity, but in the subject: and the books say not that the power is only in the king, but I can do it, and the law of necessity is the warrant.

Then, my lords, it resteth considerable in this case, what shall be said to be a time of necessity. I speak still by way of admittance, for I grant nothing.—It must be in a danger now acting or in *proxima potentia*; as fire, though not burning, yet ready to burn: that is, there must be a war, *furor belli*. Note, That when the king makes proclamation of war, or the king is in the field; and that indeed was not Mr. St. John's meaning, it was taken further than he meant it.

It must be in such a danger, when this power is of necessity to be used, as in case of fire; there must not only be fear of fire, for one house must be first actually on fire, before the house can be pulled down, but withal such a danger, that if this be not pulled down, the other will be lost: and as in case of an enemy, a subject, out of fear of an enemy, cannot build a bulwark on another man's land, but when he is a-coming. So that none of these cases will match ours. The property yieldeth not in fear of danger; but such a danger, as help must come in *nunc aut nunquam*. This time is not when the king will think there is occasion to exert this power, as in the case of 1588 Though the queen and state did command the burning of those goods and provisions, if an enemy landed; which was a lawful command, and justifiable to be done, so they did land; but could not command them to burn their corn before an enemy did come.

Your lordships know the king may command in case of danger the destruction of all suburbs, rather than an enemy should come in them. But if there be a fear only of wars, if the king should command it, how far that is justifiable, I leave it to your lordships judgments. All this difference appears out of the case of the Gravesend barge, Duffeild's case, 12 Jac. If there be a storm, or a leak in a ship, that the

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danger be actual, it is justifiable for the master to throw out the goods; but if he sees a cloud arise, and out of fear of a storm he threw out the goods, I doubt on a jury which way this will go with the bargeman; but if a storm do come, or a leak spring in, in that case the bargeman may do it. So you see upon what law my property yieldeth. That position generally taken, as it is said, may be of a great deal of consequence; for it doth not rest there, solely upon yielding of the laws of property: for all positive laws do cease in that danger: then the positive laws of my liberty and person also do cease.

Now, whether or no you conceive all laws of liberty and person cease in this time of danger, when the danger was but conceived and not actual, that I leave to your lordships judgments. And if that rule be general, then why not the other? So we may see the difference from our case; for in that case there is no manner of loss to the subject, for he shall have allowance for his loss, or make suit to the parliament, and they can recompense him; for what is taken for the public good is but borrowed. As in case of shipping, if my goods be cast out to save the ship, every one of the ship is to bear a share; so in our case, either the king must do it, or the parliament: so there is no prejudice.

So upon the whole, my answer is, Admit the rule of 'Salus populi suprema lex;' yet the law of practice doth not yield, till there be an actual enemy, or *flagrans bellum*. It is not enough that there be but an apprehension.

There were divers other reasons urged, (but those two of 'Salus populi suprema lex;' and of private property must yield to public safety) were the two *rationes cogentes;* the other were but *a pari et a simili;* and all those I shall pass over which were only for convenience, as the granting of toll, or a corporation to make ordinance for the good of the corporation: all these will not come home in the manner. My lords, in all these cases 'a minore ad majus 'non valet, negativum valet.'

But there are only two reasons urged, which require an answer: The trust that the laws put in the king in greater matters, viz. the shutting of the ports; and the Droit Royal of wars and peace. For the shutting of the ports, there is more difference in point of prejudice of the king than the subject. The king cannot shut the ports but to his own prejudice. Again, the shutting of the ports without cause of necessity, the king hath the loss as well as we; for by that he loseth his customs, and by shutting them he can gain nothing at all. And besides, there is no law at all that hinders him from that. But there is a law saith, that he shall not tax the subject without consent in parliament.

The next is the Droit Royal of wars and peace. It is one thing to say, the king can make war and peace; another thing to say, he can charge. In war and peace the king is equally charged with the subject, nay more; and for those things there are no great reasons, but that in the first form of government they might be well suffered. For that cause touching the king's power over coinage, there was a necessity to counterpoise the like thing in another state; in that case the king loseth, and we lose. The king may dispense with penal statutes, and make them as none. Doth any laws say he shall not do it? The reason differeth in that case; there is a common necessity that there should be a power in somebody, for acts of parliament are but *leges temporis.* It is one thing for the king to have power in point of favour, and another thing in point of charge; so in case of pardon there is no hurt if he doth pardon; God forbid that he should not have power to shew mercy.

My lords, there are in the case two points more which I shall move. Whether or no, admit the king could command the subjects to find ships, he can give power to the sheriffs to make the assessment as in the writ? The ground is upon this, that in all cases of politic charges the law takes an especial care to make an equality. In parliaments of old, they were always careful to make provision that way, as upon fifteenths and subsidies. And in Danegelt they went such a way, as there could be no inequality; they went by taxing of hides. Now if the law doth make this a legal way of charging, it allows the like way for assessment that is allowed in other cases, such a way as wherein there can be no inconveniency. Now how a sheriff hath that knowledge to lay it on men's estates and lands, I cannot tell.

My lords, not to leave a power in the king to lay an arbitrary charge, but in the sheriff to lay more or less on any man; though the law may trust the king, yet it is a question, whether it will trust the sheriff. Nay, I ask if the sheriff be an officer of law in this case; yet the king may command any man as well. Assessments are usually made by others, and not so much by the sheriff. So I do conceive that this is a thing that doth properly belong not to the sheriff, he is not an officer sworn, and it resteth not only in the sheriff, but the undersheriff. So that if the law doth trust the king, yet whether or no this be the way to charge it, I leave it to your lordships judgments. If a hundred be charged, they have ways to lay it on themselves proportionably.

The next thing is this: Admit a levy may be well-made, whether the money thus paid may be brought into the Exchequer, by a Sci. Fa. I do think that this is the first writ that ever was of this kind, I do not find it regularly.

My lords, I think it is hard to find where there is a writ that commands and prescribes the manner of levy. It not only gives you power to levy, but sets the way of levying, by imposition, by distress, by selling; for my part, I know no case can match it.

The First Day's ARGUMENT of Sir JOHN BANKS, knt. his Majesty's Attorney-General, on behalf of His MAJESTY, before all the Judges in the Exchequer-Chamber, in the Great Case of SHIP-MONEY.

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May it please your lordships; There was a Sci. Fa. brought against Mr. Hampden, and divers others, to shew cause why those sums of money assessed upon them by the sheriff of Bucks should not be paid and answered; it beareth teste the 22d May, 13 Car. and a Sciri Feci returned.

Mr. Hampden demandeth Oyer of the original writ 4th Aug. 11 Car. and of the Certiorari, and the Mittimus, and of their several returns. The writ 4th Aug. which went out to provide a ship of 450 tons, with victuals, men, ammunition, &c. that writ giveth power to the sheriff to make an assessment upon the county, and giveth power of distress and imprisonment in case of non-payment. He demandeth Oyer of the Certiorari, which consists of two parts; the one to certify the sums assessed, the other to certify the names of the defaulters. And the names of those that made defaults were returned, and Mr. Hampden amongst others. He doth demand Oyer of the Mittimus, which doth recite the tenor of the first writ.

Upon Oyer of all these, both of the writ 4th Aug. of the Certiorari, Mittimus and Sci. Fa. and their several returns, Mr. Hampden hath demurred in law.

The case that riseth upon the record is thus. The king is lord of the sea (for that is part of the record) the seas are infested by pirates and Turks, which commit depredations, and take goods and merchandizes, both of the king's subjects and others that traffic here, and carry them away into captivity. There is preparation of shipping and imminent danger, for so the writ reciteth: A danger that the king's dominion of the sea should be lost, or at least diminished. There was a further danger, that 'salus reg. periclitabatûr,' whether in this case the king 'pro defensione reg' tuitione maris, 'securitate subditor' et salva conductione na-'vium,' may command his subjects 'per totam 'Angliam,' by writ under the great seal, to provide ships at their own charge and cost; and this do, when the king in his own judgment conceiveth such a danger, as doth necessarily require that aid? That under favour is the question upon the Record.

There is in this Record, whereof your lordships are judges, four writs. First, That of 4th Aug. 11 Car. which goeth out of the Chancery, for setting forth this ship of 450 tons. Secondly, the Certiorari 9 Martij 12 Car. Thirdly, the Mittimus 5 Maij 13 Car. And fourthly, that of the 22 Maij 13 Car. which is the Sci. Fa.

The second and the fourth writ, which is the Certiorari and Sci. Fa. they are returnable, the first and the third writ, which is the writ 4th Aug. and the Mittimus, they have no returns; but they give command, and require execution shall be done, 'prout de jure, et secundum 'consuetudinem reg' Angliæ fieri consuevit.'

The first writ, which is the ground of this business, it standeth upon two parts: a preamble, and the body of the writ. The preamble that containeth; first, a direction; and secondly, the causes and motives of the issuing of this writ. The body containeth six parts. First, the direction that is to the sheriff of the county of Bucks, *nec non* unto the bailiffs and burgesses of the borough of Buckingham, and mayor and burgesses of Chipping-Wiccomb alias Wiccomb, and 'probis hominibus' of all the county. Secondly, the motives and reasons inducing this writ, which are nine in number. 1. 'Quia 'piratæ et maris grassatores,' &c. That these commit spoils and depredations by sea, and take the goods of the king's subjects. 2. Because they carry the king's subjects into miserable captivity. 3. Because of the preparation of shipping that is made *undique* to infest the coasts. 4. 'Quia pericula imminent,' &c. 5. 'Quia pro defensione reg. tuitione maris,' &c. 6. 'Quia pro debellatione quorund' hostium 'satagent,' &c. 7. 'Quia progenitores nostri 'reges Angliæ dig' maris temporibus,' &c. 8. 'Quia onus defensionis,' &c. 9. The most prevalent, 'Quia hoc per legem et consuetu-'dinem Angliæ,' &c. The body of the writ contains also several mandates to the sheriffs and head officers, 'quod fide et legiancia, &c. 'et sicut nos et honorem nostrum diligitis.' The mandates are six. 1. To provide a ship of 450 tons well manned and furnished with provision, and that was to be in readiness by the 1st of March, to continue for the space of 26 weeks, 'ad proficiscendum cum navibus nostris, '&c. pro tuitione maris,' &c. 2. That the sheriffs and head officers meet within 30 days, and set down what shall be taxed upon the incorporate towns. 3. A command to the head officers of those incorporate towns, that within their bailiwick they make an assessment upon particular persons, and compel them to pay the same. 4. A power to the sheriffs to assess all the rest within the county, 'juxta statum et 'facultates.' 5. A command for the levying of these sums by distress, 'et quos rebelles in-'veneris' to imprison their persons. 6. That no part of this sum collected shall be converted to any private use; but if any money shall be remaining, it should be paid *inter solvendos*.

My lords, the reasons expressed in this writ might justly satisfy any man's judgment without further argument; but I shall clearly manifest there is no clause or practice by this writ, but is verified by many records, and is 'secun-'dum legem et consuetudinem Angliæ.'

The question that is made, is of a high transcendent nature; it concerneth the king, both in his ordinary and absolute power. Whether the king in those cases, where he in his royal judgment shall conceive a necessity for the defence of the realm, may command ships in this kind; whether by his royal power he may do it, or must require the aid *per commune concilium* in the parliament. And I conceive his majesty may do it, not only by his kingly prerogative, but *jure majestatis*.

This power is not only 'inter prerogativa re-'gis, sed inter jura summæ majestatis.' I find by many records, that these writs have issued out in all succession of times; in the times of the Saxons before the Conquest: but I never

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find that this power was judicially questioned in any court at Westminster before now. I find questions made touching assessments, whether they have been equal; touching the levying, whether within the warrant of the office; touching the discharging of some, by reason of a grant of exemption: but to question the main power, whether the king by his royal power might command this for the defence of himself and the kingdom, was never disputed before now. But his gracious majesty, who hath declared himself, that he will rule his people according to his laws, for the satisfaction of the people, and to clear his justice and judgment, does suffer these writs to go forth, to which Mr. Hampden hath demurred, and to be questioned in this legal way to be determined by your lordships, to which I hope you will give a clear end.

My position shall be thus: that the king, as he is king of England, 'pro defensione reg' tui-'tione maris,' &c. when his majesty in his royal judgment conceiveth it a time of such danger, as doth necessarily require the aid commanded in this writ, that he may command and compel his subjects 'per totam Angliam' to set forth ships with men and ammunition and double equipage; and this may be done, as well by the king's writ under the great seal, as by consent in parliament.

For the proof of this position, I shall reduce what I have to say to these heads. First, that this power is 'inter jura summæ majestatis,' innate in the person of an absolute king, and in the persons of the kings of England. That this power is so inherent in the king's person, it is not any ways derived from the people, but reserved unto the king when positive laws first began. And that in this case the king is sole judge of the danger, and how this danger is to be prevented and avoided: this is my first ground.

The second is this, that the regal power is not confined to the politic advice, that the king must be *in cathedra* sitting in parliament; but that it hath been always done, either 'per ip-'sum regem, aut per regem et concilium, aut 'per dominos suos, aut per regem,' when he shall please to call a consultation of merchants and portsmen experienced in the service.—My lords, I shall present unto your lordships, that this power is so inherent in the king, that during the time of parliament, and in those years when parliaments were sitting, these writs issued out by a regal power, without any aid or power from parliament; and that advice was not thought necessary in former times.

3. I shall also shew unto your lordships, that this power is implied out of the sovereign's titles given unto him by the common law of England.

4. And also I shall insist upon precedents; and herein I shall desire your lordships to take notice that these writs have not issue out at the first any sudden advice; but that there was a great search made: first, by my predecessor, Mr. Noy, a man of great learning and profound judgment; other searches made by the king's counsel and some others; and a great number of records were considered of maturely before these writs issued: so nothing was done upon the sudden; and we that are of the king's counsel did think it fit that most of these records should be cited in the first Argument, by Mr. Solicitor, to the end that the counsel at the bar might give an answer to them in their reply: many more have been added by Mr. Solicitor, and many more I shall cite which have not been remembered.

My Lords, in the vouching of these records, I shall observe eight things. (1.) That the records we insist upon, are not grounded upon any private custom, or upon any charter, or upon any covenants, but upon the laws of the land; and there is not in any of these records any recital that these writs went out upon any of these grounds. (2.) That in all ages before the Conquest, and in the time of William 1, that these writs have issued 'per ipsum regem, per 'regem et concilium,' and did not issue upon any advice of parliament. (3.) That these records and writs were sent out, not in case of Hannibal *ad portas*, or an enemy discovered, or sudden invasion; but upon case of rumours, and in that a danger might happen; so not in approaching of an enemy, but in case of preparation to provide against an enemy. (4.) That the king did command shipping to be set forth in those years wherein there were parliaments, and sitting parliaments, by his royal power, without advice of parliament. (5.) That when great subsidies and aids have been given unto the king by parliament 'pro defensione reg',' in the same year that writ went forth for the defence of the kingdom. (6.) That these aids have not been required only from the maritime parts, the ports, nor from the inland counties only, but 'per totam Angliam.' (7.) That many times when these writs issued, there have been no such causes declared, as hath been in this writ. I shall observe, that in many of these writs no cause at all is set forth in them, but only that they should repair to the place of rendezvous, and there receive further directions. (8.) I shall verify every clause of this writ by many precedents. A Mandamus, and not a Mandamus Rogantes, shipping at the charge of the county, and assessments made by the sheriffs, as commoners, and a penalty greater, not only distress and imprisonment, but extent of lands, seizing of goods, till the king was paid. These are the things I shall observe out of the precedents, when I shall come unto them.

My Lords, in the fifth place, when I have laid these foundations, I shall then dispel those mists that have been raised, remove those forces that have been mustered, and answer the objections of those gentlemen, that will not be satisfied by the king's writ under the great seal: And in the sixth give a particular answer to the acts of parliament that they have cited, to the records that they have insisted upon, and to the reasons and authorities they have alledged.

In the seventh place, I shall answer their exceptions that have been taken unto the several writs, records, and proceedings thereupon, that have been produced by us.

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And in the eighth place, I shall collect some conclusions and reasons out of the premises, and cite unto your lordships some judicial records, that may satisfy your lordships in point of judgment. These are my materials, I shall proceed to the building.

My lords, my first ground was, that this power is innate in the person of an absolute king. All magistracy it is of nature, and obedience, and subjection. It is of nature. And before any municipal law was, people were governed by the law of nature, and practice did rule according to natural equity: this appeareth in the Reports of sir Ed. Coke, written by him, when he was chief justice, 7 Rep. fol. 13. I will not take occasion to discourse either of the law of nature, which doth teach us to love our country, and to defend it, to expose the hand to danger, rather than the head should suffer; nor of the law of God, which commandeth obedience and subjection to the ordinance of our superiors; nor of the law of nations, which doth agree, that there must be protection from the king, and obedience from the people; and without defence there can be no protection; and without aid of the people there can be no defence: nor of the imperial law, which saith, that in cases *pro communi utilitate* the king may *statuere* alone.

My lords, upon this subject I will confine myself to the law of the land, and insist upon such records, and such precedents, and such reasons, and such authorities, as I find both by records of former times, and also in our books.

First, In the original government of this nation, I do not find that it was a monarchy; I find the contrary, that there was a great number of petty regiments. And when Julius Cæsar invaded this realm, he writeth there were four kings in Kent; and Strabo saith the like, lib. 4, so those times will not be material. During the domination of the Romans, which continued 500 years, the Romans had their prefects here in England. No man will doubt but that they might command what they pleased, *Notitia utriusq;* Imperii. fol. 161, that in their times there were special officers, called Comites, &c. Officers appointed by sea, and other officers by land. Those that succeeded the Romans were the Saxons: and in their times, both by antient grants, and by edicts of the princes of those times, it appears that this naval power was commanded by them for the defence of the realm.

First, To begin with king Ina, A. D. 725, king of the West-Saxons. This king in that year made a grant to the abbot of Glastonbury, 'Quod, &c. sint quieti ab omnibus regiis exac-'tionibus et operibus quod indici solent,' except 'Expedit' arcium, et pontium construc-'tionem sicut in antiquo, &c.' which shews that these expeditions were accustomed to be done. Wuldredus, who was king of Kent in the year 742, granted unto his churches 'quod 'sint liberi ab omnibus secularibus servitiis,' except 'expedit' pontium, &c.' so in that grant these expeditions were excepted. Ethelredus, king of the Mercians, anno 749, granted 'Monasteriis de, &c.' except *ut supra*. So as in those times these services were common, and were done by a 'dicto regis.' That the churches should be free from all services, except these three, expeditions of building castles, bridges and forts; 'a quibus nulli unquam lax-'ari possunt.' Egbert, an. 840, commanded a great navy to be provided; and that for the defence of the realm, and safeguard of ships. Ethelwald, that was king of the West Saxons, anno 854, granted to the Church, that it should be free from all service temporal, except 'regalibus tributis.' In the time of king Alfred, who was the first monarch, and king of all England; one who was a privy-counsellor in his time, and wrote the story of that time, he, in the ninth page of his book, saith, 'Quod 'rex Alfredus missit galleas longas naves et 'cymbas ædificari;' and agreeing with this, is the history of Asser Menevensis, Florentius Wigornensis, 316, and Huntingdon 351, wherein your lordships may see by the record, it was done 'ex precepto regis per totum regnum.' This king made a law, which is not remembered by Lambert in his Saxon laws, to this effect; that no man, by summons, by the horn or word of mouth, should sit still in matter of theft, bloodshed, or going to war, whensoever his expedition should require: and there he doth mention it to be upon pain of forfeiture of life.

King Edgar, who stiled himself Angliæ Basilicus, he in the year 959 provided a great navy of 3,600 ships, as saith Wigornensis, and Matth. of Westminster; and he gave a command, that every year, at Easter, a navy of 3 or 4 000 should be set out, and divided into three parts, East, West, and North: the ships in those times were not so great as now they be. The same Edgar, in the year 973, granted to the abbey of Thorney all manner of immunities, and that it should be free from all services, except those three of building bridges, castles and forts. And the same king, in his charter to the church of Worcester, granteth them to be free 'ab omnibus 'exactionibus,' except 'constructionem pon-'tium, arcium, &c.'

My lords, by all these several grants, and what hath been done by those kings, it doth appear that these three fundamental services were ever reserved unto the crown, saving the grants to two or three abbeys, which had some particular exemption. In the year 1008, which was remembered by Mr. Solicitor, there was then a great navy provided by king Ethelred. The words are thus: 'Rex Ethelredus per 'totam Angliam ex 310 hides, navem unam. '&c. preparare, fecerat, &c.' that was for every 310 hides of land to build one ship; and every eight hides of land to find a man and a corslet, and to meet at Sandwich for defence against the Danes. This appeareth in Huntingdon 360. Matth. of Westminster 387. Hoveden 426. and Malmsbury 100.—In this record these things are observable, 'rex parare 'facit, et rex eos misit;' then 'per totam

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'Angl.' all England was to be charged. By the Glossary of that learned and judicious antiquary, sir Henry Spelman, it appears that 'virgata terræ continet 24 acras, quatuor virgatæ continent unam hidam, et quinq; hidas 'feod. militar.' Upon casting up of this, it doth appear, that there be in England 363,600 hides of land; and every 310 hides being to set out one ship, the whole number amounteth to divers thousands, 11,072; and every eight hides, to set forth a soldier, amounts to 45,450 men: but it is not the number, but the matter, that is done by the king's command, 'per totam Angliam.'

In the 30th year of king Ethelred, he made an edict, which Mr. Solicitor caused to be read in court, saying he had it out of an old book in Cambridge, 'Quod instaurant tiel nomber del 'naves per singulos annos.' I read it to this purpose, to shew that in the 30th year of his reign, there was a naval expedition to be always ready at Easter, and sheweth the penalty of such as did depart without licence.

King Canutus, Lambert fol. 117, 118, 'ex 'sapientum concilio, &c.' ordained a command amongst his temporal laws, cap. 10, 'quod 'præsidia fiant,' &c. commands ships to be provided; and fol. 118, a penalty upon all those that refused to pay 120*s.* which was a great sum in those days.

That which I observe out of these two were these: First, That they were made by the king, by the advice of his lords; that there were to be yearly preparations for shipping; and those that departed out of the service without license, were to incur the forfeiture of all their estates. If these edicts were acts of parliament, they stand unrepealed; and if no acts, then they stand by command from the king's power.

My lords, I have shewed you the practice, as it was before the time of William the 1st: He did not abrogate the former laws, but was sworn to perform them. Nay, it was said that he did confirm 'antiquas leges et consuetu-'dines Angliæ.' So then, if these were the laws, and this the power that the antient kings of England had before his time, he did ratify and confirm it, but not diminish it. This power of commanding of shipping, for the defence of the realm, it is a principal part of the power royal. This kingdom, it is a monarchy, it consists of head and members, the king is the head of this politic body; it consists of clergy and laity: the head, it is furnished with entire power and jurisdiction, not only to administer justice in cases criminal and temporal unto his people, but likewise for defence of both; and he may command the power both of the one and the other. This power I find to be mentioned in the register of original writs, written before the conquest, 127 b. It reciteth, that 'Nos considerantes quod ratione regiæ digni-'tatis maxime ad providendum salvationi reg' 'nostri circumquaq; astringimur.' It appears by Stamford, in his Prerogat. cap. 1, that as the king is the most excellent and worthiest part of the commonwealth, so is he also the preserver, nourisher, and defender of his people. I find it in Fortescue, that they have cited; that a commonwealth without this head is but a trunk, as the natural body is a cadaver. I find it in Fitz. Her. Na. Br. fo. 73, or 173, that the king of right ought to save and defend the realm, as well against the sea as against the enemies, that it be not surrounded nor wasted.

How is this defence against the sea and enemies of the kingdom? Is the king bound to defend the kingdom by sea walls at his own charges?—No; the power of defence is a superintendent power in his majesty, to authorize sheriffs and commissioners to see it done, but by his power; yet at the charge of the people. Register 127 b. it appeareth there, where the king commandeth the people by his writs; the one directed to the sheriff, and the other to the commissioners, and in both willeth and commandeth, 'quod distringat A. B. et al',' to distrain the lands of all those that may receive damage to repair the sea-walls, as well as the Ter' Tenq'. This writ was before any statute concerning that, for the Register was before the Conquest; and the first statute that concerneth commissions of sewers, was made 6 H. 6. So it is by the power the king had at common law, and not upon any statute: And this was to the sheriff, as well as to commissioners; and that it was done at the charge of the country, and not at the king's charge, Pat. 33, Ed 1, m. 4, dors. agreeth with the Register: The king doth there recite. 'Quod ratione dignita-'tis regis, &c. et per juramentum suum astricti 'ad providendum salvationi reg';' and there he giveth power to commissioners to distrain the people to make defence against the sea, at their own charges. Pat. 2 Ed. 2, pars 2, m. 5, dors. in the case of Wiseman. Rep. 2, fol. 15, the king, *ex officio*, ought to govern his subjects in peace and tranquillity. 7 Rep. fol. 9, protection of the king is general over all the kingdom; there is reason why it should be thus: For the king of England, he hath an entire empire, he is an absolute monarch; nothing can be given unto an absolute prince, but is inherent in his person, as may appear by books, records, and acts of parliament: Bract. lib. 2, fol. 55, b. Sciendum, &c. 'Dominus rex super 'omnes qui ad coronam pertinent.' This appears likewise in the statute 24 Hen. 8. There it is declared that this realm of England is an empire, and hath been so accepted in the world. Stat. 25 Hen. 8, cap. 21, 1 Eliz cap. 1, 1 Jac. cap. 1, the crown of England is affirmed to be an imperial crown; and acts of parliament are proofs of the highest nature. 16 Ric. 2, c. 5, that the king holdeth his empire immediately of the God of Heaven: And at his coronation, his crown is elevated as a signification thereof. This is likewise acknowledged in the Irish Reports, fol. 60, 'Rex Angliæ est absolutus mo-'narcha in regno suo.' Fortescue saith, the king of England, as well as any other king or emperor, hath all the liberties within this kingdom 'in imperio suo.' The law of England

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makes the king of England, not as his subjects are, a natural body, but a body politic, freeth him from all imperfection and infirmity; he is immortal, and never dies; the king ever liveth, Com. 177, 11 Rep. fol. 7, 21 Ed. 4, and other records.

My lords, as he is an absolute monarch, so all these, 'Jura summæ majestatis,' are given unto his person by the common law.

First, He hath supreme dominion, both by sea and land, as is proved by the Mirror, the greatest part whereof was writ before the Conquest. Some things are added to it by H. Horne in the reign of Ed. 4. He holdeth, that all lands, and all jurisdiction, and all dominion, is derived from the crown: That whatsoever was not granted from the crown, remaineth in the person of the king. This Supremum Dominium is so inherent in the king's person, that if the king grants away his lands, 'absq; aliquo 'reddendo,' yet the tenure must still remain to the king; 8 Hen. 7, 12, 30 Hen. 8, 45 Dyer. This dominion is not only upon the land, but it is upon the sea. And so the king he hath not only a dominion at sea, but he is 'dominus ma-'ris Anglicani;' he is both owner of the sea, and of the soil under the sea. And so it was resolved lately, by my Lord Chief Baron, and the rest of the barons in the Exchequer, in the case of Sutton Marsh, Mich. 13 Car. That the soil of the land, so far as the sea floweth, is the king's, and the king is seized thereof, *jure coronæ*. Mirror 8, Bract. fol. 8, temps Edw. 1, Avowry, 46 Ed. 3, Com. 3, b. That not only the dominion of the sea, but the very soil belongeth unto the king.

In the next place he hath, besides his *supremum dominium*, a sovereign jurisdiction, and that extends both by sea and land.

First, For creation of all his great officers and judges; creation of the Admiralty, time out of mind. 20 Hen. 7, fol. 8, 12 Hen. 7, fol. 17, power to make justices could not be granted; and all these powers resumed in the statute, as inherent in the crown. 12 Hen. 7, fol. 17, there it is said by Fineux, that at the beginning all administration of justice was in one hand, that is, in the crown. And surely this jurisdiction did not begin in the time of Ric. 1, when those laws were renewed by him at his return from the Holy Land; but there were admirals in England, and the admiral law by sea long before. 27 Ed. 1, a famous record in the Tower, that the commissioners for the emperor, Spain and France, did appear before the king's commissioners, and did acknowledge the sovereignty of the king of England upon the sea did belong unto him time out of mind. And for further proof of this, it likewise appeareth in that learned book of Mr. Selden's called Mare Clausum.

My lords, the next inherent power of the crown are pardons of offences and condemned persons, and restitutions, which none can do but the king himself, 1 Hen. 4, fol. 5, 20, Hen. 7, 8.

The next is 'jus nummi percutiendi,' a setting of a royal stamp upon his coin, the advancing of the value of his coin, and the debasing of it. 21 Ed. 3, 6. That the king only can put a value upon it. 5 Rep. fol. 114. That the king, by his absolute prerogative, may make any foreign coin lawful money of England, by his proclamation, Davies Reports, fol. 20.

The next, 'jus summæ majestatis,' is that of concluding war and peace, which is absolutely inherent in the king's person, which he may do without calling his great council, 19 Ed. 3, 6, and 7 Report 25. That all the subjects of England cannot make a war, *bellum indicere* belongs not to the subject. And to make aliens and denizens, is a high prerogative.

My lords, this trust that the king hath for making of war and peace, and for the defence of the realm, both by sea and land, it is a great trust, inherent in the person of the king; no man ought to mistrust where the law doth trust.

There is an objection made, that if it should rest in the power of the king, he might do it when there was no ground for it, and without cause; and cause forces to be mustered, and ships provided where there is no imminent danger, in such a manner, as that it might be grievous unto the people. There are objections clearly against presumption of law; for where the law trusteth, we ought not to distrust. The king, as appeareth by all our books, is the fountain of justice and piety, and will do justice unto all his subjects, 1 Com. 240. All justice is derived from the king, 13 Ed. 4, 8. The king can do no wrong. Bract. lib. 3, cap. 9, 8, H. 6, 20. It is royal power, 'De aver 'correction de luy m'.' He is the sole judge, and we ought not to question him, Bracton, 'Rex non habet superiorem nisi Deus,' 11 Rep. f. 72. The king is the fountain of justice and common right: And the king, being God's lieutenant, cannot do wrong, 17 Ed. 3, 49. The king could not be made an instrument of covin and fraud, but the patent was void, Littleton's Comment. 99, the 5th Report, fol. 14. That religion, justice and verity, are the sure supporters of crowns and diadems, 24 Ed. 3, 42. Stamford's Pleas of the Crown, fol. 72. At the common law, the law doth not distrust where the king doth commit one, but that is upon just cause, and so we are not to doubt it. And therefore at the common law, West. 1, cap. 15, a man committed by the king was not repleviable: Nay, if he was committed by his council that was his representative body, he was not repleviable. Shall we then, when the law hath committed this power unto the king, who is the fountain of justice and equity, who is mistrusted by the law of the realm, and the commonwealth intrusts him; shall we think that succeeding kings will do that which is not fit to be done? I say, if the law trust him, we ought to trust him. At the common law, if the king commit a man *per bouche*, he is not repleviable.

But for a further reason, those that are his delegates or judges, are not to be mistrusted.

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That which a judge doth, as in his office, shall not be assigned for error. If it be so in the delegate power, much more in the primitive and fountain. 5 Mar. Dyer 163, the court of King's-bench did receive a record of *nisi prius*, the Postea returned of the clerk, and the death of the justice of assize assigned for error, and could not be received; and so, 1 Mar. Dyer 89, a writ of error to reverse a fine, *proat* in Dyer. That is the reason of the book, 7 Hen. 7, fol. 40, 10 Hen. 7, 28. Fitz. Her. Na. Br. 126, saith, he cannot assign for error, nor shall be admitted to allledge any thing contrary to the office of a judge; as to say, the judge did not give right judgment, or the clerk did not make right entries, m. 7, Ed. 1, B. Rs. and that is the reason why a man of *non compos mentis* in a fine, and suffering of a recovery, it shall not be assigned for error against the acts of a judge, 8 Rep. Dr. Bonner's case. Records by a judge, nor justice of peace, not traversable. Good my lords, then, if by the laws of this kingdom one shall not be admitted to receive an averment against any acts done by your lordships the judges, or against acts done by inferior judges; surely in this, where the king is absolute judge, it shall not be allowed to say, there was no cause of danger, or that is done by the king which ought not to be done. Bract. lib. 1, cap. 24, 'est in corona regis fa-'cere justitiam;' The king is so absolutely trusted with this defence, that a subject cannot make a fort or castle upon his own freehold without the king's license; that appears in the old Mag' Char' fo. 162. Inquiry made of those that do build forts and castles without the king's license, Rot' Parl' 45 Ed. 3, m. 34, 6 Hen. 4, 19, and a book of Long. 5 Ed. 4, fol. 129, that a subject cannot make a fort or castle without the king's license; not in his own ground.

My lords, the king hath so discharged this trust, that though there were no account unto the subject, yet these ships that have been commanded were 'ad proficiscend' cum navi-'bus nostris.' The king hath been at greater charge with these ships going out, than any king of England ever was, as will appear by those vast sums of money the king hath spent in these years, besides what hath been contributed to it by the subjects.

My lords, I have done with my first position, that it is an inherent right in the person of the king of England; and that the king is the sole judge, both of the danger, and when and how it is to be avoided.

It hath been objected, That the king of England may do it, but how? It must be according to the institution of the laws of the realm: there must be a concurrent power, a politic advice in parliament, and so it may be done. But the king, either by his ordinary power or absolute, without the assistance of the great council, he cannot do it, as hath been objected. And therefore in the second place, I shall come to the second thing I did propose, that was, That the king, as he is king of England, that he alone, for this common defence of the realm, without the aid of parliament, may *statuere, &c.* That the king, by the advice of his council when he pleases, may do it; that he may ordain several ways by the institution of the common laws, by his ordinance, by his proclamation, by his patents, by his writs, and in legal matters by his judges. That this may be done by him.

First, It is agreeable to reason; for kings were before parliaments, and then surely they might have done it. As justice doth flow from the crown originally, as it was in Moses, so it is in the king of England, only in the king's person. But afterwards the king did depute his deputies, and gave others power; this is no conceit of mine. 12 Hen. 7, fol. 17, b. per Fineaux, there was a time when there were no municipal laws, when positive laws were not established, when kings did rule their people according to natural equity; and then surely the king might ordain. No man will question it; since there have been positive laws and municipal laws, the kings of England they have ordained, as by those several records cited appears. It appears by the practice since the time of William 1, that the kings of England in all those writs that they have ordained, have prescribed the time for issuing of these writs, the numbers of the ships, the times of meeting, the manner of munition, and to stay for the defence *quamdiu nobis placeret*. I have made a collection of what have gone out by the king himself, what *per regem et concilium*, and what by advice of his council, and with the advice of merchants and portsmen; but they are so infinite, and so many of them, that I will not trouble your lordships with the repetition of them.

These ordinances for the defence, they are suitable and agreeable to the ordinance that the king maketh in other cases, where the king alone doth ordain, as by his proclamation. Claus. 24 Ed. 3, pars 2, m. 2, dors. The king by his proclamation commanded all earls, barons, knights, esquires, and other men at arms, that none of them should depart into foreign parts. Fitz. Na. Br. fo. 85, he agreeth it; and saith the book, He that transgresseth this proclamation shall be fined for his disobedience. And this command may be under the great seal, signature, or privy-seal; for saith the book, The subject is to take notice of any of the king's seals; so in all ages he hath commanded no victuals shall be transported. Claus. 24 Ed. 3, m. 7, dors. 5, Dec. 4 Hen. 8, 11 Hen. 7, 23. The king granted a proclamation for a Justing; and if one of the two that be fighting be killed, it is no felony. 5 Report 114. The king by his absolute power may make any kind of money current by his proclamation. In the next place, the king may ordain by his patent alone. 40 Ed. 3, fol. 17, 18. The king did grant a privilege to the scholars of Oxford, that they should have the choice of the inns in Oxford, which was before there were any fair colleges in Oxford: saith

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the townsman, This is my freehold, the king cannot do it: say the judges, This is by the king's patent, and is in favour of learning, and therefore a good ordinance. So the justice in eyre may take up the principal inn in a town. Is there any thing more usual than for the king to give power to a corporation to make ordinance for a common good? 49 Ed. 3, 162. Shall it be so in the creature, and not in him that makes the creature? A case or two upon every one of them. The king may ordain by his writ, and that appears 9 Ed. 3, 16, a writ of Cessavit against the tenants of Northumberland. The tenants had been mightily oppressed by the Scots; they petitioned the king, and said, they were not able to pay their landlords their rents, by reason of those incursions upon them of the Scots, and desired stay of suit; and there it appeareth, that the king did ordain by his writ, that those suits upon those reasons should not proceed against the tenants for non-payment of their rents. Out of the same reason are the writs of protection.

Then the king and his council may ordain; for that I find, m. 4, Hen. 3, Fitz. Her. N. Br. Dower 179, a writ of Dower there brought by a French woman. The tenant of the writ pleaded, that there was an ordinance of the king and council, 'Quod nullus de potestate 'regis Franciæ respondeatur de Anglia ante- 'quam Angl' respond' de jure suo in Francia;' that is, We Englishmen should not be compelled to answer any Frenchman or woman in a legal way, till the English were answered in France to their suits there. 39 Ed. 3, 7 per Thorp. The king and his lords may make an ordinance, which shall be as binding as a statute. Rot. Franc. 72 Ed. 3, m. 6. The king by the advice of his council did ordain 'quod 'omnes magnat. et al' qui habent terras 'et 'tenementa continue morat', &c.' Upon this ordinance I can shew above 40 writs that have gone out to the nobility, clergy, archbishops, and bishops, and to all the king's subjects too that had houses in the maritime parts. Rot. Franc. 22 Ed. 3, m. 16, and 50 Ed. 3, m. 47, dors. 24 Ed. 3, m. 6, that of 24 is to the inlands within 16 miles of the sea coasts. 40 Ed. 3, m. 37, the like writs awarded to most maritime counties, upon pain of seizure of their lands and goods. So likewise for provision for the army; the king and his council have ordained, both for markets to be kept within such a distance of the army, and wine to be sold there, and no where else. Rot. Sco. 10, 12 Ed. 2, m. 13, dors. So they have set down the number of the men of arms that every town should be charged with, Claus. 13 Ed. 3, pars 1, m. 14, dors. with a command that they should distrain the commonalty of that county for the wages of those men at arms.

My lords, if the king may at any time of danger, by his proclamation, by his patent, by his writ, by the advice of his council; surely in case of necessity it is much more lawful, for *necessitas est lex temporis*, where a defence by sea and land is required. 5 Ed. 4, 6. 14 Hen. 7, 29, jurors by law are to hold together till they give up their verdict, yet otherwise, if the house be like to fall upon their heads. 38 Hen. 7, 11, upon a Præcipe, the tenant may be excused, if he could not pass the waters.

My lords, I find that in legal matters the king and his judges make certain explanations upon the statute of Glocester, as appears by Mag' Char.' And what was done then by the judges advice, hath the force of a law at this day. So as you see by the laws of England, as well in other cases, as in cases of defence, the law hath given the king of England this power to ordain for the good and safety thereof.

I find that in all ages, and in all times, the incidents to a defence, as well as this principal part, hath been given to the king himself, as he is king of England. First, For the Murage of Towns: That the king hath commanded the murage of towns to be done at the people's charge; the precedents are so many, I will mention none of them; and shall he not command for the defence of the wooden walls of the kingdom? Rot' Alm' 12 Ed. 3, pars 2, m. 10. The king commands by writ a place to be fortified towards the war; and every man having rent there to contribute, or to be compelled thereto by distress; that was commanded to be done by writ, Pat. 12 Ed. 3, pars 3, m. 5, it appeareth it was done. The king imposed a certain rate upon all goods and merchandize that came unto Kingston upon Hull, and commanded this should be employed to the walling of the town; this was 'de volun- 'tate regis;' this appeareth Rot. Pat. 19 Ed. 3, pars 1, m. 12, there was the same command for other towns, as Dover, &c. The said roll, m. 22, Pat. 12, Ed. 3, pars 3, m. 14, dors. a writ for the repairing of the walls of Winchester at the subjects charge. Rot. ib. m. 15, the king by special grant gave power to the mayor and burgesses to assess the inhabitants towards the making of the wall, and the defence of the town. Claus. 1 Ric. 2, m. 12, Oxford was commanded by the king to be fortified at the inhabitants charge. Claus. 12 Ed. 3, pars 3, m. 32, the king commanded particular subjects to fortify their castles at their own charges in time of danger, Pat. 18, Ed. 3, m. 9, the king taketh the castles of the subjects into his own hands in time of danger, 'ad evitantum damna 'et pericula quæ nobis evenire possint.' Claus. 13 Ed. 3, pars 1, m. 36, dors. the king by advice of his council did ordain, that the town of Southampton, 'pro salvatione ejusd',' should build a wall.

My lords, if the king may command the walling of a town at the charge of the inhabitants, he may likewise command the defence of the kingdom by sea; so for other incidents of defence, as for erecting beacons upon the sea-coasts. Rot. Vas. 11, 12 Ed. 3, m. 29, 'de communibus in singulis;' Claus. 1, Ric. 2, m. 4, dors. 'de ordinatione per regem et con- 'cilium pro vigiliis faciend'.' So likewise the king in all ages hath commanded the imbarring of ships for the defence of the realm, and for all

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public service; this appeareth Claus. 14 Hen. 3, m. 17, dors. all ships arrested that could carry 16 horses. Rot. Sco. 10 Ed. 3, m. 2, dors. 'omnes naves pro defensione, &c.' Rot. Alm. 12 Ed. 3, m. 23, pars 1, and 12, for the imbarring of ships for the defence of the realm. So likewise the king commandeth and appointeth who shall be officers, who shall be admiral of the fleet, who shall be Custodes Maris, as appears Pat. Ed. 2, m. 7, dors. and in the same roll, m. 10, Pat. 15 Johannis m. 10, Pat. 48 Hen. 3, m. 5, Claus. 23 Ed. 3, m. 5, dors. and an infinite number more. Then that the county paid the charges of those who had Custod' Maritim', that appears, Rot. Fra. 21 Ed. 3, m. 31, dors. Claus. 13 Ed. 3, pars 1, m. 14, dors. The king when there was cause he moderated the expence. Claus. 25 Ed. 3, m. 16. The king did order how much, and how long the county should pay for wages; and commanded the stay of those that could have been gone before their time: and this appeareth Pat. 48 Hen. 3, m. 4. Claus. 48 Hen. 3, m. 2, 3. dors. Then it appeareth by many records, that this guard of the sea-coasts was to be according as the king should order and direct, sometimes *per regem* and sometimes *per nos et concilium*: and this appeareth Claus. 23 Ed. 1, m. 5, dors. Claus. 13 Ed. 3, pars 2, m. 14, dors. Pat. 29 Ed. 1, m. 1.

Sometime the king out of his royal power hath been pleased to give discharges to particular men, to be discharged from this Custod' Maritim. This appeareth Claus. 23 Ed. 1, m. 5, dors. Portsmouth discharged, because their ships were in the king's service, Claus. 8 Ric. 2, m. A discharge for the abbot of St. Albans, Pat. 12 Ed. 3, pars 2, m. 8, Pat. 12, Ed. 3, pars 1, m. 14, discharges de Custod' Marit.

Then the power of punishing those that should neglect those commands hath been always in the king, and to be punished by his commissioners, or by his writs, and that in a high manner.

That there have been commands by distress, by imprisonment, by seizure of lands, goods, and forfeiture of all that they had, this appeareth, Pat. 48 Hen. 3, dors. Claus. 48 Hen. 3, m. 3, and a great number in the times of Ed. 2, and Ed. 3. The king hath so far meddled in this business, that though it hath been the money of the country, yet the king hath appointed the pay-master, Claus. 48 Hen. 3, m. 20, Claus. 16 Ed. 2, m. 13. So all arrays for mustering of men between 16 and 60, have been in all ages, and by the king's command, to be in and continue in readiness so long as the king shall please, Rot. Alm. 12 Ed. 3, pars 2, m. 6, dors. So, my lords, it doth appear by these precedents that have been cited, by these records, and by these book-cases, that the kings of England have in all ages given command, and made ordinances by themselves, by their council, by their judges, and by their peers; and these ordinances have been obeyed.

My lords, I promise upon this head to make it good, that in these times, and in these years, wherein there were parliaments, that though the parliaments did determine matters concerning the land forces, and the going of the king's army into Scotland, and yet sitting the parliament, the king hath commanded the setting forth of ships by his writ; this was ever left to the royal power. For the proof of this, there was, the 24 Ed. 1, a parliament, as appears in the printed books of that year; and in that year the king commanded ships by his writs at the charge of the subjects. Pat. 24 Ed. 1, m. 17. Command to take up a hundred ships; and in Pat. 24 Ed. 1, *ex parte regis* rem. Exchequer-Roll 22. Command pro Custod' marit'. Hil. 9 Ed. 2, a parliament holden at Lincoln, and yet in the same year writs went out to provide shipping, as appears by Rot. Pat. 9 Ed. 2, pars 2, m. 26, I find there was a parliament held 12 Ed. 2. This appeareth in the book of statutes, Rot. Scot. 11, and 12 Ed. 2, m. 8, the king recites certain inroads made upon the men in Northumberland, 'et quod de communi 'concilio,' held at York, 'ordinavimus, &c.' 'and assigns the earl of Pembroke, and bishop of Norwich, 'ad requirend' Norff' et Suff' 'juxta discretiones vestras subsidium facere 'per naves, &c. per tempus trium vel quatuor 'mensium.' At this time there was a provision by parliament for the king's service by land, and for his armies to meet him at Newcastle; and for two reasons why Navale Subsidium should be necessary. First, to hinder the bringing of any victuals into Scotland. Secondly, for the free intercourse of trade. So as you see, in this year wherein a parliament was holden, this Navale Subsidium was commanded by the king's writ, without an act of parliament; though this writ was for Norfolk and Suffolk, yet the like was for Dorset, Somerset, &c. It appeareth likewise 10 and 11 Ed. 2, which were those great years of sending out of writs, that then parliaments were holden. And so it doth appear by the printed book of statutes; yet in that year of 10 Ed. 3. Claus. 10 Ed. 3, m. 37, dors. a writ directed to the mayor and bailiff of Bristol, with a command, that all ships of 40 tons *et ultra*, should be seized. 10 Ed. 3, m. 21, dors. command that the ships should be set forth for the preventing of danger, and that no foreigners ships come in to aid the Scots. M. 21, dors. the same roll; command to the city of London to set out ships at their own charge. Sco. 10 Ed. 3, m. 21, dors. Writs to the sheriff of Bucks to send horsemen and footmen to the county of Southampton: so there were men drawn out of their county, and the refusers there were called rebels. Rot. ib. writs 'De Navibus pro Defensione Regni.'

My lords, there was something more observable in this year of 10 Ed. 3, for some of the writs that went out bear teste 3 Octobris 10 Ed. 3, and mention a parliament, but did not go out by any ordinance of parliament; so that the awarding of these writs 10 Ed. 3, were sitting the parliament, and by the royal power: which is a strong argument, there needeth not

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aid of parliament for the king to command his forces. 11 Ed. 3, there was likewise a parliament, as appeareth in the printed books of statutes, yet writs dated 10 Januarii 11 Ed. 3, *per ipsum regem*, ships are commanded *pro guerra super mare*. Rot. Vas. 20 Ed. 3, m. 6, dors. proclamation to several counties, that all ships be in readiness. In the 12th year of Ed. 3, there was a parliament at Northampton, Claus. 12 Ed. 3, pars 2, m. 1, the same roll pars 2, m. 32, and yet the same year the king commanded shipping at the charge of the counties, as appeareth Rot. Parl. 12 Ed. 3, pars 1, m. 12. Claus. 12 Ed. 3, pars 3, m. 29. And in the 13th year of Ed. 3, there was likewise a parliament holden, as appeareth 12th Ed. 3, m. 9, 10, but printed statutes make no mention of a parliament then.

My lords, in this record these things a[illegible] servable, cited, and made use of by the defendant's counsel; a strong record as any can be against them! In that parliament the king he did pray the advice of the commons in parliament touching his war with France, and the guarding of the sea-coasts; the commons they make answer, 'Prient les commons que ils ne 'counsel doner al choses de quel ne pass conu-'zance, &c.' They say further, and they grant that the maritime towns ought to make the guard upon the sea without wages, and the inland towns upon the land.

Two things are observable in this record. First, When the king doth descend so low as to pray the advice of his commons in parliament, and assistance for the guarding of the sea; the commons disclaimed it, and said, they have no connuzance, &c. and yet the defendant's counsel did press, that now the king should ask the advice of the commons in parliament; a thing disclaimed by the commons in parliament 13 Ed. 3, to have any cognizance of. Secondly, That by this record, the maritime parts ought to guard the sea at their own charges: This, though it was granted in their petition, it was not granted by the king; for it appeareth in the same year, Rot. Alm. 13 Ed. 3, m. 13, dors. that the king that year hearing of some preparations in France, commanded ships for three months. Claus. 13 Ed. 3, pars 1. m. 14, that in several counties men were distrained for not payment of wages for the archers and others that guarded the sea-coasts. It appeareth by these records, that both the guard of the sea, and the sea-coasts, was done *jurta ordinationem nostram*, order made by us and our council. Rot. Alm. 13 Ed. 3, m. 15. dors. the king appointed the archbishop of York, Hugh de Percy, *et al'*, for that purpose, &c.

So, my lords, I have done with the second ground, that is, that the king is the sole judge of this without his parliament: That the commons in parliament have disclaimed to have any cognizance of it: That in the same year, when parliaments were holden, the same year these writs have issued without advice of parliament.

The third thing I did propose was those supreme titles, which the common law of England giveth unto the king, which may enforce this. Bract. lib. 2, cap. 24, saith, that the king he is Vicarius Dei; his power, as was agreed, is *jure divino*. God is the God of hosts, and the king is a model of God himself. 40 Ed. 3, fol. 18, the king is the chief guardian of the commonwealth. The sheriff hath Posse Comitatus under the king, the king's vicegerent in the county: And he hath this power, not only for the execution of legal process, but for the defence of the realm. 12 Hen. 7, fol. 7, this delegate power of the sheriff is as well for defence, as for the execution of process. Shall the sheriff do it, and not the king? 10 Hen. 3, fol. 1, B. Hen. 7, fol. 1, the king is the conservator of the law. 20 Hen. 7, fol. 4. 'Rex est 'Capitalis Justiciarius totius Angliæ;' he is not only to maintain justice in the courts of justice, but to protect and defend his people. Stamford's Prerogat. cap. 1. The king is the most worthy part of the body of the commonwealth, the preserver, nourisher, and defender of it: And by this they enjoy their laws, goods and lands, 11 Rep. fol. 70. b. Magdalen-College's case, 'Rex est Medicus Regni et Sponsus 'Reipublicæ.' It is the part of a good physician, as well to prevent diseases, as to cure them; and the office of a good king, as well to prevent danger, as to remedy it. Com. fol. 130. He is the soul that animates the body of the commonwealth; and we ought to move as he moves. 11 Rep. fol. 72. The king is the fountain of common right, therefore we have no reason to stain the fountain.

I am now come to my fourth proof, which is by precedents, wherein I shall be somewhat long.

The Second Day's Argument of Sir JOHN BANKS.

May it please your lordships; To remember I shewed by charters, aids, and a great number of precedents, that this royal power was in the king of England before the Conquest: And that though some were exempted from the setting forth of ships by grant unto some particular men, or some particular churches; yet these three fundamental services of expedition, repairing of castles, and making of bridges, were always exempted.

Then I shewed, by a great number of precedents, that not only the principal, but all other necessaries that concern the defence of the realm, both by sea and land, hath been always commanded by the king's writ: for the fortifying of towns and castles, and the murage of towns, the appointment of admirals of the fleet, and those that should be guardian by sea and land; the imbarring of ships, and arrays of men, the erection of beacons, and discharging of some upon just cause, and by punishing of those that were refractory: And all this was done by the king's command, *per ipsum regem*, or *per regem et concilium*, without any aid of parliament.

Likewise, I have made it appear to your lord-

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ships, that the king is the sole judge of this defence: That the king is not to be mistrusted in the execution of his office, as king; nor your lordships as judges, are not to be mistrusted. I have then shewn out of precedents, that in those years, wherein there have been parliaments, and sometimes sitting the parliaments, writs have issued *per ipsum regem*, and *per regem et concilium.*

I shall proceed to make good other particulars, which I have opened unto your lordships. First, That these precedents that have been shewed, and which I shall shew unto your lordships, have not been grounded upon any particular covenant or charter of custom, but upon the law of the land, and upon such reasons as are irreversible, and bind all the king's subjects, as well clergy as laity. For this I shall remember Claus. 48 Hen. 3, m. 3. The writs do recite, 'quod tum milites et liberi tenentes quam 'omnes alij, &c. ad defensionem regni teneantur.' Claus. 9 Ed. 3, m. 11, 'pro defensione 'regni omnes teneantur.' Scot. 10 Ed. 3, m. 12, 'quia consonans rationi, quod omnes tangit 'per omnes supportari debet:' And the same roll, m. 20. dors. 'ex legiantia ad defensionem 'contra hostiles ingressus inimicor' manus exponere adjutrices, &c.' Rot. Alm. 12 Ed. 3, m. 1, dors. 'omnes et singuli tenentur, &c. 'Se et sua exponere,' the same roll, m. 12, dors. 'omnes et singuli ad defensionem regni 'astricti.' And I think every man will acknowledge himself to be bound out of his allegiance. Rot. Alm. 13 Ed. 3, m. 13, dors. 'ex legiantia 'ad defensionem regni et vestri et vestrorum.' Same roll, m. 17. And there be writs unto all the bishops of England, 'quod invenerint 'homines ad arma pro defensione.' Francke Almoigne Tenure was no plea against this service. Rot. Franc. 46 Ed. 3, m. 34. There was a writ directed to the bishop of Canterbury, for the arming and arraying all ecclesiastical persons within his province: The like to the bishop of York in the same roll. So it extends to all the king's subjects, as well to the clergy as the laity.

Nay, ports that were obliged to do particular service, yet in case of extraordinary defence, that there the writs went out, not only to perform the ordinary services, but services *ultra debitum.* The Cinque Ports, by their charter of Ed. 1, were to set forth 52 ships at their own charge for 15 days; yet we find by several writs, and in several kings reigns, that the Cinque Ports have been required to do further services. Arrests have been of these ships, 'Ultra servitium debitum.' Scot. Roll. 10 Ed. 3, m. 2, 3. dors. and 28. dors. there is a command, that all their ships of 40 tons should be arrested for the king's service. And so likewise, m. 22, that all the ships of the Cinque Ports, 'tam majores quam minores,' should be arrested. Rot. Alm. 13 Ed. 3, m. 13. 'Omnes 'naves quæ transire poterint,' arrested and brought to the Cinque Ports.

So then, to tell of particular rolls, that these and these towns were obliged to do these services; this, under favour, is no argument. For although they be obliged to do the service, yet upon other occasion, the king took all their ships, *ultra servitium debitum.* Claus. 16. Ed. 2, m. 13, dors. The king writeth to divers earls, barons and others in this manner, 'Quod sint 'tam citius quatenus poterint parati,' beyond your service, with horse and arms, and come to our town of Newcastle upon Tyne: so as this writ was directed to all the lords spiritual and temporal, and all the king's subjects; not only with their due service, but beyond their service to be at Newcastle. So your lordships see the motives, and grounds, and reasons of these writs are universal; they concern not a particular part and subject, but all the king's subjects; and they are 'Legiantia sua debita. So that is the first thing I would observe to your lordships, that these writs and precedents are grounded upon the law of the land, and not upon particular custom.

The second thing is this: that all these writs have issued by the king's mandate, either by the king only, or by the king and his council, without advice in parliament; of which I have made a collection: and it is better for me to attend your lordships withal, than to cite them; because they are above 500, wherein I have distinguished what have been *per regem*, and which *per regem et consilium*, and where the advice of particular merchants and portsmen were required, Scot. 11 Ed. 3, m. 2, dors. 19 Ed. 3, pars 1, m. 26, dors. And in these, the advice of particular men were called to assist the king and his council.

Now, my lords, if before time of William 1, and since, and for so many hundred years together, this hath been done; shall not these precedents make a rule? That precedents that are not against the law, nor contrary to the rules and reasons of the law, make a law, this appeareth by 4 Ed. 4, fol. 43. The lord-chancellor sent forth a writ of error. The judges took exceptions both to the matter, and the manner, saith the book, because it hath been always so; the precedents make a law. 33 Hen. 6, fol. 20, an absurd return made by a sheriff; yet because precedents to warrant it, a good return. 2 Ric. 2, fol. 7, where a duty was to be paid to a corporation of mayor and commonalty, the duty to be paid to the body, and an acquittance to be had from them; but because it had been used the mayor alone to give the acquittance, a good acquittance. 2 Rep. Haines's case; the king shall not part with his interest without the Great Seal; but yet a lease for years, under the seal of the Exchequer, is good by custom. 4 Rep' fol. 9, that the precedents of the court are good against the express words of a statute. Having so many precedents, I will not trouble you any longer, though I have reserved a special place for answering of objections; yet such objections as fall materially in the way, I shall give an answer to, though I reserve the answer to the main objection to the fifth place.

It hath been said, by Mr. Holborn, that

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here hath been a discontinuance of time; and that since the time of 50 Ed. 3, none of these writs have issued. Shall discontinuance of time take away the king's right? If there have been no use within the time of the memory of man; yet if there have been an inherent right in the crown of England, shall the crown lose it by discontinuance of time, contrary to the rule of the law? 10 Hen. 4, fol. 6. Where the king is the founder of a bishopric or abbey, and is by common right to have a Corody, though not used, and the king hath not demanded it in time of memory, yet the king shall not lose it. Fitz. Her. Na. Br. fol. 5. A writ of right brought by the king, where you must alledge *expleis et seisin*, will not bind the king to alledge a Seisin in him and his progenitors: for if once the king had a Seisin, protracts of time shall not discontinue it. 12 Hen. 7, fol. 20. The statute of Mortmaine confineth the lord to enter within a year and a day; but it shall not bind the king, for he may do it any time. 35 Hen. 6, fol. 26. If a villein doth alien his lands, it barreth not the king. Plenarty after six months, no plea against the king. 6 Rep. no discontinuance of time, if the king hath a right. 7 Ed. 4, 30. If an alien and another man purchase lands together, and the alien dies, the king shall not be prevented by survivorship: and in personal goods, you shall raise no prescription against the king. 35 Hen. 6, fol. 27. There is no man can pretend a title to the king's goods, for waifs, estrays, or wrecks; for no prescription can invade the king's profit.

But then they say the precedents are not in all times; for we have not shewn, nor cannot shew that in all times these writs have issued. —A strange objection in all times; My lords, it is a casual service. In all times, God be thanked, not that occasion or necessity of this defence. Will you have us shew you precedents for a casual service done at all times? 4 Rep. fol. 10. If a man hold to do service to his lord, to go with him into the war of the king, this is out of the statute of limitation; for it may happen not once in two or three hundred years: therefore the law doth not require we should have a Seisin, for this very reason, because it is casual. 33 Hen. Br. Fealty 15. That for homage and fealty, casual service, they are out of the statute of limitations: so as now, by the same reason that they would tie us to precedents where there was no occasion, by the same reason the tenants are to do homage, or go into the wars when there was no occasion. But besides, he is much mistaken; these precedents do not end with Ed. 3, 7 Ric. 2, m. 18. 13 Hen. 6, m. 10, 14 Hen. 6, pars 1, m. 14, a great number of ships commanded then in the king's service.

But it hath been said, that the people have always petitioned against it, and there hath been a decrying by the people; and they have petitioned in parliament against it. And these things, that must be made good by custom, must gather strength by a consent. And further, that when petitions have been preferred, the king hath not denied the petition expressly.

My lords, I shall shew, when I come to give a particular answer to those records and petitions that they have mentioned, that notwithstanding these petitions, this service hath been always continued: and for the answer that he speaketh of, that they have not been denied; these are the very words of the answer, 'Le 'roy se avisera.' We know whether this be an express denial or no. So though the king took time to advise of the petition of his commons, this is no argument, but that it is a mannerly kind of denial. Besides, in these very years of 10, 11 et 12 Ed. 3, the writs went out for the shipping business, by the royal power.

Then it hath been said, that we can make no precedents of these; for though writs have gone out, yet it doth not appear that these writs have been put in practice, or that any execution of them have been done.—But the service hath been done, as doth appear by the monuments of those times. Then it doth appear by other records, that the wages of mariners have been paid by the country. These very years, Rot. Claus. 20 Ed. 3, m. 6, 7, it doth appear that some particular men had particular discharges, either because they were in the king's service, or in Gascoigne, or lived on the sea-coasts; that they pleaded their discharges, and had them allowed for that reason, 23 Ed. 3, m. 14.

So as, my lords, upon this second ground, that these writs have gone forth thus constantly in several ages; that there being such a number of precedents, the discontinuance hath ever been when there was no occasion. That the precedents of the courts of justice make a law, and discontinuance cannot take away the king's title. This is the second thing I do insist upon, that these precedents make a law.

The third thing I shall observe upon these precedents is, That these writs have gone forth, not only in cases of an actual war, or in cases of an invasion, when the enemy's fleet hath been upon the sea; but by way of preparation before-hand, when the enemy meant to come; and in contingent cases, when the king might conceive any danger might issue: but in these cases writs have issued out, will appear, Rot. Claus. 48 Hen. 3, m. 2. The writs are here in court. 'Cum necesse sit ad defensionem regni 'esse promptum, &c.' Claus. 23 Ed. 1, m. 5, there were several writs directed to divers earls, bishops and others, de Custod. Marit. The words are thus, 'Quia volumus quod 'partes marit' in com' Essex, &c. contra ini- 'micos diligenter custodiend. forsan si in partes 'illas venire contingent.' 24 Ed. 1. Remembrancer in the Exchequer; upon information given, that there were 1,000 men in Flanders made preparation to come unto Yarmouth to burn the town, writs sent forth by the treasurer and barons *ex officio*, to be in readiness in case there was an invasion. Pat. 9 Ed. 2, pars 2, m. 26, writs directed to all the port-towns between Southampton and Thames, to set forth ships, at their own charge, for the better de-

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fence of the kingdom; and against those that commit depredations upon the sea, as well to men of this kingdom, as to others coming to this kingdom. Rot. Scot. 11 & 12 Ed. 2, m. 8. The king, by several writs, directed to several commissioners in several counties, recited the provision made for his army at land at the last parliament, and saith, 'Nos considerantes 'ad expeditionem præd. tam ad impedend. 'Scotos, quam pro custodiend. maris, &c.' and so commandeth for that purpose, that ships should be sent out of several counties for these two causes; the one to hinder victuals from going into Scotland, the other for free intercourse of trade. It appeareth, 10 Ed. 3, that the ships of France were not upon our seacoasts, but were in Britain in France; and yet the king, upon relation that they had an intention to invade the realm, did send forth for the providing of ships in most parts of the realm; this was only upon information, Rot. Scot. 10 Ed. 3, m. 30. *Ut audivimus;* m. 23. *Ut intelleximus;* m. 16, 22. Quod audit. m. 18, dors. 12. dors. 5. dors. 'in partibus trans-'marinis.' So by these records, this preparation of shipping was only upon information. Franc. 26 Ed. 3, m. 5. 'Qui vulgaris opinio 'regnum nostrum Angliæ invadere,' therefore commandeth shipping by sea, and forces by land. Rot. Franc. 10 Ric. 2, m. 23, 24. 'Quia 'certi rumores quod Franc. infra breve tempus 'cum magnis armat' hoc regnum invadere, &c.' commands the custody of the sea and seacoasts. So as it doth appear, by these records, that upon an information, or conjecture of the king, he may send forth these writs, and command his subjects to be in readiness, in case that danger might happen; better so, than to receive a blow, and then to make preparation for defence; we should buy that wit with repentance. 'Prudentissima ratio, quia timor 'belli, &c. præparavit.' And surely when the king sees those preparations abroad, those great armies in adjacent countries, 'qui nocere 'possunt,' great reason we should be in preparation.

This is not only consonant to precedents, wisdom of times, policy of state, 'Venienti oc-'curere morbo,' but to the reason of our common law. If a man be in fear, that another man lieth in wait for him to do him a mischief, shall he stay till he receive a wound? 17 Ed. 4, 4. In this case he may have a writ to bind him to the peace, 13 Hen. 7, fol. 17. If a man have a warranty for his land shall he stay till he be impleaded? No, a Warrantia Chartæ lieth till he be impleaded. If lord and tenant in antient demesn, and the lord shall require more service of the tenant than he ought to perform; shall the tenant stay till there be a distress taken? No, he shall have his Monstraverunt, Fitz Herb. Nat. Br. 40 Ed. 3, fol. 45, 46, and this only upon verbal demand of service.—Shall then the common law of England secure the subject not to stay till a present danger, but he shall have his Warrantia Charta, and Monstraverunt before distress taken; and shall not the common law provide for the king, that he in his expectation of danger, may make his preparation against it? So surely these precedents are according to reason of law.

The next thing that I did observe out of these precedents was, that in these very years, wherein there have been aids granted to the crown 'pro defensione regni,' in those very years these writs have issued out by the royal power. Claus. 48 Hen. 3, m. 2, 3, dors. There was then a tenth given by the clergy 'pro defensione reg-'ni;' and yet in that year he did command the defence of the realm, both by sea and land; and that appeareth, Pat. 48 Hen. 3, m. 6, dors. and Claus. 48 Hen. 3, m. 30. In the 22 Ed. 1, the king had given him in parliament, 'pro 'subsidio guerræ,' a tenth of all moveable goods, which was to be collected in the 23d year, as appears, Pat. 22 Ed. 1, m. 2. My lords, this very year, when this was paid, he commanded a great number of shipping for the defence of the coasts, and that appeareth, Pat. 23, Ed. 1, m. 6. Writs were directed to divers counties, as Sussex, Southampton, Dorset, &c. commanding them to be aiding and assisting to William Thornton, in the taking of all the ships in those counties, Pat. 23 Ed. 1, m. 7, 'a Com' Radolpho de Salwico ad providend. 'de navibus, ita quod prompti sint quandocunq; 'mandamus.' So to be in readiness with all ships in those parts, that were of 40 tons. M. 8, some roll-writs directed to most of the sheriffs of England to be assisting to John de Barwicke, to the chusing and sending forth of Archers, 'ad proficiscendum cum fleta nostra.' So as they were not only brought out of their own counties, but all the counties of England, 'ad proficiscendum.' My lords, this 23d year, when this great aid of tenths, and part of all the moveables were granted, Pat. 23 Ed. 1, m. 7, the king writeth to all the archbishops, earls, and others, reciting, that he hath committed the custody of the sea to William de Stoaks, 'Ita quod idem Willielmus vos omnes,' naming the archbishops, bishops, earls, &c. 'prout ne-'cesse fuerit.' So as you see the greatest subject is not exempted from these commands, but should be 'auxiliantes, respondentes et inten-'dentes.' Claus. 23 Ed. 1, m. 5, dors. The king commanded the bishops of London and Norwich, for the safeguard of the sea-coasts. Pat. 23 Ed. 1, m. 1. A command to all archbishops, bishops, abbots, earls, barons, knights, and others, commanding them to be aiding to Adam de G. 'Ita quod idem Adam compel-'lere posset quoties necesse, &c.' So Claus. 23 Ed. 1, m. 5, dors. the like commands. So as, my lords, in those times, which was 23 Ed. 1, when there was an aid granted by parliament, it doth appear, those great defences, both by sea and land, were commanded.

My lords, 10 Ed. 3, in a parliament holden at Nottingham, there was a Fifteenth granted to the king for three years, and so it was recited in the Record. And it appeareth likewise, Pat. 12 Ed. 3, m. 2, pars 3, Claus. 12 Ed. 3,

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m. 28, pars 3, it appeareth, that a Tenth and Fifteenth were granted to the king in parliament; and this was 'tam pro defensione quam 'arduis negotiis.' 12 Ed. 3, The prelates, and lords and commons at a parliament holden at Westminster, gave the king 10,000 sacks of wool, said to be given 'pro defensione regni,' as appears Rot. Alm. 12 Ed. 3, pars 1, m. 1. In the same year there was granted likewise 'pro defensione regni medietatem lanarum,' the moiety of all their wool, m. 31, 32. In the same year the clergy, they gave the king in parliament, 'medietatem lanarum usq; vigint. 'mill. saccar.' as appeareth, Rot. Claus. 12 Ed. 3, pars 3, m. 13, Rot. Claus. 12 Ed. 3, pars 2, m. 1, dors. And in this year the king collected a Tenth and Fifteenth, that was granted to him by the laity in parliament for two years; as appeareth, Claus. 12 Ed. 3, m. 30. And besides all this, the clergy gave the king a Tenth, Claus. 12 Ed. 3, pars 3, m. 30. These I cite the more particularly, because no memory of them in the printed statutes. Were all these aids granted, 10, 11, 12 Ed. 3, 'pro defen-'sione regni;' and shall the king in those very years send forth writs for the defence of the sea and kingdom? And may not the king do it now, when he seeth such great cause?

Now, my lords, in this 12th year, when all these great aids were granted, Rot. Alm. 12 Ed. 3, pars 1, m. 12, Walter de M. was appointed admiral of the fleet towards the north, and appointed commissioners 'ad assidendum villas 'bonis et catallis ad contribuendum, &c.' and commandeth all sheriffs and officers to be aiding and assisting. So in this Record it doth appear, that in these 10, 11 and 12 years, ships and forces were commanded. Claus. 12 Ed. 3, pars 1, m. 17, dors. Command by the king, that the men of Surrey and Sussex should have their goods seized, and persons imprisoned, if they refused to contribute towards the charge of shipping. Rot. Alm. 12 Ed. 3, pars 1, m. 2. A commission to William de B. and others, 'ad assidendum omnes homines juxta statum,' and to seize their goods and chattels, if they refused to contribute for the wages of mariners for the ships.

So as your lordships see by these records, though there be Aids, Tenths, Subsidies and Fifteenths, granted by the clergy and laity; yet in that very year, if an extraordinary occasion comes, though ships not upon the sea, the king hath commanded the defence of the sea and land at the charge of the counties. I have done with the fourth particular.

The fifth particular is this. This aid, and these contributions, they have not been required only from the maritime towns, but from the inland counties, 'per totam Angliam.' And this is materially to be insisted upon, because we are now in an inland county, in the county of Bucks.

My lords, That this was done before the Conquest, your lordships have heard. For Alfred, the first monarch, anno 827, 'jussit Cim-'bas, &c. per totam Angliam.' Asser. Menevensis fol. 9, Wigor. Floren. 316, Huntington, 351. That king Ethelred did the like, anno 1008, 'per totam Angliam,' every 310 hides of land to find one ship. Floren. fol. 9, Matth. of Westm. 387, Huntington, fol. 360. The decree or council which was held at H. about the 30th year of king Ethelred, was, that ships should be prepared against Easter. And those laws which are remembered in Lambert, were before the Conquest, cap. 10, fol. 106, 'Quod 'præsidii, &c.' So it was general and universal throughout the realm, concurring with those antient precedents and council, since the time of William the 1st. Claus. 48 Hen. 3, m. 2. For where a record is to be applied unto several purposes, I must mention that record again. It appeareth by that Record, that Bedfordshire, which is an inland county, was charged with the guard of the sea-coast, and paid for wages: Same Roll, m. 3, intus m. 2, dors. Rutland, Oxfordshire, Dorsetshire, inland counties charged for the same service. Pat. 48 Hen. 3, m. 7, Cambridgeshire and Huntingtonshire charged for the like service, and that they should do 'prout per concilium nostrum ordi-'natum fuerit.' 24 Ed. 1, king's remembrancer in the Exchequer, Rot. 77, 78, 79. Title 'de 'associando pro custod. maris;' and writs went out for ships in divers counties; and amongst others to Bucks. Pat. 26 Ed. 1, m. 21. When there was a complaint that the subjects did suffer upon undue service, the commissions that are directed for enquiry thereof, are directed to all the counties of England, as well inland as maritime. Pat 23 Ed. 1, m. 5. That men, to furnish a fleet, were drawn and commanded from the most parts of the kingdom. Rot. Scot. 10 Ed. 3, m. 14. Inland counties charged with shipping for the defence of the kingdom, as Cambridgeshire, Huntingtonshire, Nottinghamshire, and Derbyshire. Claus. 13 Ed. 3, pars 3, m. 14, dors. and there Oxfordshire is charged with Custod' Maritim. Rot. Scot. 12 Ed. 3, m. 12, dors. Bedfordshire, Bucks, your county, and Derbyshire charged there with the same defence. Claus. 1 Ric. 2, m. 18. There Cambridge and Huntington were to provide a barge at their own charge; and yet seafaring men there were none. Writs were then also directed to Nottingham and Derby; though they had no seamen, yet they had money and means to provide them. Rot. Franc. 7 Ric. 2, m. 18. The king sends his writs into most counties of England, as well inland as maritime, reciting that the king of France was gone with an army into Flanders, and that Calais was in danger; and commandeth all knights, esquires, and archers, and every of them, according to his estate and faculty, to be sufficiently arrayed and armed, and come to the port of Sandwich, 'ad profi-'ciscend'. My lords, in this Record there was mentioned Bucks, Bedford, Huntington, Cambridge, Nottingham, Derby, Leicester, Rutland, Northampton, and Berks, all these inland counties. The words of the writ are, 'Quod 'omnes teneantur pro defensione regni, &c.

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Claus. 9 Ed. 3, m. 12, 'per omnes supportari.' Rot. Alm. 12 Ed. 3, m. 12, vel 20, quod, &c. All and every of our kingdom, out of their allegiance, to be ready to defend the realm. 13 Ed. 3, dors. a great number of ships.

By all which it doth appear, First, That the service was commanded from those inland counties. Secondly, That the same reasons which are given to bind the inland counties, are given to bind the maritime counties, Pat. 28 Ed. 1, M. 6, for the taking of ships in Sussex, Devon, Middlesex, and other counties. If so be the maritime counties be in danger, surely the inland counties cannot be in safety. We are in an inland county; and the entry of an enemy upon any part of it, concerns the safety of us all. And by the rule of the law, every one that is to receive a benefit, is to give a contribution. As the case of 16 Hen. 7, fol. 13, all feoffees, whose lands were liable to a statute, the one shall have contribution against another. If four or five cognizors in a cognizance, all shall have contribution one against another. 40 Ed. 3. Parceners, upon whom a warranty descendeth, they shall be equally charged. If a man bind himself and his heirs in an obligation, having lands partly by his father, and partly by his mother, and they descend to several heirs, both shall be equally charged, as it is 3 Rep. fol. 13, Herbert's case.—So I go upon these reasons, that it is consonant to reason of law, besides these precedents, that where a danger is to all, and all receive a benefit, all are to be equally charged.

My lords, to illustrate it by further reasons, that though the inland counties and maritime counties be charged, I find that the ports, by the charter of Ed. 1, were to find 52 ships. I find that when the necessity of the service did require it, then all their ships were seized in the king's service. I find likewise, that when there hath been a disability in the ports to perform the service, as now they are, for then the main part of the trade was in the port towns, but now it is gone from thence, and gone to London; and few ports have the trade, but London, Newcastle, Bristol, and Hull: and shall it not now be required of the inland counties, since there is a disability in the ports? Rot. Franc. 21 Ed. 1, m. 23. I find there, that Plymouth, and some of the port-towns, did bear more than London; for Plymouth found 4 ships, Dartmouth 6, Bristol 4, Newcastle 3, Norwich and Yarmouth 4, London 2, Hartle-Poole 2, Sandwich 2, Dover 2, Rye 2, Shoreham and Arundel 2, and other places found but one. It appeareth, Rot. Alm. 13 Ed. 3, m. 3, dors. that Yarmouth furnished, at their own costs, 4 ships, Kingston 2, Boston 2, Lynn 2, Harwich 2, and Ipswich 2.

My lords, are these ports able to furnish the king with so many ships in these days to do their service? The wealth of one portsman in those days, was worth the wealth of a whole town now.

Admit the maritime towns were bound to it: yet if there be a failing of their ability, that they cannot do it, shall it not elsewhere be required? That it is agreeable to the rule of the law, before any commissions of sewers, where particular men are bound to defend the sea-banks, yet before any statute, in case the man was not able, the service was required from the county: for by it they might have either gain or loss. This appeareth by the rules of the common law, before any statute, in case Register fol. 123. 'Quod. distringat omnes, &c.' when one man was to maintain the banks against the sea; if not able to do it, the rest that had benefit by it, were to be distrained to do it, 5 Rep. fol. 99. 10 Rep. fol. 140, 141, the case of the Isle of Ely agreeable, that all that have 'salvationem et damnificationem' shall contribute.—To this purpose are those two records mentioned by Mr. Solicitor, Rot. Parl' 7 Hen. 14, m. 18, that where there was a subsidy granted to the king for the defence of the realm, it was assigned to merchants, yet with a salvo, unless royal power came. Rot. Franc. 6 Ric. 2, m. 8, certain merchants had the custody of the sea, except 'regalem po-'testatem.'

So the conclusion is, if an extraordinary defence, there may be no cause to go into the inland counties; but if a royal power, or extraordinary danger, though not imminent, the king may require an extraordinary contribution, 'per totam Angliam,' from all his subjects.—But this hath been objected against, and some records vouched; that is, say they, we will shew you many precedents, wherein 'navale subsidium' hath been required from inland counties, and they have been discharged thereof, as Pat. 2, Ric. 2, pars 2, m. 42, dors. the town of Beverly petitioned, because they were to contribute, being an inland town, towards the finding of a ship with the town of Hull, and were discharged thereof.—This is truth, but not the whole truth: for the town of Beverly was discharged by reason of a charter of exemption granted unto them 'in honorem S. Johannis de Beverly,' the king's confessor; upon that charter they were discharged.

They have objected likewise the town of Bodmin, an inland town in Cornwal, was discharged 'a custod' maris:' For this, Claus. 13 Ed. 3, pars. 2. m. 14, was vouched for it, that the town was discharged of this contribution.—For answer to that, it will appear, that one Trussel was then admiral of the fleet, and was by his commission to be furnished from the ports at their own charge for three months. My lords, this appears, Rot. Claus. 13 Ed. 3, pars 1, m. 35, and so that town, an inland town, was to be discharged. My lords, likewise there were other discharges; upon this reason Norwich was discharged from finding of men for manning of ships, because the admiral's commission did not warrant it, Rot. Scot. 10 Ed. 3, m. 15, for it only extended to the ports; but yet Norwich was charged to find ships, Claus. 13 Ed. 3, pars 2, m. 14. So Colchester was discharged for finding of a ship, but

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it was because they were not within the words of the writ, as appeareth, Rot. Claus. 13 Ed. 3, pars 1, m. So to tell your lordships a story of a great number of land tenures discharged 'de 'custod' maris,' and not to give your lordships the reason, it is nothing to the purpose.

So, my lords, having verified these five points by the precedents, and justified them by these reasons, and answered these objections, I shall now come to the sixth matter upon this record; and that is, though no cause be declared in the writ, no danger manifest, nor against what enemies; that yet the king by his writs hath commanded shipping for defence of sea and land; and in the king's wisdom the danger hath been reserved in his breast, and not communicated to his people by his writs.

First, I find that antient precedents have been so, that it hath been reserved to the king himself, and those that he did depute to take care thereof; this appeareth, Rot. Claus. 14 Johan. m. 2, the king directed his writs to Herbert, with a Mandamus to make ready all ships for our service, when we shall command; not a word of the cause declared, or an enemy proclaimed. The same Roll, m. 6, the king by writ, directed to several parts, causeth all ships that could carry six horses or more to be sent unto Portsmouth; and the like writs were directed to other ports. Rot. Pat. 15, Johan. m. 4, the king appoints a guardian upon the sea coasts, and commandeth all men that they should be *intendentes;* and other writs in the same Roll, directed into many counties with a Mandamus, Claus. 17, Johan. m. 7, dors. Writs for taking of ships, and bringing them into the Thames mouth, without shewing any cause: all this was done in the time of king John. In the time of Hen. 3, Rot. Pat. 13 Hen. 3, m. 5, a writ commanding the sheriff of Kent and Sussex to arrest all ships in those counties to be at Portsmouth, to be ready to go into that service we shall command. And it appeareth in the same Roll, that these ships were able to carry but six horses. So Rot. Claus. 14 Ed. 1, m. 13. To our bailiff of Portsmouth, and keeper of our navy, to make ready one good ship, and to be ready to go in our service, whither and when we shall command it. Rot. Claus. 23 Ed. 1, m. 5, dors. The king declares that he will have the sea coasts in Essex guarded against the enemy; and there commandeth them to be obedient to such an one, who had the custody. Rot. Pat. 23 Ed. 1, m. 2. The king writeth to all the archbishops, bishops, sheriffs, knights, and others, to be assisting unto William de S. who had the custody of the sea. So as by all these, it appeareth the king did give no account to his subjects, either of the service, or the time when. Rot. Scot. 10 Ed. 1, m. 13. The king commanded all ships to be arrested, and men and mariners to be sent to the admiral of the fleet, 'ad proficiscend.' The same Roll, m. 5, dors. a matter fit for the council, and not for the people to know. Same Roll, m. 20, that they should do 'prout nobis,' &c. the king oweth no account to his subjects of these things. 24 Ed. 1, m. 19. The king having commanded E. S. to take up 100 ships fit for his service, commandeth the sheriff of Northumberland and others to be assisting. Same Roll, m. 17. A command to the same effect, that all ships should be taken between Lynn and Berwick. It was so likewise in the time of Ed. 2, Pat. 9 Ed. 2, pars. 2, m. 26, ships taken up at the charges of the inhabitants, to defend the sea against malefactors and pirates. Rot. Claus. 12 Ed. 2, m. 11, dors. Writs directed to the mayor and bailiff of Sandwich, to make ready all ships within their port of 40 tons, 'Ita,' &c. that they be ready within three days warning to go, as we shall more fully declare; but the service that was to be done, not mentioned. So it appeared by other writs to other towns in the same Roll, 17 Ed. 2, m. 11, Pat. 14 Hen. 6. m. 14. 'Rex quia quibusd' arduis causis,' &c. doth assign John Hoxham to take up all barges of 10 men and upwards.—So in all these times of king John, Hen. 3, E. 1, E. 2, E. 3, and Hen. 6, writs have gone out generally; that the service hath been concealed; and for instruction, they were referred to the council.—It standeth with reason, for resolutions of war are not to be communicated; his majesty hath a separate council of war from the body of his privy council.

Now, my lords, for the objection that hath been made against the first writ of 4 Aug. 11 Car. that is, that the king hath not declared sufficient cause for the issuing of this writ: The king hath not communicated to J. S. and J. N. what the employment must be; he must satisfy the counsel at the bar, which he ought not to communicate to his privy council, but is reserved for his council of war.—This is a writ to command obedience from his subjects, and upon such reasons as may satisfy any reasonable man; and if fewer reasons, it had been the better agreeable to all former writs.—For the next matter out of the precedents, which is, that during the times of the sitting of parliaments, these writs have issued out by command from the king, I have made it good upon my former head.

The last thing I observe upon the precedents was this, that there was no clause, no particular in the writ of 4 Aug. 11 Car. but was warranted by many precedents: and that in this thing the king doth but 'jubere per legem.'

First, for the direction: It is, as in this writ, sometimes upon one, or 'probis hominibus' of such a county, sometimes the direction is to commissioners; sometimes one way, and sometimes another: and of this of the precedents themselves, when your lordships come to see them, I shall speak. They would have the king descend so low, as to give them a reason why he doth it: some reasons are expressed in the writ; as 'quia periculum imminens, quia pro 'defensione regni, tuitione maris, securitate 'subditorum, salva conductione navium,' &c. My lords, all these are expressed in the record, 9 Ed. 3, m. 12, Scot. 10 Ed. 3, m. 20. Rot. Alm' 12 Ed. 3, m. 1, Rot. Alm' 13 Ed. 3, m. 13. I find in these writs the same matter, power of

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assessment, sometimes levies by distress and imprisonment; nay, seizure of lands and tenements, goods and chattles, that are expressed in former writs: and that it was at the charges of the counties, both inland and maritime, this appeareth, Rot. Scot 8 Ed. 2, m. 9. 'De Navigio providend.' Pat. 9 Ed. 2, m. 26, pars. 2. 'De Navigio providendo pro Custod' Maris.' Many more of these, Scot. 10 Ed. 3. That the wages of the men that went in the ships, and guarded the coasts, were at the charge of the county; this appeareth 10 Ed. 3, m. 2, dors. 60. Men appointed and sent to Portsmouth, and they refuse to go without wages; but a command came from the king, and commanded the counties to pay them wages. 10 Ed. 3, m. 21, dors. And his predecessors not to bear any charge whatsoever, though 'pro defensione.' Rot. Alm' 12 Ed. 3, pars 1, m. 2. Those of Lynn, who refused to contribute towards the charge they were assessed by the commissioners, 'juxta quantitatem,' were compelled to contribute; so Rot. Claus. 12 Ed. 3, m. 8, the like 'pro custod' maritim.' I might be infinite in these particulars, but I will not trouble your lordships.

Here they have made some objections; though to answer the main objection, I am not yet come. They say, this power of assessing the people for sums uncertain, ought to be no more than escuage uncertain, and must be assessed in parliament: and this assessment for defence, ought not to be by commission, or the king's writ. First, for the authority, which is Littleton, he saith, fol. 20, 'Que communiter 'dit que escuage serca assesse pur parliam'.' —I do not find by the Register, where these writs are; neither do I find them grounded upon any act of parliament. Some that are grounded upon acts of parliament, do recite them. But what if it be by act of parliament? A service that is to be done by the tenant to his lord; what if this be so, that it must be assessed in parliament? Your lordships know that the tenants must do according to the original duties of them. And if this be, that the lord shall not assess them but in parliament, is that an argument from a tenant to a lord in this case?—This is a service commanded not by tenure, but by a king from his subjects; this is suitable to the reason of law in other cases: for those ancient aids, which the law doth require for the making of his eldest son a knight, or 'pur file marrier;' are not those certain at the common law? Must there be an act of parliament to assess those aids? The books are otherwise.—But the king at the common law might require an aid uncertain, and might assess it as he pleased. Glanvile lib. 9, cap. 8, Brit. fol. 57, cap. 27, Bract. lib. 4. cap. 16. So as at the common law they were uncertain. 11 Rep. fol. 68, D. It is said there, the statute of Westminster 1, cap. 15, which puts reasonable aid in certain, doth not bind the king; *a fortiori* we must not bind him to a certainty for the defence of the realm. No man can tell what the preparation must be, or the charge thereof. If they can shew an act of parliament that limits the king for the defence of the realm, they say something.

But they say the sheriff is no proper officer, not sworn to execute this writ. This is as wide as the other: for, my lords, the sheriff is sworn to execute all writs that shall be delivered to him for the king's service. And surely this writ, if it come to him, he must at his peril execute it.—First, The direction of those writs have been many times as well to the sheriffs as the commissioners. Rot Scot. Ed. 3, m. 13, Claus. 15 Ed. 3, m. 17. The king commandeth the sheriff of many counties to furnish men with arms, victuals, and other necessary provisions, both for sea and land. 23 Ed. 3, m. 5, dors. 24 Ed. 1, rot. 7, 9. Ex' Remem' Regis 11. The lands of the sheriffs and other officers were extended, because of their negligence in doing of their duties concerning those writs, 25 Ed. 1, Ex' Remem' Regis. A commission went out to enquire of the execution of the officers in the duty of their places.

Besides these writs at the common law, this is seconded by the authority of the common law, Register 122, or 127. The writs that go out to the sheriff (for they go out to the sheriff as to commissioners) it is left to the discretion of the sheriff or commissioners, as occasion shall require, Register 191. Brc De Partitione, before any statute was made concerning the same, that writ went out generally to the sheriff; so that in all times and ages it hath ever been in these cases, where no certainty, left to the discretion of the sheriff and commissioners.

My lords, for the manner of the levying 'per districtiones,' and by imprisonment of those that do refuse: is this new? It hath been so in all the precedents that have been vouched, both by distress and imprisonment. For the distress: if the king makes a corporation, and gives them power to ordain for the common good of the corporation; and if they make an order for the payment of money, and that those that do not pay the same, shall be distrained; is not this adjudged a good ordinance? 5 Rep. fol. 64, Clark's Case, Trin. 7 Hen. 7, rot. 3. There is a benevolence granted to Ed. 4, for his voyage into France; one T. R. did deny payment, and he was distrained for his proportion.

They except to the penalty of the writ. The penalties of former writs have gone higher. Inter Commun' in the Exchequer, there was a Mandamus to assess those that were employed in the provision for shipping; and the Mandamus was, 'sicut nos et honorem nostrum et 'salvationem regni diligitis.' In that roll this is so often remembered, Rot. Scot. 10 Ed. 3, m. 11, dors. 'quod, &c.' their lands, goods, and chattels to remain seized in our hands. And m. 2, under pain of forfeiture of life: 11 Ed. 3, m. 2, to cast those in prison that did refuse. Rot. Claus. 12 Ed. 3, m. 18, dors. Writs directed to Henry Hussey, and others, to punish those that refused to contribute; and to imprison them, and to seize their lands and goods into the king's hands. Claus. 13

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Ed. 3, pars 1, m. 36, dors. to seize into their hands the lands and tenements of the refusers. Rot. Franc. 21 Ed. 3, pars 1, m. 11, the king commands ships, under pain to lose life, and all their estate. Rot Franc. 10 Rich. 2, m. 23, to imprison those that are contrary, under forfeiture of all they had. So as your lordships see Mr. Holborne was very far mistaken.

My lords, in the next place, they have laid hold on the distance of time: they say there were seven months between the Teste of the writ, and the time of the rendezvous; that the king in that time might have called a parliament, and there might have been an aid granted, and the service performed in a parliamentary way.—But they may remember the 40 days between the Teste and the return of the writ for summoning a parliament; then the time spent in presenting of a Speaker; the solemnity used before they begin their grand committee; their reading of a bill thrice; the debate about passing of it in both houses before it be granted; and after all this be done, and the parliament ended, a time for the levying of the money must be had; and when it is levied, time for the return of it; and when it is returned, time for the expending of the money: and the preparation will go slowly on till the money be returned. 48 Hen. 3, m. 4, dors. There was a command for guarding of the sea-coasts. Claus. 28 Ed. 1, m. 5, dors. The port of Yarmouth commanded to find ships for a certain time. Rot. Scot. 11, 12, 13 Ed. 2. They are put down in that roll, m. 8, that there was a command for a Navale Subsidium for three or four months.

So as, my lords, for the time of preparation and for the time of the continuance, it hath ever been referred to the wisdom of the king. My lords, for the Spanish invasion, that hath been so late in our memory, I find by the books that are kept in the council-chamber, that the preparations were in October 1587, against the coming of the Spanish fleet in 1588, which did not set forth till June: I find no parliament called that year. And by letters and orders from the council-board, those ships, and defence that was made, was *ad sumptum* of the subject.—So, my lords, by this that hath been said, it doth appear to your lordships, that there is not any clause in this writ, either for the direction, motives, mandates, or penalties, but are warranted by former precedents in a higher degree.

My lords, these are the precedents that I have collected, and reduced to these several heads. I shall now remember, to your lordships divers others. And in the first place observe, that William 1, came not to abrogate any former law, but was sworn to observe 'Antiquas leges Anglicanas,' that appeareth in Lambert, fol. 125, prout. So every man by this law, that was but a confirmation of former laws, must provide 'pro viribus et facultatibus.'

I find by the grant that William 1, made to his abbey of Battel of his own foundation, a charter to be free from Danegelt 'et omnibus 'auxiliis.' If they had not been freed, they had been subject. I find Pat. 7, Johan. m. 5, the king authorized Walter Scot and others, 'quod omnes naves, &c.' which they should find, to arrest, and command all to assist, as they love us and our peace in our realm. 14 Johan. m. 6, as your lordships have heard, all the ships were arrested, that could carry six horses, and to be at Portsmouth. M. 2, all the ships in the port were to go in his service, without expressing for what, and unlade. Claus. 12 Johan. m. 7, dors. commanded all ships to be brought into the Thames mouth. So here was not a laying down, but a continuance of it. So in Hen. 3's time, Claus. 14 Hen. 3, m. 12, dors. all ships taken that could carry sixteen horses. Claus. 15 Hen. 3, m. 17, dors. Command for the furnishing of arms, men with victuals, and other provisions for forty days. And here was the like command to sheriffs in several counties. Claus. 26 Hen. 3, the king commandeth the men of Yarmouth to have their ships ready with men and arms; the same roll, to find ten ships to go to Picardy. Pat. 40 Hen. 3, m. 3, dors. Writs to the several port-towns, that no ships should go beyond sea, but all to stay at home. M. 5, dors. Those that returned from guarding the sea-coasts without leave, were punished by seizure of goods and chattels. M. 4, same roll, dors. Provision to be made till further orders be had. So it was not confined to time, but occasion, as need should require. And there be divers others in the time of Hen. 3, upon other occasions, which I have remembered. In the time of Ed. 1, 21 Ed. 1, m. 23, it appeareth there, that all the port-towns were appointed by the king and his council, how many ships every one of them should set forth. Rot. Vas. 22 Ed. 1, m. 11, dors. The king of England in that writ stileth himself Dominus Regni Scotiæ, &c. and sends his writ to the king of Scotland, to let him know, the king of France had taken part of Gascoigne, an inheritance of the crown of England, that he should, 'in fide et homagio,' be at London with horse and arms, &c. This writ is very observable, the king of England is Superior Dominus Scotiæ. A part of Gascoigne was then lost. The king of Scotland was required by this writ, as well as requested, to give him aid for the recovery of those grounds taken from him in Gascoigne. My lords, this power is not confined only to England, but it reacheth, as Great Lord, into Scotland. Also into Ireland, Vasc. 22 Ed. 1, m. 5, dors. The king by his writ commandeth divers earls, and others in England and Ireland, to do the like, to send men to London with horse and arms. The same roll, m. 13, dors. All that claim to be of the liberty of the port so commanded. Pat, 23 Ed. 1, m. 1, 5, 7. All ships of 40 tons were to be furnished and provided for the king's service. Claus. 23 Ed. 1, m. 5, every man is compelled to contribute. The same roll, m. 4, those that did not inhabit maritime towns, yet if they had lands there, they must contribute,

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resident or not resident; within or without the liberty, all must contribute.

My lords, in that writ, which is Claus. 23 Ed. 1, m. 5, dors. I will observe these things: 1. A command to all bishops, abbots, lords spiritual and temporal, 'quod sint intendentes 'et respondentes ad custodiam maris.' 2. In contingent causes; 'causa, &c.' 3. The writ saith, 'quod omnes ad arma, &c. secundum statum, &c. ad transfretandum cum nobis;' and possession of goods and lands to be taken for the custody of the sea, as in former times they were accustomed: so it is to be done in this manner as in times past. 4. The writ was directed to several sheriffs, 'per corpora, bona, et terras,' to distrain.

Next, 24 Ed. 1, m. 15, The king commanded the archbishops, bishops, barons, and all the commonalty, to defend the maritime parts. Claus. 24 Ed. 1, m. 19, 'pro custodia marit.' There was another of Symon de Spencer, which I remembered before. 24 Ed. 1, rot. 76. Another of the like, Ext' Remem' Regis, Claus. 25 Ed. 1, m. 26, dors. The king moderateth the expences of the country when the danger ceaseth. Claus. 25 Ed. 1, m. 12. The king commandeth the sheriffs of several counties, and others, to bring all the ships to be ready for our service, when we command. M. 26, The like command. 'De custodia marit.' Pat. 31 Ed. 1, m. 20, power given to Thomas de B. to raise forces in Cumberland to resist the Scots; and those that did refuse, to seize their goods. In the time of Ed. 2, Claus. 2 Ed. 2, m. 21, the king commandeth divers towns to set out ships against the Scots; and after, by special writs, some of those were discharged. Rot. Pat. 9. Ed. 2, pars 2, m. 6, Pat. 16 Ed. 2, m. 11, a writ directed to sir Thomas Weston and others, to array all between 16 and 60, or to take their lands and goods, if they did refuse. Pars 1, m. 7, of the same roll, Claus. 20 Ed. 2, m. —, the king doth there declare that those that stay at home ought to contribute to set forth ships, and for the wages of the men employed. Claus. 20 Ed. 2, m. 6, writs directed to the scholars at Oxford, they were not exempted, but commanded to keep Southgate safely. Rot. Vasc. 18 Ed. 2, m. 18, The king writeth to the archbishop and others, commanding them to have horses and men in a readiness, as often as need shall require. For time of Ed. 3, Claus. 2 Ed. 3, m. 13, and m. 22, dors. to Southampton, and to several other towns for their shipping, above 40 tons. Pat. 3 Ed. 3, pars 2, m. 6, the king commandeth the sheriff of Cornwall to distrain knights and others, that abide not upon their lands in maritime parts, and to imprison. Those years of 10, 11, 12 and 13 of Ed. 3, having been remembered, 21 Ed. 3, The king, concerning the defence of the sea and sea-coasts, gave special rules to be observed, both for the number of the ships and the men, and the quality of their persons, and for the proportion of their wages; as appeareth, Pat. 21 Ed. 3, pars 1, m. 26, 27, where there was special order taken for the guarding of the sea and sea-coasts at the charge of the inhabitants. Rot. Franc. 21 Ed. 3, pars 1, m. 11, command to the sheriff of London to arrest all ships in London to be sent to Calais, to resist the enemies against us then about to come. Rot. Franc. 25 Ed. 3, m. 9, the king reciteth, that France made a preparation to invade the realm, and gave a power to some to raise forces; and commandeth the sheriffs to raise the Posse Comitatus, to assist the commissioners. Pat. 26 Ed. 3, pars 1, m. 7, the king, by his writs to several counties, commanded all men between 16 and 60 to be in readiness to resist the Scots. Rot. Franc. 25 Ed. 1, m. 31, commanding all officers and ministers to assist Andrew de Gulpho, in the raising of forces for shipping. So as in that roll likewise, your lordships see that the inland counties were commanded for shipping. Rot. Franc. 28 Ed. 3, m. 6, the king appointed Ro. Co. and Ro. A. to arrest all ships of 20 tons and upwards, between such a distance, and to bring them to Southampton. Rot. Scot. 29 Ed. 3, m. 13, several writs were directed to the bishops of Durham and Carlisle, and others, for the arraying of men. Rot. Franc. 40 Ed. 3, m. 37, the king sent forth divers writs, commanding 'quod, &c.' with all their forces, they should assist to the safe keeping of the sea-coasts, to resist the malice of the enemies. Rot. Franc. 50 Ed. 3, m. 47, dors. command to make proclamation, that all that have land upon the sea-coasts should repair thither with their families. So in all ages, and at all times, writs have issued both for the defence of the sea and land by the king's command. In the time of Rich. 2, Rot. Parl. 6 Rich. 2, m. 42, that was objected as a record against the king, but maketh clear for him: 'Que dit que le roy persons assemblés, 'en parliament, est desire de vivere del re-'veneus del corone car escheats marriages et 'forfietures sont pur le defence nostra royalme.' The king answers, 'Le Roy volet de fairs in 'ceo case come per de advise des seigniors, &c.'

Your lordships see they desire of the king, that he would live of his revenues, that the profits of escheats, wards, &c. might be kept for the defence of the realm. The king giveth them this answer, That he will do in this case by the advice of his lords, as shall be most for his honour and profit: So no reason to make any enforcement out of this record, that the profits of escheats, wards, &c. should go for the defence, because the king maketh no absolute denial unto it, saying, that he will do as he shall be advised by his lords. Rot. Franc. 7 Rich. 2, m. 18, that the lords beyond the seas be arrayed and armed according to their state and faculties. Pat. 8 Rich. 2, pars 2, m. 15, a command that all between 16 and 60 be in a readiness. Rot. Franc. 10 Rich. 2, m. 23, arrays through all England. And so in the time of Hen. 4, Rot. Parl. 5 Hen. 4, m. 24, for the arraying of all men throughout England, and those that were impotent, and could not go, to contribute unto it. 3 Hen. 5, m. 36, dors. Pat. 13 Hen. 6, m. 10, general commis-

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sions for the arresting of ships, without declaring the cause. Pat. 14 Hen. 6, assigned Job. de N. to arrest all ships in the port of Southampton, to do service as the king shall command, there was no cause declared. Pat. 26 Hen. 6, m. 2, 13, commissions to array, and those arrayed to keep in array, with diligent watches into several counties. 1 Hen. 7, pars 1, the king writeth to sir Fitz Hugh, to array archers and horsemen.

So that it appeareth by those precedents in all ages, that those defences which have been made by sea and land, are not confined to port towns, and maritime places, but 'per totam 'Angliam.'

In the next place, I shall give a particular answer to some objections that have been made, as have not fallen in my way; and to the acts of parliament, reasons, records and book-cases, urged by the other side.

The Third Day's Argument of Sir JOHN BANKS.

May it please your lordships; The matter that I did propose to insist upon this day, was the answering of the objections. I shall use no preamble, no repetition to introduce what I have to say: but in the answering the objections, I shall first give answer to the several acts of parliament insisted upon, then to the several records and reasons that have been urged on the other side. And in the last place, I shall answer the exceptions that have been taken to the writ, 4th Aug. 11 Car. Mittimus, and form of proceedings.

The first act they have insisted upon, is that of William 1, call it what you will, an act or a charter. The words of it are verbatim in Mat. Paris, 'Volumus et concedimus, quod omnes 'liberi homines sint quieti ab omni tallagio,' &c.—It doth no way trench upon the royal power: for as in the beginning of my argument, I opened to your lordships, that this power was inherent in the kings of England before the Conquest; here is only a concession that they shall be free 'ab omni injusta exac-'tione.' Now this is no unjust exaction, for it is of common right. And then the other part of that law doth explain it; for it doth say, 'Quod sumus fratres conjurati,' &c. so for the defence of the realm. By the same law they would urge to take away the power, by the same law it is reserved.

The next thing they insisted upon, was the charter 17 Johan. or on Magna Charta, as they call it; which indeed is mentioned in Mat. Paris, and may be under the great seal. The words of that are, 'Nullum scutagium vel 'auxilium nisi per commune concilium, nisi ad 'primum filium militem faciend' et maritand' 'fil', &c.'—This charter, as it was acknowledged by themselves, was granted at Running Mead, where the banners were displayed, when there was war or rebellion between the barons, commonalty, and the king. It was not assented unto, the king sitting in parliament: for parliaments are not called with arms, and in the field. It was, in truth, an inforced act from a distressed king. Shall this bind the crown? I shall remember the act of parliament made 15 Ed. 3, and there only were things that were in parliament enacted derogatory to the crown, as this is: That no peer should be questioned but in parliament: That no great officer be removed but in parliament: That no clergyman shall come before temporal judges. These were things that were much derogatory to the prerogative of the king: 15 Ed. 3, That king the same year, when he was better advised, did make a charter which is in print, for the recalling of this prejudicial act of parliament still in force. It appeareth by the parliament-rolls and printed books, where the king declareth it was drawn from him with an unwilling mind, and was prejudicial to the prerogative of his crown; and therefore by that charter it was repealed.

But, my lords, if that Charter 17 Johan. should be in force, why hath there been no confirmation of it in so many parliaments since? The statute of Magna Charta, 9 Hen. 3, hath been confirmed one and thirty times; why no confirmation of the charter 17 Johannis? And why have we not heard of it since that time? The reason for it is, that it trencheth too much upon the prerogative of the king and crown. But take the words as they are, what be they? 'Nullum scutagium vel auxilium nisi per com-'mune concilium reg. nostri.' If these were an act, doth it extend to take any thing away that belongs of common right unto the crown? And that hath been the exposition of my lords the judges of acts of parliament: That aids due of common right, are not taken away by general words, 'Commune, &c.' And therefore these aids due of common right, as this is, are no way taken away.—Besides, for the statute of Magna Charta, it is made 3 Hen. 3, c. 29, 'Nullus liber homo capietur, aut impri-'sonetur nisi per legem,' &c. The general words of this act of parliament do no ways impeach the royal power, for this royal power is 'lex terræ.' Besides, in these precedents, 14 Hen. 3, 15 Hen. 3, 26 Hen. 3, 48 Hen. 3, and all the succeeding kings remembered in all of them, that these writs went out to provide shipping at the charge of the inhabitants; so, surely, if they had been taken away by Magna Charta, the writs after Magna Charta would not have used it.

But then there hath been objected, the statute De Tallagio non Concedendo. If it be 25 Ed. 1, as it is printed, or 34 Ed. 1, or as the Petition of Right doth recite it 'temp' Ed. primi,' be it when they will, under favour, there is nothing in that act doth take away this power: The words are thus, 'Nullum tallagium 'vel auxilium sine voluntate episcopor' baron' 'burgens', &c.' Mr. Solicitor, in his argument, upon probable grounds, did make question whether this was an act of parliament yea or no: 1. In respect it was not inrolled amongst other acts of that time. 2. Because by the penning of it, it may seem rather to be an al-

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stract. 3. Because when the other acts of those times were sent over to Ed. 1, to be sealed and confirmed, no such act was sent over.

My lords, I will not lay hold on this, but will admit with them that it is recited in the Petition of Right to be an act of parliament: so I will admit, yet to wave nothing that hath been said, but by way of admittance, I give this answer.

First, That it taketh away no aids that are due by the laws of the realm; yet the words are general: 'Nullum tallagium vel auxilium 'nisi assensu parliamenti, &c.' Here is not in this act of parliament so much as any exemption of an aid to knight the king's son, or to marry his daughter; yet in this the law is observed, that these aids are not taken away; and so it is declared, 25 Ed. 1, cap. 11, which doth reduce these aids unto certainty. So as your general words of 'nullum auxilium' will not do it, if this be an aid due by the laws of the land.

Then I say this is not properly an aid, but a contribution of king and people for the defence of the realm; it is 'ad proficiscendum cum na- 'vibus nostris:' then I say this power is 'inter 'jura summæ majestatis,' one of the highest prerogatives of the king, and shall never be taken away from the king: 17 Hen. 7, statute 'Quia emptores terrar'' doth not extend to the king to take away his tenure. If you will have such a high prerogative taken away, you must shew it in the acts of parliament. Nay, my lords, I say that in the times of Ed. 1, this royal power is expressly reserved by act of parliament to the crown; and therefore in after-times never intended to be taken away.—First, I shall inforce it out of the statute of 25 Ed. 1, c. 5, 6,* that doth recite, that aids and taxes that have been given unto us towards our wars, and other business of our own grant and good will, howsoever they were made, might turn to a bondage, &c. We have granted that we shall not draw these taxes into a custom, &c. and do grant that for no business henceforth, we shall take such manner of aids, but by a common consent of the realm, &c. saving the ancient aids due and accustomed. This aid is not to taken to be an aid, for this was never given the king of England, but taken by royal power: the statute of 25 Ed. 1, speaketh of such aids as have been given, and excepteth such aids as have been due and accustomed. And by the precedents shewn, it appeareth these have been due and accustomed. It hath been desired in 'fide legiantiæ,' and with a Mandamus: 2 Ed. 1, cap. 1, this statute doth confirm the Great Charter, and the Charter of the Forests; but in the end of it in the Parliament-roll, that notwithstanding all these things before-mentioned, both the king and the council, and all they present at the making of this ordinance, will intend the prerogative of his crown to be saved unto him.

A further answer to the statute De Tallagio non Concedendo; the practice that hath been since the time of Ed. 1, in the time of Ed. 2, Ed. 3, Rich. 2, and the practice since, doth shew plainly, that it was never intended by the statute to take away this royal power. But then there was a thing materially objected, if the records would have warranted what had been said, and that was, Rot. Parl. 29 Ed. 1, and then it was said, That though there be a saving, 25 Ed. 1, and 28 Ed. 1, yet here is no saving in this act; so then if not for the act 29 Ed. 1, all was lost. My lords, to this I say, 'Nul tiel record.' And therefore I shall desire, that this which they call an act, 29 Ed. 1, I may attend your lordships with. By this record it doth appear, that it is only a record of the perambulation of the forest, and no repealing of any former law; neither is any thing enacted by that law derogatory to the crown.

The next statute objected, is 1 Ed. 3, cap. 5. The words are these: That 'no man shall be 'charged to arm himself otherwise than in the 'time of the king's progenitors; and that none 'be compelled to go out of his shire, but where 'necessity requires, and the sudden coming of 'strange enemies within the realm.' So this statute is relative to what hath been formerly done: What hath been found done formerly, appeareth by the records of king John's and Ed. the first's time, that the subjects were to set forth shipping at their own charge: then those writs went out in king John's and Ed. the first's time, as hath been shewed. And then this statute alloweth in two cases, one where necessity requireth, the other upon coming of strange enemies; and this writ requireth no other, but where there is necessity, in the king's judgment.

The next statute is 1 Ed. 3, cap. 7, which was objected, where men at arms were conveyed into Scotland and Gascoigne without wages; the king saith, it shall be done so no more.—The statute mentioneth Scotland and Gascoigne, foreign wars, and so foreign to this business; for though Scotland was subject to the dominion of England, yet it was a divided kingdom. 8 Rich. 2. Continual claim. Com. 376. That a fine shall be paid by a stranger, because he was in Scotland at the time of the fine levied. Bract. 436. An abjuration into Scotland is good. 6 Rich. 2, Protection. 46. That Scotland is out of the realm; therefore this statute that speaketh of Gascoigne and Scotland, speaketh of foreign war, not of defence.

The next statute is 18 Ed. 3, cap. 7, men of arms, hobellers and archers, shall be at the king's charges; the statute speaketh likewise of going out of England. But he that is upon the defence at sea of the kingdom, it is no going out of England; for that see 6 Rich. 2, Protection, 40. The sending of men and ships for the defence of the coasts, is no going out of England.

The next statute is 25 Ed. 3, cap. 8, no man shall be compelled to find men of arms, hobellers or archers, otherwise than those that hold of such service, without consent.—My lords, this statute of 25 Ed. 3, doth not take

* Vide les parols del Statute.

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away any former laws. These three former statutes of 1 Ed. 3, 18 Ed. 3, and 25 Ed. 3, are recited in the statute 4 Hen. 4, and it is enacted, they shall be firmly holden and kept in all points; so if these statutes must be kept firmly in all points, then the statute of 25 Ed. 3, doth not repeal any of these. Now that of 1 Ed. 3, cap. 15, reserveth a power to the crown where necessity requireth, and where sudden enemies come. 26 Ed. 3. Those ships were sent forth, and commanded for the defence of the realm, at the charge of the subjects, Rot. Franc. 26 Ed. 3, m. 4, 5, Rot. Franc. 28 Ed. 3, m. 6. So as clearly there is no part of this power impeached by this statute of 25 Ed. 3.

Then they have objected, Rot. Parl. 2 Rich. 2, m. 3, That upon a council of a great many earls, barons, and sages of the realm, assembled by the king's privy-council, it was there declared what danger the kingdom was then in, and that money was wanting; they declared they could not remedy these mischiefs without charging the commons, which could not be done but by a parliament.—This is no act of parliament; it is but a parley, or discourse, or communication between the lords and commons; it was 2 Rich. 2, in the non-age of a young prince, who did not assent; for there was no royal assent unto it, so no proof in this case.

The next record they objected was, Rot. Parl. 9 Rich. 2, m. 10, there was a tenth and a half, and a fifteenth and a half granted to the king, upon condition contained in the schedule; which is, that the king should assent that the great officers of the kingdom should be named by parliament; and servants appointed for dispence of the money. If the king doth accept of the subsidies and aid upon condition, doth this take away his royal power? There is no more done in this than was in the parliament 21 Jac. for there the officers and treasurer were appointed by the houses of parliament. But then further it doth appear, that this was granted, 'pro viagio Johannis regis de Castile, &c.' so that it was not granted for the custody of the sea, but for that voyage.

The next record they insisted upon was, Rot. Parl. 8 Hen. 4, m. 2, a tenth and a half, and a fifteenth and a half, granted with a protestation, that this should not be brought into example. —This is nothing, no more than the other. A parliament grants a subsidy, with condition it should be thus and thus employed; and the protestation can no ways prejudice the crown in this.

And 7 Ed. 4, Rot. Parl. m. 7, hath been objected; there the king's speech is entered upon the roll, that he will not charge his subjects but upon great and weighty occasions.—My lords, this is nothing but a gracious speech of the king to his subjects, that he would charge them but in such cases as should concern the defence of the realm.

The statute next objected was 1 Rich. 3, cap. 20, that the subjects from henceforth shall in no way be charged by any such exaction or imposition. This is no benevolence, but a legal due.

Next they object, the statute of Tonnage and Poundage granted to the crown for the defence of the realm.—First, In answer to this, I say, that there is no act for Tonnage and Poundage that is now in force, neither are any duties taken to the crown upon any act of parliament. Those acts for Tonnage and Poundage that have been granted, make for the crown. And therefore, if your lordships look the statute 1 Eliz. and 1 Jac. it was given towards the king's charges, for the defence of the realm and safeguard of the sea: It was given towards his charges, it was not intended of extraordinary defence. So my lords, these acts, when they were in force, did give this but towards the charges. It is so now; for this which is done, and those contributions levied, are but towards his charges: and that will appear upon account, that his majesty for these three or four years hath expended more upon the sea than any of his progenitors.—Besides an acknowledgment in these acts, that this defence could not be done without the intolerable expence of his majesty; these aids are of necessity, and are not to be lacking at any time.

My lords, in the next place, they insisted upon the Petition of Right, 3 Car.—It was never intended, that any power of the king, by his prerogative, should be taken away or lessened by it. I dare be bold to affirm, for I was of that parliament, and was present at the debate, that there was never a word spoken in that debate of taking away any power of the king for the shipping-business.—Besides, it is declared, assented unto, and denied by none, that there was no intention, by the Petition of Right, to take away the prerogative of the king. The king thereby did grant no new thing, but did only confirm the antient and old liberties of the subject.

My lords, these were the acts of parliament that have been objected and insisted upon by the other side.

In the next place, for an answer to scandalous objections. It hath been said by Mr. Holborne, of these statutes of 25 Ed. 1, and 28 Ed. 1, that at the times of making these laws they were positive, no such Salvo was in them of the king's prerogative: that the acts before Hen. 4, were penned by the king's council, and those clauses of a Salvo crept in by the king's council.—These were bold and presumptuous assertions of the acts of parliament made in that time of Ed. 1, that there should be any clauses added by the king's council, that should not be added to the record. I have here the Parliament Record, that these exceptions are recorded as fully as any part of the rest of the record, and those laws confirmed since: therefore to make any such assertions against records, ought not to be done; he may object the same against Magna Charta, which is for the liberty of the subject.

In the next place they have objected out of the Parliament Books, 33 Ed. 1, that upon a

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petition made to the king, to have restitution of money taken, that the king did ordain the treasurer should give satisfaction. I shall desire it may be read, and you shall see, those moneys for which direction was given for satisfaction, were for goods taken for the king's use. Rot. Parl. 33 Ed. 1, fol. 105, dors. 'per 'scrutin' pro guerra, &c. Respons. per regem, 'Rex ordinavit per concilium quod satisfactio 'fact' tam cito quam poterit.' So this record was for moneys taken for the king's use, therefore reason satisfaction should be given, Perambulat' Forest' Rot. 20 Ed. 1, de Libertatibus Angl. 18 Febr. Lincoln. So here is no taking away of any former act of parliament; it referreth to what shall be futurely amended and revoked.

The next they objected was, Rot. Parl. 8 Ed. 2, m. 8. The fryars of St. John's at Jerusalem did petition to have satisfaction of 2,354*l.* taken by the king out of their treasury. Now, because this record was vouched two days together, I desire it may be read; and upon the reading it will appear, to be upon another purpose, 'Sur' le Roy, &c.' there was cause and reason why the king should make satisfaction.

The next record was, Pat. 26 Ed. 1, m. 21, and that was highly magnified by them: that there were several commissions went out to enquire of *gravaminibus*, of wools, and of other particulars, 'de custod' maris;' and in this it was affirmed, that, as all the king's counsel took their notes, these clauses were omitted out of the writ that concerns the forfeiture of lands, goods and chattels, or seizures.—This commission maketh nothing to this purpose, for like commissions daily come, where there are taxes laid upon men heavier than ought to be. Then a commission to enquire of grievances in this kind, wherein an answer of any thing unjustly taken shall be restored, but not a word to impeach this royal power. And, my lords, for the penalties in the writ, 31 Ed. 1, m. 20, power to seize the lands and goods of the refusers, 20 Ed. 2, m. 10, under forfeiture of all their goods, 10 Ed. 3, m. 5, dors. Claus. 12 Ed. 3, m. 18, dors. that the penalties and commands were as high in this commission as before.

The next objection was, that the kings of England have always consulted with their parliament concerning the defence of the realm, and that the aids and subsidies for defence have been granted by parliament.—This is no argument to impeach this royal power; for if in time of war the king will consent to it, shall this take away his royal power? In the times of Edw. 3, and Rich. 2, did that take away the king's royal power, that he may not ordain standards of the money himself? He may by his royal power erect courts of justice: shall that take away this from his power, because the court of wards was erected by court of parliament?

Next they objected Rot. Alm. 12 Ed. 3, pars 3, m. 22, That Ed. 3, was so penitent for what he had done, that he sent to the archbishop of Canterbury to pray for him; and that the people would forgive him for laying those taxes upon them, which his war compelled him unto, and he would never do the like again.—You shall see, it was only to pray for him for his voyage into foreign parts, (and he caused the record to be read, beginning thus; 'De excu- 'sando regem versus populum,' and ending, 'de gravaminibus') dated at Berwick upon Tweed. Your lordships see nothing by this record, but the desire of a prayer; first, to pray for the king for his voyage beyond seas; the other, concerning the charges and impositions. Surely this contribution commanded in the shipping business, was none of these charges, tailliges, or impositions. This his desire to the archbishop was not only in the 12th year of his reign, but the like in anno 25, 26, and 50; so surely those prayers of the archbishop were for other causes, and not for this, which was for the defence of the realm.

Next they do object Rot. Franc. 7, Rich. 2, m. 13. That the king assigned Tonnage and Poundage to Henry earl of Northumberland for guard of the seas.—My lords, it doth appear by the very record itself, that this was only for an ordinary defence, and not for an extraordinary defence.

Then they insisted upon the Parliament-Roll 13 Hen. 4, m. 43, the office of measuring of linen-cloth, a half-penny upon the buyer, and as much upon the seller, and other fees upon long-cloth: the parliament, 13 Hen. 4, declares it to be a void office, and that accordingly judgment was given, 13 Hen. 4. Out of this he would conclude, that therefore there should be no new office, and that an office granted with a fee is void in law.—For answer to this: First, The reason why that was a void grant, was this; it appeareth, 4 Ed. 1, that the office of measurage of all woollen and linen-cloths, was one entire office. If the king will grant that to another man which did intrench upon the former office, a void patent; therefore a strange conclusion, that because this office was void, therefore no new office to be granted. 22 Hen. 6, fol. 9. The office of surveying the packing of all cloth, a good office. 27 Hen. 8, fol. 28. The king granted to one to be his surveyor, a good office. Fitz-Her. saith, because it had no fee, therefore it was a void office. And now at the bar it is said, because it hath a fee, it was a bad office: If this reason may hold, all antient offices may fall. 34 Hen. 6, office to be marshal of the King's-bench; 12 Hen. 7, 15, to be warden of the fleet. Nay, it taketh down all offices that have been erected for the public good, and upon just occasion, as the office of Subpœnas in Chancery, Star-Chamber, &c. All those within time of memory must be shaken by this.

In the next place they object, that these contributions, they are in substance impositions; and that the king should not impose upon the subject by his charter, or by his writ; but it must be done by common consent in parliament.—Your lordships have observed in all my discourse, that I have not insisted any way

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upon any power of imposition, neither is it the question in the business: For no man's property is invaded, no seizure of any man's goods, unless they incur it for contempt; and by a wilful contempt, the subject may lose his property. Therefore, Dyer, fol. 16, and 13 Eliz. fol. 296, if the king will command his subject to come into the realm, and he will not, he shall forfeit for his contempt all his goods; or if he be attached to appear in the courts of justice, and not appear, he shall forfeit his goods, 34 Hen. 6, 49, 9 Hen. 7, 6. If a man will wilfully contemn the king's command by his writ, he may be distrained; this he incurreth not by an invasion of his property, but in respect of his contempt.

Then they alledged Rot. Parl. 50 Ed. 3, m. 24, the lord Latimer, he was sentenced for persuading the king to lay impositions on the people. My lords, I have looked upon the record, and there the case of the sentence is declared, that he himself laid the impositions, and did take upon him royal power; and therefore he was justly sentenced.

And for the sentence of Dr. Manwaring, it is nothing to this purpose. This writ denieth not the property to be in the subject, but saith, the subject hath the property; and therefore commandeth the sheriff to distrain him if he will not pay.—And for the commission 2 Car. for the borrowing of money for the Palatinate, this was for the recovery of the Palatinate, and not for the defence of the realm; and besides, it was called in by special order.

In the next place, they objected and shewed divers records, that the king hath paid the wages of divers mariners and soldiers. And I do agree it. Is that an argument that he may not command the mariners to be sent at the charges of the county to furnish the king's ships? This is against the records that I have remembered. So likewise they have cited 21 Ed. 3, rot. 77, Ex parte Remem' Regis. The king commanded the constable of his castle of B. to build ships, and the king to pay for them. So he doth at this day; he hath built the Sovereign of the Seas, and paid for it.

They have objected Dr. Cowell's book, which was called in. I wish they had read the proclamation: there are three causes expressed. First, Because he had writ things derogatory to the crown. Secondly, For ——. And Thirdly, speaking irreverently of the common law. Just like to the men who do not spare to wade into all the deep mysteries of princes, who are gods upon earth.

For their objection, that the king hath a revenue belonging to his crown, for the defraying of all ordinary and extraordinary charges, and for the guard of the sea, as Tenures by Knight-Service, Escuage, Wards, Marriages, antient Demesn, &c. Tonnage and Poundage, Service of the Ports, and Profits of the Sea. My lords, it is not for us that are lawyers to look into the secrets of the king's revenue; he hath high officers, as treasurer, and under-treasurer, that look to the secrets of his estate, and they know well whether his ordinary or extraordinary revenues do answer more than his annual expence. The story of Actæon might deter men from looking into the secrets of princes.

For his tenures, that Knight-Service tenure was originally instituted for the service of Scotland and Wales, 19 Rich. 2, Fitz-Her. Guard. 165, and Old Tenure, fo. 10. The duties of Tonnage and Poundage are not given now to the king by acts of parliament; and when they were given, it was for the great charges of this defence. And besides, those acts of Tonnage and Poundage only concern the ordinary defence: the sending forth of the 75 ships out of the Cinque-Ports, it was but for 15 days, at their own charges. And for the Profits of the Sea by sturgeons, whales, &c. is it a proper defence for a kingdom? And for the Service of the Ports, you may remember by the records shewed, they were several times commanded 'ultra servitium debitum.'

But then they have granted one case, and, I think, but one; that the king may ordain a Toll in a fair or market, or grant pontage, or the like, because there is an 'ad quod damnum,' and thereupon shall be an inquiry, 'si patria gravetur.'—The king may grant a fair, without an 'ad quod damnum,' if in his judgment, &c.

Rot. Scot. 1 Ed. 3, m. 8, A writ directed to the treasurer to pay for the shipping at Yarmouth. My lords, it doth particularly appear in the record, that J. S. was admiral, and going into Scotland: so the defence was for a foreign war.—It hath been mightily insisted upon, that here needeth no command to furnish ships, by the king's writ; every man, by the instinct of nature, will do it, where there is a necessity; no need of a royal power to command it.—Surely this argument is made by the people, or to please the people. What will the consequence of it be, but the introducing of a democratical government, when every man shall be his own defender? The God of hosts chose captains and leaders to go before his people, and command them. But to give the people this liberty, that every man shall do as he pleases, and make a defence by an instinct of nature, is a strange position.

But it hath been said in these cases, it is better to sustain a mischief than an inconvenience: by this inconvenience every man's property is taken away from him, as often as the king pleaseth, and in what proportion he pleaseth.—This, though a maxim in law, yet it goeth but to particulars: but the loss of a kingdom is both loss of liberty and estate; this is not to be reckoned among the mischiefs, for this mischief destroyeth both head and members. Therefore I do marvel to hear the rule of Mr. Holborne, Suffer a mischief rather than an inconvenience.

The next objection was the Parliament-Roll, 2 Hen. 4, m. 22, 'Pur faire des barges;' this was the petition of the commons, that the commissions granted to burroughs, cities, and towns, for building of barges, should be re-

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pealed. The king's answer for the present is, They should be repealed; but for the future, for case of necessity, he would advise with the lords.—It doth not appear that these were granted for the building of any ships for the defence of the realm.

These are the objections that have been made out of the acts of parliament, out of the records, and reasons they have insisted upon.—Now I come to their exceptions and objections against the writs and proceedings in this matter.

First, they say, there was no sufficient danger represented by the writ 4 Aug. 11 Car. They say a supply by the Mittimus comes too late; and that the words of the Mittimus are not a good affirmative, 'quia salus regni periclitaba-'tur.' And it doth not appear there was any danger, 4 Aug. 11 Car.—For this I have given it an answer, that it was not necessary to represent the danger in the writ. The king has secret intelligence, he hath his spies abroad, his ambassadors beyond seas; he knows the danger, we know not; nay, he knows that which is not fit to be discovered, and those dangers by preparation perhaps diverted another way: it is not fit by a public writ to reveal the danger. But, my lords, for the satisfaction of his people, he hath expressed sufficient cause enough in the writ; 'Quia salus regni 'periclitabatur.' They say there was no danger represented at this time when the writ went out. That is mistaken, for the writ of Mittimus doth recite the writ 4 Aug. and that saith, 'quod quidem prædones, piratæ, &c.' which shews that danger was the cause of the issuing of these writs.

Then they except at this word, *salus;* it is a physical word, and signifieth health, and you must have no metaphors in writs. Surely the grammarians tell us, that *salus* is taken 'pro 'incolumitate,' as well for safety as for health. Metaphors are usual in writs; I dare be bold to speak, there are more metaphors in the Register than in any book: Register 61. Turba, &c.

Then they have left no stone unrolled in this case: now they say the king's testimony, by his writ, is insufficient for that. Under favour, the *teste meipso* is without exception; we are bound to give credit to it. 1 Eliz. fol. 105. 'Ne exeat regno;' the king affirms J. S. will go beyond the sea, saith the book, this averment of the king in his writ is not traverseable, you shall not aver against it. The case remembered by Mr. Solicitor, was mistaken by Mr. Holborne in the answer, Hil. 20 Ed. 1, coram rege, Rot. 14. He saith, these words vouched in the record were but the saying of the king's counsel, and not the opinion of the court. Clear otherwise, for it was the saying of the judges; and then agreed, 'Quod domi-'nus rex est superlativum record' et præex-'cellens.' Will your lordships give credit to the marshal of the king's host, to the certificate of the captain of a company, if the men be in the king's service, as 11 Hen. 7, fo. 5, to the certificate of a bishop, as in case of bastardy; to the certificate of a mayor and alderman, by the recorder, as 5 Ed. 4, 30, and will you not admit of the certificate of the king by his Mittimus?

The next exception was taken to the Scir' Fac' that this Scir' Fac' ought not to go forth for this debt; and gave two reasons for it. First, The writ of 4 Aug. doth direct a form of levying, which is by distress, or imprisoning those that are rebels. Secondly, It is no debt to the king, and therefore ought not to be levied by Scir' Fac'.—My lords, for this, this duty is a duty to the commonwealth; it is 'pro defensione regni, the-'saurus publicus respicit regem:' whosoever shall detain any public duty, he may be questioned by the king, as the head of the body politic; for that it appeareth, 27 Ass. Pl. 17, it was declared that J. S. and J. D. had levied 100 marks on the county for the array of certain archers; which money did not come for the profit of the king. Out of which I observe two things.—First, This money that was for archers: the money was levied on the body of the county. Secondly, recovered by an indictment at the king's suit, 27 Ass. Pl. 17, 11 Hen. 4, fo. 2. The fees of the knights of the shire that serve in parliament, they are reckoned among public duties; therefore the goods of a stranger may be taken within the town to pay those fees, if the money be not paid; the distress may be sold, for it is for a public duty, 11 Hen. 4, 2. So are the books: Regist. 19, the king may command the sheriffs to levy these fees, as well within his liberty, as extra. Hil. 23 Ed. 3 rot. 57, coram rege. Jurato-res Hundredi de S. they make a presentment that J. S. and J. D. chief constables of E. paid wages to archers which went not beyond sea. So as by this record it appeareth, that these public duties are recoverable at the suit of the king, 'quia ad opus dominis regis.' Pat. 14 Ed. 1, m. 1, 14, the king commandeth an account to be taken of the murage, and how the sums levied have been employed. P. 15 Ed. 1, coram rege 70, dors. Rippon was besieged, they gave hostages; promise made by the town that these hostages should be redeemed, they were not: complaint is made to the king, and it came to the King's-bench; and these moneys being 700*l.* that was promised by the town for the bringing back those hostages, was ordered to be paid, because it was for the public service. So for other things that are 'pro com-'muni utilitate, inter Communia.' Hil. 5. lib. 4, rot. 4, Aurum Reginæ, due unto the queen, may be levied by process out of the Exchequer in the king's name, nothing more usual.—This Scir' Fac' is grounded upon the whole matter, the writ 4 Aug. the Certiorari, and Mittimus; and commandeth that the defendants shall shew cause why they should not pay the moneys assessed upon them for the public service.

My lords, I have done with the Objections. I shall come to the judicial records, 24 Ed. 1, 'Ad custodiam maris.' Berks, an inland county, refused to contribute the names of those that made default, were certified into the Ex-

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chequer; it appeareth by the records, that process went out of the Exchequer in the strictest manner, 'A capias in manus,' of their lands, tenements, goods and chattels; and that their bodies, with horse and armour, be sent to Portsmouth; for besides the doing of their service, the seizure of their lands and goods, 24 the same year, Exc. Remem. Thesaur. On the other side, J. de S. gives information to the Chancellor of the Exchequer, and barons, in absence of the Lord Treasurer, of the preparation of men in Flanders (this being remembered before to another purpose). It appeareth that after consultation had, they did resolve to send forth two writs, one was to the town, the other to the T. H. Custos Maris, to call all for defence of the maritime, &c. Exc. Remem' Regis, 24 Ed. 1, Rot. 80. Henry Hussey was seized of the manor of W. in Berks, he was assessed to find a horse 'pro custod' marit.' He complained in the Exchequer, that he had not the whole manor, and yet he was assessed to find a whole horse; he did not come and say, I ought not to be taxed, but submitted to the power, and desired a manorly contribution. 28 Ed. 1, Rot. 72, the abbot of Robertsbridge's case, remembered on both sides, divers times: under favour, the joining of the issue in the record is a very full proof in the cause; he brought a replevin against J. S. for taking his goods in an inland town in Kent; he pleadeth the contestation between our king and the king of France, and Leighorne assigned keeper of the sea, that the plaintiff was assessed unto 7*s.* 7*d.* anno 22, to 13*s.* anno 23, to 15*s.* and the defendant being collector did distrain; the plaintiff did not say in bar of this, that he ought not to be taxed, but that he was assessed 'ad inveniend', &c.' for such lands: the defendant saith, the plaintiff holds other lands in the county, and for that land he was assessed. Now this doth admit the power of taxing. Hil. 16 Ed. 3, Rot. 23, coram rege: The jury of Suffolk did present that J. Russel, and others, 8 Ed. 3, were hobbellers, elected in the hundred of T. and staid at home. They plead, Not Guilty. The jury finds that J. Russel did perform the service, but J. S. did not perform it, therefore committed to prison, and paid a fine unto the king. By this record it appeareth, the money paid to the archers and hobbellers was at the county's charge. Methinks that the disclaimer that is by the commons, 13 Ed. 3, Rot. Par. 9, & 11, is in nature of a judgment in this case; for there they did disclaim they had no cognizance, and there likewise upon their own concession, that the maritime parts ought to defend at their own charges, as the inland parts, the inland counties. This concession, 13 Ed. 3, is a strong argument, Parl. 21 Ed. 3, rot. 20, when the commons did petition for a guard for the sea: The answer is, 'Soit guard fait,' and that was at the charge of the counties, as your lordships know. 20 Ed. 3, divers ordinances made, which ordinances made had the force of a law: The king and his council did ordain, 'Quod 'omnes illi, &c.' which have such a quantity of land should be assessed to find one archer; one hobbeller 10*l.* two hobbellers *vigint. libr. unum hominem ad arma* 25*l.* This appeareth Rot. Franc. 20 Ed. 3, pars 1, m. 17, in the counties of Bedford and Bucks. In the same year, another ordinance, that those that did reside with their families, 'cum toto posse,' within six miles of maritime parts, were excused from finding of men without.

My lords, upon the occasion of this service, there were divers refusals made, certificate by Mittimus of their names into the Exchequer: as in this case, J. T. and W. G. were certified for defaulters amongst others: upon this, the court of Exchequer award process against those men and others, which was a 'Capias in manus,' Seizure of their lands and goods; they came in, and pleaded, they resided 'infra sex leucas,' with their families and all their powers; issue joined; upon this, the jury impannelled, and it appeared, those that were found within six miles, judgment *quod sine die*; but for others, they were imprisoned and fined; for so much land as they had without the six miles, for that they were charged. If I should number to your lordships all the judgments in this kind, I might speak here till to morrow morning. P. 22 Ed. 3, 'inter communia,' in the Exchequer; P. 25 Ed. 3, m. 27, P. 27, and 28 Ed. 3, and there is a number more in other years, as 29 and 30 Hen. 4. And, my lords, according to those judgments, Trin. 31 Ed. 3, rot. 3, the writ went forth for discharging of such as have resided upon their lands within six miles. 21 Ed. 1, Pipe-Roll; some discharged because they were in the king's service.—So as, my lords, out of these records thus much may be collected. First, they affirm the king's power in assessing and levying. And secondly, that they are grounded upon those ordinances made by the king and his council. Thirdly, the process went out of the Exchequer, and in the king's name. M. 22, Ed. 3, parl. coram Baro. Issue joined, whether J. S. had lands to the value of 40*l.* to find hobbellers; if he had, then he was to do it.

My lords, I have now done with the Judicial Precedents; I have cited some few, amongst many others. It is now time, after so long premises, to draw to a conclusion: wherein your lordships have heard: First, that the king of England, he is an absolute monarch; and that by the common law of England, all those 'jura summæ majestatis,' are inherent in his person. This 'Supremum Dominium' for all the land that any subject holdeth, it is derived from the crown; and, as Plowden putteth it, 12 and 13, that there is a tacit condition in law annexed to his grant, that his officers may do justice to execute process surely upon his grant. This tacit condition may be subject to a common defence. Supreme jurisdiction, both by sea and land, was never yet impeached, and from him lieth no appeal. And originally, by the institution of the laws of this realm, what was once in his hand, and was never granted from him, is still in him; he hath absolute

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power of concluding war and peace: All these are in him as he is an absolute monarch, and holdeth his kingdom under none but God himself. It hath appeared also, that a principal part of this kingly office consists in the defence of the realm; that as his jurisdiction is by sea and land, so is his defence. And this hath been made appear to your lordships, both by precedents before William the 1st, and since: 'pro communi utilitate,' and, in case of necessity, the kings of England may ordain, by their proclamation, writs or patents, by the advice of their council, or judges, in legal matters. That the king is the sole judge of this danger, both for the prevention of it, and for the avoiding of it. Therefore for us to distrust that he will command too great a power or aid, it is a presumption against the presumption of law.—It hath appeared likewise that all the incidents of defence are likewise inherent in his majesty. We cannot build a fort or castle on our own ground, without license from him. Your lordships have heard the precedents, particular and general; precedents which have universal reasons, 'quod omnes ex debito astricti sunt;' Writs awarded by the king's royal power, in times of parliament, when parliaments were sitting, and in those years when great aids and subsidies were granted to the king, many times no cause declared, nor the occasion discovered.—There is no act of parliament made to take away this power: And the judicial precedents which your lordships have heard, have affirmed this power.

My lords, if there were no law to compel to this duty, yet nature and the inviolate law of preservation ought to move us. These vapours that are exhaled from us, will again descend upon us in our safety, and in the honour of our nation. Therefore let us obey the king's command by his writ, and not dispute it. He is the first mover amongst these orbs of ours; and he is the circle of this circumference; and he is the center of us all, wherein we all, as the lines, should meet; he is the soul of this body, whose proper act is to command.—But I shall need to use no persuasions to your lordships to do justice in this cause: and therefore I shall humbly desire Judgment for the king.

The ARGUMENT of Sir FRANCIS WESTON, Knt. one of the Barons of his Majesty's Court of Exchequer, in the Great Cause of SHIP-MONEY.

In Easter Term last, there was a writ of Scir' Fac' went out of the Exchequer, directed to the sheriff of Bucks, reciting, That whereas divers several sums of money, specified in a schedule annexed to the writ, by virtue of the writ 4 Aug. 11 Car. were assessed upon the several persons in the schedule named, towards the providing of a ship of war mentioned in the writ, which sums being so assessed, and not paid, by writ of Certiorari 9 Martii 12 Car. under the great seal of England, the names of those several persons and sums assessed are certified into the Chancery, and by writ of Mittimus dated 5 Maii 13 Car. sent into the Exchequer, and there to be proceeded upon according to the course of the law. The sheriff of Bucks is commanded to warn the parties named to appear, and to shew cause why they should not be charged with those several sums assessed upon them.—Hereupon Mr. Hampden appeareth, and demandeth Oyer of the writ 4 Aug. of the Certiorari and Mittimus, and their several returns; they being all read unto him, he saith that these several writs, and the returns thereof, and the schedules thereunto annexed, do not contain any sufficient matter to charge him to pay the 20*s.* and thereupon demurred. Mr. Attorney General saith, that they do contain sufficient matter to charge him. And thereupon the demurrer is joined. The demurrer being joined, the record was read in the Exchequer; and the cause appearing to be of great weight, it was adjourned unto this place in the Exchequer Chamber, to have the advice of all the judges of England.

Upon this record, I am to deliver my opinion; and I take it there is sufficient matter to charge Mr. Hampden with this 20*s.* And so I give Judgment for the king.

Here have been twelve days spent in the arguing of this case at the bar: I will confine myself to two hours and less, though not tied unto any time. The way to be short, is shortly to find out the points.—But I must first observe, in what state this cause cometh in judgment before us. There is a rule in law, that if a man shall demur generally to the writ, he doth confess all other matters in fact that are alledged. The reasons of it are apparent: because matters of fact are to be tried by jury, and matters of law by the judges. So in this case all the danger alledged by the writ, is confessed: and the matter in law is that which we that are judges are to deliver our opinions upon.

It hath been objected, by Mr. Holborne, that we are tied to the writ 4 Aug. for that writ is the ground of all, and upon that doth all the rest depend. It is true, that if he had relied upon the writ, it had been so. But his demurrer is this: That the writ, and the rest of the proceedings with the schedules, do not contain matter sufficient: so that now they have not put to us the writ 4 Aug. alone, but all the rest, to give judgment upon. For the writ of Mittimus, it is confessed, that in that there is an expression, that 'salus regni periclitabatur,' which is not in the writ 4 Aug.—To this he hath taken exception, that 'salus regni periclitabatur,' the danger is at the present time of the Mittimus, and doth not say, 'periclitatur,' 4 Aug. 11 Car. and therefore this expression now in the Mittimus cannot make good the defect thereof in the writ of 4 Aug.—To this I answer, that the demurring to all, hath confessed all, and yet the matter in the writ is sufficient to express the danger.

Then he objected, that *salus* signifies health, and not safety; and that the physicians term it so.—But *salus* signifies safety as well as health.

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So it is Englished in Cooper's dictionary, and so it is taken by poets and historians for safety.

The next objection was to the writ 4 Aug. That if there were a danger, it must be plainly expressed in the writ, &c. The words are 'datum est nobis intelligi,' &c. How cometh the king to understand it? the danger must be fully expressed.—For this I hold it more fit for a statesman than myself to give an answer to, that the king should discover his intelligence; whether it is fit to make known to all the world the danger the kingdom is in. But yet I find that in the said writ 4 Aug. there is expressed both danger by pirates on the sea, and that the dominion of the sea is like to be lost: and that these are dangers to the whole kingdom. For the Certiorari, I find it is directed to the shire, and the writ of Mittimus to the court of Exchequer; and therefore he could not take exception to these writs; whatsoever I shall take advantage of it must be contained in the writ 4 Aug.

In this writ, three things, as dangers, are expressed. 1. The danger by pirates. 2. The danger of losing the dominion of the narrow seas. And, 3. The great peril in this time of war.—For the pirates, I shall not meddle with them; they are but petty robbers, and still running away: the ports must defend themselves against these; the inland counties are in no danger of them.—I will not insist upon the dominion of the narrow seas, though that is considerable; for in the defence of that consists much the preservation of the kingdom. But I shall insist on the danger of the kingdom expressed in the writ 4 Aug. thus, 'Consideratis etiam periculis undiquaque,' &c. There is danger, there is peril round about us; and it is by reason that there are now times of war, we see danger on every side.

There are two things trouble this point. 1 The subject suspects that this is only a pretence, and that the kingdom is not really in danger. 2. That there being great sums of money raised upon this occasion, this, in the end, will be drawn to be annual and perpetual: but if they were satisfied that the kingdom were really in danger, likely they would be content to pay the money till the danger be over.

For my part, I answer to these objections, that it is an unworthy supposition. I must be satisfied, and I am, that the kingdom was in danger for two things: one reason is, because it is so expressed in the writ 4 Aug. It cannot be denied, but that the kingdom may be in danger. It hath been conquered, and so it may be again, therefore it is necessary it should be foreseen and prevented; and somebody must do it, and who better than the king, that hath the care and charge of the kingdom? he saith the kingdom is in danger, and hath so declared it by his writ; why I should not believe it, when the king hath declared it so by his writ, I know not.—My other reason that the kingdom is in danger is, that it is so *de facto*. It cannot be unknown to any man, that these three or four years last past, great navies have been at sea, and great forces on land. If we should have but an ordinary defence at sea by shipping, no man can tell or suppose but that those navies, being so great, may land where they will, and in as many places as they will; what spoil would they make before such time as any resistance could be made against them?

They objected here, that these navies at sea, they are engaged in war one with another; we are safe enough, we need not fear them. I answer, they are, I think, engaged in good earnest; but who knoweth how soon these wars may end? they may end by the mediation of friends, or the death of some one person. And when there is a great navy at sea, and forces at land, how easy is it to remember an old quarrel, or to pick a new one?

These things do persuade me that the kingdom is in danger, and a very great and just cause to make preparation for defence. And if every man would be so persuaded, they would not deny the payment of the money. An example of this nature hath happened in former times: in Henry 7th's time, it appeareth, by a record on the king's part, Par. 1 Hen. 7, pars 3, duo; there were wars between the king of the Romans and the king of France; they were both friends to Hen. 7, they owed him no ill-will; yet by reason of these great wars, great forces at sea, and great forces at land, the king would not trust them, but sent forth his proclamation, to command that watch and ward be kept over the sea-coasts; and command was to all his subjects, that upon short warning they should be ready for defence of the kingdom. So this may well be an example for the course that is now taken, for defence of the kingdom.

I shall now come to those reasons, and to the records that have been objected on either side. I shall begin with the king's side, because that layeth a charge on the defendant.—It hath been objected, that some of them are not warranted by the record. First, say they, there is a ship commanded to be provided, and money must be levied: but in the end, when this great sum of money is collected, it must be disbursed, no man knows how. No such thing in the record.—To this I answer, the record saith, a ship must be provided, and the sheriff is to rate the county, 'secundum facultates,' towards the same; not a word of any money to be paid unto the king. It is a ship that the sheriff is to build, and to assess money towards it.

They have said besides, here is in the writ a command for the imprisonment of the party, and that his liberty, dearer to him than his life, and his goods, wherein he hath an absolute property, shall be taken away. These things, they say, are not warranted by the writ, nor by any thing in the record.—I answer it is not warranted by the proceedings in this case; for the Scir' Fac' is not to shew cause why the party's goods should not be sold, or he imprisoned, but why he should not be charged with the money assessed upon him.

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They say, that the general defence of the sea lieth upon the king; because he hath wherewithal to do it. I would willingly disburden myself as much as I can of the objections: a general answer I shall give to these particulars.

They say, the king hath personal service, the service of tenants, by knights service, escuage, castle-guard, grand serjeanty, petty serjeanty. Is the king bound by these to the defence of the kingdom? He that doth look on their originals, will not say so; for these are tenures reserved upon the several grants made by the king; and no more reason is there that the king, by this, should be tied to defend the kingdom, than there is for the lords, that are subjects, and have the like tenure, that they should be bound to the defence of the sea.

They say, he hath besides these, wards, marriages, reliefs, fines, issues, amerciaments, primer seisin, fines of alienation, respites of homage, all fruits of the tenures; which all must go towards the defence of the kingdom.

I answer these profits are casual; besides, if he be not bound in respect of the tenures, as aforesaid, he cannot be bound by the fruits of them.

It hath been objected, that the king hath the profit of the sea, as royal fishes, whales, &c. wrecks at sea, treasure trove, royal mines, &c.—I answer, these he hath by his prerogative, and not for the defence; neither are they fit for a subject to have.

You say, he hath particular service from the Cinque Ports and other places, as from Malden, Colchester, and other places; and besides, he hath all manner of customs, and in regard of these he is bound to provide for the defence of the sea. It is true, the king must, for an ordinary defence, use the means the law hath allowed him; but that is not now the question: it is for an extraordinary defence. The question now ariseth, if it were asked any man, whether, they do think in their conscience that the king is able of himself, out of these, to prepare a royal navy, without help from the subject? None are so senseless as to think it.

There be some other things, to which I shall give a general answer. It appeareth by many records, that the king hath paid wages to soldiers, and sometimes hath hired ships; and unless there had been a consideration, the king would not have done it.—To this I answer, it was for ordinary defence, and he is bound to do it; and if he engaged himself by promise to repay unto them their charges, I can say no more but this, that every honest man that makes a promise will perform it, and so is the king bound to perform his promise: for that which honesty binds others to the performance of, honour binds the king.

I shall come to those things to which a more particular answer is to be given. The charge lieth general upon the whole kingdom, which I shall divide into three parts. 1. The Ports. 2. The Maritime Counties. And, 3. The Inland Counties: And to these three I will apply the records. 1. For the Ports; they are of two kinds, the Cinque Ports, and the Ports at large. What services are due from the Cinque Ports, is expressed in Libr' Rubrico, in the Exchequer, that they were to find 52 ships, and 24 men in every ship, for fifteen days; which cometh to 1188 men. The ports at large are tied to no certain service; it will appear by most of these records which I shall apply, that the Cinque Ports have been charged with more than their due, and the ports at large equally with the Cinque Ports. Pat. 25 Joh. m. 6, the king sent his writ to the Cinque Ports, and thereby commandeth, 'quod omnes naves paratæ, &c. et homines;' he doth not here tie them to a number, but all must go. Claus. 17 Joh. m. 7. Here the king sent his writ Baronibus suis de Rye, a member of the Cinque Ports, 'Quod venire faciatis omnes naves apud Quin-'que Portus;' this was general, as the others; all the ships, not tied to the number of 52. Claus. 14 Hen. 3, m. 13. A writ went out to Portsmouth, being a port at large, to provide a galley, 'et eam munire faciant cum hominibus, 'et quod prompti et parati sint ad proficiscend' 'cum necesse fuerit.' So here is a particular charge upon Portsmouth, not bound unto it, to provide a galley with all manner of munition. Claus. 25 Ed. 1, m. 5, dors. A writ went unto Guernsey, a port at large, to make a ship ready as often as need should require, 'de contribu-'tione faciend' pro navibus quoties opus fuerit.' Pat. 9 Ed. 2, pars 2, m. 26. A writ goeth forth, and that was directed, 'Ballivis et probis 'hominibus comit' Southampton,' to make 'pro-'visionem navigii sumptibus propriis;' no promise from the king to pay this again. Claus. 20 Ed. 2, m. 7. A writ goeth to the sheriff of London, and that reciteth a charge formerly laid upon the city, and upon Kent, for finding of 12 ships; London to find 9 ships, and Kent 3, and forty men in every ship, 'ad sumptus 'illarum.' Claus. 20 Ed. 2, m. 8. A writ directed to the bailiff of Yarmouth, which is none of the Cinque Ports, and they were charged with two ships at their own costs. And the same command, in the same roll, for all ships of 50 tons to be ready. Rot. Scot. 10 Ed. 3, m. 12. That writ reciteth the general obligation that they are bound in to defend the kingdom, almost in the same words mentioned in this writ; it reciteth, that every man should be assessed 'juxta statum et facultates,' so there was a contribution; then cometh in the clause 'ultra illam pecuniæ summam debit' pro 'servitiis.' It is true, indeed, the king did pay towards this, but it is expressed to be of his mere grace and favour. 10 Ed. 3, m. 2, dors. A writ to Winchelsea, a member of the Cinque Ports, and that was, 'Quod omnes naves sint paratæ,' both of the ports 'et aliarum villarum;' and the reason is expressed, because without their help the king was not able to defend the kingdom; and appointed them, by that writ, that the ships should be ready victualled for thirteen weeks; whereas the ordinary time was but for fifteen days. Vas. 12 Ed. 3, m. 8.

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There a writ goeth forth to the sheriff of Kent, and to the barons of the Cinque Ports, whereby they were all commanded to look to the custody of the sea-coasts; here are the maritime towns and port towns joined together. 25 Ed. 3, m. 22, dors. A writ to Southampton, 'ad congre-'gandum naves.' In the same roll, m. 8, more writs to other towns. Pat. 12 Ed. 3, pars 4, m. 3. There was a command that all that dwell within the isle of Thanet, from 16 to 60, should be ready to defend the sea-coasts, and this was 'juxta statum et facultates.' Rot. Alm. 13 Ed. 3, m. 12, Yarmouth charged with 4 ships, and in each ship 24 men: whereas usually it was but 21 men in a ship, now I think they are come to sixscore men in a ship. There are an infinite number of rolls to this purpose, to charge the port towns.

I come now to my second division, which is maritime towns. Pat. 48 Hen. 3, m. 4, dors. A writ went to the sheriffs of Norfolk, reciting, That ships and soldiers had staid there long, and that they were intending to depart, because their forty days were past: Command was, that they should stay, 'donec aliud inde mandatum 'fuerit.' Claus. 23 Ed. 1, m. 5, dors. There were writs directed to the sheriffs of Southampton, Dorset and Wilts, these three are all maritime counties; A command, that they should raise three thousand men to defend the coasts. Pat. 24 Ed. 1, m. 17. A writ directed to the sheriffs of Lincoln, York, and Northumberland, to assist certain commissioners to take up an hundred ships, with a competent number of men, these are to maritime counties: The like writs go to the sheriffs of Sussex and Southampton, and these for the preparation of ships, and to take them wheresoever they are to be found. Rot. Pat. 25 Ed. 1, m. 6, writs went to Southampton, Devon, Cornwal, Dorset, and many other places that were maritime towns, for arresting of ships, and raising of men. But the rolls I might most insist upon, are only these; I'll but name them: Pat. 24 Ed. 1, m. 16, Ex parte Remem. Regis, et rot. 78, Claus. 25 Ed. 1, m. 26, Claus. 13 Ed. 3, m. 14, pars 1, dors. Scot. 10 Ed. 3, m. 22. By all which it appears, not only the ports, but the maritime counties have contributed towards the charge of the defence of the kingdom. And the other side do hardly deny it, but that the maritime towns may be charged.—I will open it plain, that it is for their ease to bring in the inland counties. This cause is not of so great consequence, as is conceived; for if the port-towns and maritime towns may be charged, then it bringeth but in the inland counties. In England and Wales there are fifty-two counties, thirty-three of these are maritime counties; so the inland counties are but nineteen at the most, and they contribute but to a fourth part of the charge for the defence of the kingdom. And so much to my second division of maritime towns.

3. To the third division, which is of Inland Counties, that they have been charged; I shall make that appear, that the greater part of them have been charged formerly for this manner of defence. They objected, that the county of Bucks is an inland county, and that Mr. Hampden dwells there; and therefore no reason he should contribute to the defence; no inland county ever did it, say they. There may be two reasons, why, in former times, the writs for the most part went to the ports and maritime counties. 1. Because they have the benefit of the seas by exportation and importation of their goods. And, 2. Because they are continually in danger of pirates and robbers; and far nearer for a sudden defence, than the inland counties are. But this cannot be held for a sufficient reason, that they only that are near the danger should be put to defend the whole kingdom. I am sure the inland counties receive great pains and profits by the commodities from the port-towns; and they are the more in safety, the stronger the sea-coasts are kept: and therefore no reason but that they should contribute towards the charge of the defence of the sea. For all the writs, save one commission, have gone to be for the general defence of the kingdom; then no reason but inland counties should be charged. If they say they never did it, it is a strange prescription, that because they never did it, they never will do it. A man cannot excuse himself, that because he never paid tithe to such a vicar, or such a parson, that therefore he will never pay it.

I shall go to the records that charge the inland counties. Claus. 48 Hen. 3, m. 2, a writ directed to the mayor and bailiff of Bedford, an inland county; it doth recite, that divers of that town were called to go with the king towards the sea-coasts, 'contra hostilem inva-'sionem, et nunc necesse est, et causas fortuit' 'ut levari fac' et expensas;' and appoint at what rate they should levy it, the horsemen were to have eight pence per day, and the footmen four pence. Claus. 18 Hen. 3, m. 7. A writ directed to the sheriff of Huntingdon, whereby the men of that county were commanded to go to London, and from thence to the sea-coasts, for the defence of the kingdom. Rot. Scot. Ex. Remem. Regis 21 Ed. 1, m. 78, dors. A writ is directed to the sheriffs of Berks, and this is to distrain men to make good the custody of the sea-coasts. Rot. 26 Ed. 1, m. 5. The like writs were directed to the sheriffs of Hertford, Essex, Nottingham, Derby, Huntington, Cambridge, &c. and almost to all the inland counties, 'pro custodia maritima,' all to come to London, and to go from thence to the sea-coasts, for the defence thereof. Claus. 13 Ed. 3, pars 1, m. 14, dors. A writ goeth out to Oxford, 'ad distringendum,' for wages, 'pro 'custodia maritima;' one man was distrained, and he pleaded he had been charged in Wilts, and ought not to be charged in another county, and for this there went a Supersedeas. Rot. Viagii 1 Hen. 4, m. 10. A writ was directed to the sheriffs of Nottingham and Derby, two inland counties, and this was to proclaim 'quod 'omnes homines, inter 16 & 60, parati sint, &c.'

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to go with the king, within the kingdom, where he pleased. Claus. 1 Ric. 2, m. 18. Writs were directed to the mayor and bailiffs of Huntington and Cambridge. This roll is cited by the counsel for the defendant; and in part it maketh for the defendant, and in part against him. The effect of it is this: the writ is directed to the bailiff of Huntington, and this recites a former writ to provide barges, called Ballingers, with forty and fifty oars a-piece, like to a galley, at the charge of the most rich men, and this was 'ad custod. maris.' And the like writs went to the towns of Nottingham, Gloucester, and Warwick, and divers other places; these vessels were not devised then, I find them used before in Edward the third's time. In the Parliament Rolls, 2 Ed. 4, m. 22, the commons did complain that a commission was gone forth for the making of these barges. True, upon a petition of the commons, the king saith, he will advise with his lords: there is no more done; but upon this they cease. I have now done with the precedents on the king's side.

I shall now come to that which hath been said on the defendant's side for their discharge. And, first, for the acts and petitions in parliament, which are weighty and considerable.—First, for the statute De Tallagio non Concedendo, which was in the time of Edw. 1, it hath been doubted, whether this be a statute or no. I see no colour of doubt, but that this is a statute; it is printed amongst the statutes, and ever accounted for a statute: and in the Petition of Right, it is recited for a statute. And to say it is no statute, because the Parliament-Roll is wanting; if it should be disallowed, it would draw a great inconvenience with it: for private men might embezzle the records, and then if the records were wanting, the act of parliament should be void.

It is an act of parliament, no question; but the question is, whether the provision made by this writ, be within the meaning of this statute. —And I conceive it is not; for there are two words in this statute observable, Taillage and Aid. By 'no aid' here, will you take away the aid 'pur fils marrier, or 'pur faire fitz chevalier?' By 'no taillage,' will you have it so, the king shall demand no sum of money? Then if you will give it this large construction, you will take away all fines and amerciaments that are due to the king, all lawful impositions; and surely this was not the intent and meaning of this statute: but it was only to take away all taxes and taillages that were unlawful. If they were lawful, this statute meddled not with them. —Now that no taillage is to be taken, it appears in the Parliament-Rolls, 13 Hen. 4, m. 42, where an office was granted by the king, with a fee, for the measuring of linnen-cloth, that the subject should pay him a certain sum of money for every piece measured; whereupon at the parliament, the commons complain, that this was an unjust imposition, and they desire that they might not be charged with this kind of taillage, which, as was apparent, was unjust, and so they had present relief against it.

The next act of parliament is 14 Edw. 3, the second parliament of that year, three parliaments being held that year. The commons grant the king a certain sum of money, for the great business he had as well on this side the sea, as beyond; but after a cessation of the troubles, then the king is to be at the charge of the future defence; thereupon the king granteth this shall not be had in *exemplum*, and that they shall not afterwards be taxed without parliament: and this is the strongest thing that I have heard objected.—It requireth a good answer; the words are plain, no charge no question; but this is a charge. I looked into the Petition of Right, and it is not there mentioned, nor amongst those acts of parliament that are in the margin; but the reason why it was omitted, I know not.—I observe in this act of parliament a subsequent clause, that will go far to the answer of this objection; for neither in the acts of parliament, nor in the Petition of Right, is there any mention made of the defence of the kingdom; if the king had been bound to defend the kingdom, could the parliament have accepted this as a kindness at his hands? 14 Edw. 3. This act was made, yet the aids continued, none of these writs found till 24 Ed. 3, Rot. Franc. 24. Ed. 3, m. 9, & 26, there went out commissions to array men, to the counties of Suffolk, Dorset and Somerset, for the defence of the maritime parts; within eleven years after the making of the statute, Rot. Franc. 26 Ed. 3, m. 5, the like writs to the earl of Huntington, 'Considerantes quod omnes 'incolæ tenuntur de jure ad defendend' in pe-'riculo;' and that they shall array the men in this county, and to bring them 'ad custodiend' 'mare;' and by this it is recommended for the erecting of beacons, which is the first direction of that nature; so here is a new charge, and within eleven years after the making of the statute. The same year likewise there went writs to the sheriffs of Nottingham, Derby, Salop, Berks, Middlesex, Bucks, Northampton, &c. So though these writs go almost into every county, and divers other writs of the like nature, as Rot. Franc. 28 Edw. 3, m. 34, yet as I said in no act of parliament extant, nor in any writ that ever went forth that I can find, there is any thing appears to charge the king with the defence of the kingdom, and in all of them, no distinction made between the port-towns, maritime-towns, counties, and inland-counties; but that all of them are generally chargeable. And for the rest of the acts of parliament, they all mentioned in the Petition of Right, and therefore I pass them over. There is in those acts, provision against loans and grievances; but this clause, for the defence of the kingdom, I find it mentioned in no act of parliament but this of 14 Ed. 3, before mentioned.

I will now come to the petitions in parliament: Rot. Parl. 18 Ed. 3, m. 9, 11. It was there declared to the commons, that the French had invironed the island of Guernsey, and all this was for default of a navy upon the sea; and therefore it was needful to consider how this

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might be regained. It was answered by the commons, That concerning the right and guard of the sea, they desire to give no advice, saying, they have no cognizance of things concerning the sea; but if there be occasion, the cinque-ports are to be charged: and said further, that in the marches of Scotland, they were to defend the kingdom against the Scots: but that this kind of defence should lie upon them, was never heard of.—I will give you an answer to your acts of parliament, and petitions of parliament, by putting of a case. I will admit you have an act of parliament as strong as you can make it, that the whole charge of the defence of the kingdom should lie upon the king, and not upon the subject, in case of any sudden invasion. Admit there was a greater power at sea, than the king was able to make defence against; then, I pray, whether should this not give way to the present necessity, or the kingdom should be lost? Is it not better to endure a mischief, than an inconvenience?

If you say, the acts of parliament should give way to necessity, then you have answered all you have objected:—This is not the only case of necessity. I shall put you another case, when acts of parliament must give way to necessity: that if a man be attainted of treason, he is disenabled to inherit by act of parliament; but if the kingdom should descend to such a man, then the act of parliament should give way to it. And shall not the acts of parliament give way to necessity for defence of the kingdom? What though there have been petitions in parliament to have it decreed, that this kind of charge should not be laid upon the subject? Admit it had been so decreed in parliament, yet by the law of equity they ought to be charged; and in all reason they ought to be charged towards the defence of the kingdom; and that for three respects. 1. For the reason given in the writ, 'Quod omnes tangit per 'omnes debet supportari:' which is but equity. 2. The king is trusted with the defence of the kingdom, and therefore it is fit he should have means wherewith to do it.

But you say he may call a parliament, and they will give him means wherewith to do it. It is true, this thing in question, if it had been done by parliament, it had been done by the happiest means; but because he might have it by parliament, must he therefore have it no other ways? The question now is, Whether what is done, may be done without a parliament or no? What is done, is done by the great seal, which is the next authority to a parliament. What if an enemy had come before the parliament had met, or before they had granted any aid, should the safety of the kingdom depend upon such contingencies? God forbid. Will you have forces on both sides, and restrain the king to his power by parliament, which may be so dilatory, that the kingdom may be lost in the mean time?

3. Many inconveniences might happen both to the king and subject, if this should be suffered: if the king should be restrained of his royal power, it would turn to his contempt, both at home and abroad: and all this while the matter is not so great, it is but parting with a little money 'secundum statum et facultates.'—It is true, as Mr. Holborne hath said, That in former times they have been careful not to leave too much power to the king; but you would leave so little as would bring him in contempt both at home and abroad. The worst that comes to the subject, is but to yield their help to the king, in such times of danger, with a small part of their estate; and then it would make foreign nations that know of it afraid of us, which now by this occasion have encouragement to attempt that which otherwise they would not.

It hath been objected, That if the king may raise monies is this manner, many inconveniences would follow, and it would be a means to keep back parliaments.—To this objection I answer, It is no means to keep back a parliament; for there are many other causes of calling a parliament, besides for the defence of the kingdom: as, for making good laws, redressing of grievances, &c. The king may be engaged in a foreign war, and the subject must help him. But to call a parliament always is not necessary; for when the kingdom was in the greatest danger that ever it was, as in 1588, and the rebellion in the North, yet no parliament was called in either of these dangers.

Next they object, That if this course be admitted, the king may pretend a danger when there is none; or a great danger, when it is but small: and so may raise a great sum of money, and the subject shall have but little benefit thereby.—I shall give three answers to this objection: 1. If this power be in the king, and that power be just and equal, then it is not to be taken from him, because he may misemploy his power. If he misuse his power, the fault is his. 2. This objection cannot be made, unless you suppose injustice in the king: make what laws you will, if the king be unruly, he will break through them. 3. If it so falls out, that the writ going out upon this pretence, and that great sums of money are levied, and the monies employed to another use, it were a great inconvenience; but in this case there is no such fear, for the writ is expressly to make a ship; and if they would have taken any advantage upon that, the counsel ought to have pleaded it, and the judgment ought to appear there upon record. There appears no money in this case to be coming to his majesty's hands; but it is said in the writ, 'volumus 'autem,' &c. we will that no part of the money be converted to another use than to the building of a ship.

Then they object, That by the same reason the king commandeth his subjects to provide one ship now, he may command two ships the next year. To this I answer, If the danger be greater, the defence must be greater, and then the supply must be greater; and no man can suppose that the king will impose that on his subjects when there is no need.

I shall now come to the two last exceptions,

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First, That the power cannot be given to the sheriff by the writ 4 Aug. to tax every man 'secundum statum et facultates;' that this is too great a power to be committed to the sheriff. To that I answer, That I conceive the sheriff to be the fittest man, and most indifferent for that purpose; for if there were commissioners, or many men appointed for doing thereof, they might perchance be partial to their friends: And the sheriff having all the freeholders names, and the bailiffs for his ministers, that know the estates of most men; therefore out of all doubt he is the fittest person. For the exception to the Scir' Fac' it hath been objected, That the king cannot by that course levy moneys, because the king having no interest in the money, he cannot levy it by Scir' Fac'; neither doth it appear in the writ, to whom this money is to be paid. I confess this point, though not spoken to by the defendant, is of most difficulty. Though no person certain is named, to whom this money is to be paid, and the sheriff is only to levy it according to the writ, and the king providing a ship, I suppose that Scir' Fac' may issue for it; for if a common person claim any thing, or be wronged, or debarred from his right, he hath by the law a writ for his remedy: and shall not the king have the like remedy for this ship, being for the defence of the realm in general, for which he is intrusted, to prevent a wrong to be done to this common-wealth; But in this case, the Scir' Fac' is not for Mr. Hampden to shew cause, why he doth not pay the money to the sheriff, but why he doth not pay the money he was assessed towards the making of the ship; which for aught I know, when it hath done the service, is the subjects again, at whose cost it was provided, for they might either have hired a ship or bought a ship. In Fitz-Her. Na. Br. it is held, the king may, for the good of his people, send forth writs for removing common grievances, and for repairing of bridges, and the like: And why may not the king send forth writs, for so necessary a service as to defend the kingdom? Claus. 1 Rich. 2, m. 7, a writ went out to the mayor and bailiff of Oxford to repair the walls and ditches about the town; and why not as well to repair the wooden walls of the whole kingdom, as the walls and ditches of a town? The king hath charge and power over all, to see all done.

But it hath been said, When this money is gathered, we know not what becomes of it. I answer them with the common roll in Scacc' 24 et 25 Ed. 3, where a commission went forth to levy money for maritime defence, but what was done thereupon is not expressed. But at that time there was a cause adjudged in the exchequer, it is a Norfolk cause, where divers being commanded to go to the wars against the Scots, and had thereupon armour and wages allowed them; afterwards comes a countercommand to some of them not to go, and two men that had wages went not. Whereupon a writ went out against them, and the jury found the one guilty, and he was ordered to pay back the money; but the other going to the wars, afterwards, by a second direction, was quit: And the first gave security for the repayment of his wages, being 30s. and also for the armour.

It hath, lastly, been objected, That this taxation ought to be 'secundum legem et consuetudinem Angliæ:' and that ought not to be by writ, but by parliament.—To this I answer, That from king John's to Henry 4's time, there hath been an usage and custom to send forth writs of this nature, and since that time till now not the like command. About Henry 4's time, began your tonnage and poundage: so long as he had that, the defence was at his own charge. There is no act for taking this charge by writ away; it is become a general custom, and the general custom makes the law of England; and we are to examine and try new causes by the old law, and now compare this with what hath been done in former times.

I shall make an end: For my own part, I am persuaded in my conscience that there is imminent danger: I am satisfied in it, both by the king's writ, and that which is apparent to every one; and there is a necessity this danger should be prevented. I do conceive this writ to be grounded upon this danger of necessity; and that the danger appears sufficiently in the writ.—Therefore I conceive that the proceedings are legal, and that there is good and sufficient cause to charge Mr. Hampden, and that he ought to pay the 20s. assessed upon him.

The ARGUMENT of Sir EDWARD CRAWLEY, Knt. one of the Justices of Common-Pleas, in the Exchequer-Chamber, in the Great Cause of SHIP MONEY.

The record hath been opened, therefore I shall spare that labour. I conceive the Case in question to be this: Whether the king, by his right of sovereignty, may charge the subject, in case of necessity, to contribute with him to the necessary defence of the kingdom, without the subject's consent in parliament? Mr. St. John, whom I take to be the mouth of the defendant's counsel, confesseth, That this question is not so much *de re*, of necessity, but *de modo*, if done without parliament.

This is one of the greatest cases that ever came in judgment before the judges of the law. The king's right and sovereignty, in a high point, is concerned, and the honour and safety of the kingdom, on the one side; and the liberty of the subject, in the property of his goods, on the other side.—This is the first cause that ever came to judgment of this kind, that I know of. Kings have not suffered their rights of sovereignty to be debated at the bar, as now it is; for these are Arcana Regni, not fit for public debate. The use of law was to have causes debated? as saith one, no man knows what metal the bell is of, until he hears it ring. This bell hath been rung very roundly and laboriously on both sides.

The subjects have objected, that they may bring actions against officers of the king for

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assessments by virtue of this writ. But for that I find no precedents, save only one, which is 26 Ed. 1, the abbot of Robertsbridge's case; and he was taxed double for this matter of defence of sea and land, in two several places: and therefore he brought his action to be discharged in one place. But in cases of this nature, they petitioned in parliament to the king for redress, as appears by many precedents.

In Bracton, who wrote after Hen. 3's time, and inclined to those times when the liberty of the subject was strongly maintained, he saith, 'totum regnum petatur, &c.' They used to petition the king; but now you have actions brought against the king's officers in the King's Bench, Common-Pleas, and here in this court; and it pleaseth the king to bring this Scir' Fac' to the end that the right of this cause may be tried by the judges of the law.—In 11 Rep. and Coke's Comment. on Littleton, fol. 10, it is said, That the laws and customs of the parliament are obscure: 'Lex est consuetudo 'parliamenti, quærenda est ab omnibus, ignota 'a multis, et cognita a paucis.'—As Tully said of one that would define *anima*, and said it was *musica harmonia*, that was, a musician, 'Homo non multem recessit ab arte sua:' I for my own part, will keep myself to my own art of the books of the law and statutes. And if I use the help of others, I hope you will pardon me for that.

I will briefly propound my order and method throughout the case. 1. I will remove some few impertinent discourses, which are not in the record, as being out of the ring of this bell. 2. I shall propound, that the sole care of defence, at sea and land, 'Jure Regio,' appertains to the king, and none other; and that he is the sole judge of this. 3. That the sole charge of defence, in ordinary cases, regularly and legally appertaineth to the king. 4. That the extraordinary charges of defence ought to be supplied by the parliament, and upon this rule, 'Quod omnes tangit ab omnibus debet 'supportari.' 5. If the defence be of necessity and the danger great, and so great as the king's revenue is not sufficient to supply the occasion, then the rule comes to be in use, 'Qui sentit 'commodum sentire debet et onus;' and if it be general, 'Quod omnes tangit, ab omnibus 'debet supportari.' 6. That in the defence, where all ought to join, the sea and land ought to assist and contribute the one to the other. 7. I say, there are some particular cases, in which this charge of defence cannot be imposed by parliament. 8. That the king solely is intrusted, by the law, to impose this charge upon the subject. And, 9. These being my generals, I shall come to my minor, and conclude that this charge is justly imposed by the king, without parliament.

As to the first impertinency, you speak of tonnage and poundage: is there any such grant on record? Shall we take notice of a thing that is not *in rerum natura*? I say, I wish it had been granted, for 'Qui adimit medium 'demit finem:' he that taketh away the ordinary means of preservation, is the author of ruin and destruction. You see it is taken, but you cannot tell by what right. If this were material, you wronged your client, you pleaded it not: and if it is not material, you wronged us, and your auditors, and yourselves, to talk of it.

You say, this Ship-Money hath been charged for these three years together; is this discourse within the record? If not, you speak without book. You say, the king hath imposed great sums of money upon merchandizes: but what is this to the business now in question?—Then you talk of a property the subject loseth thereby; but this rather to abuse the people without either colour or shadow. It was 'ad 'faciendum,' or rather 'inficiendum populum.' If you at the bar had not spoke it 'argumenti 'gratia,' it could not but have proceeded out of the depth of malice, or ignorance, or both. If one be found guilty of murder, and the judge knoweth the contrary, what shall be done? He ought to acquaint the king therewith; for it is the king's right of sovereignty to pardon, but the judge hath no such power. I say, the whole care appertaineth to the king only, and he is the sole judge both of the defence at sea and land. Fitz. Na. Br. fol. 113. 'Le roy de 'droit saver et defender son realme al bien 'vers la mere come vers les enemis.' Regist. fol. 127. 'Rex, &c. pro eo quod nos dignitatis 'nostræ regni ad providend' salvationem regni 'nostri circumquaq; sumus astricti.' Fortesque cap. 37. 'Omnes potestat' regis deferre, &c. 'in defensione et tuitione regni.' I think no man can well oppose this.

But we will come to the third. The sole charge of the defence regularly and legally appertains to the king. Bract. fol. 1. 'In rege, 'qui recte regit, hæc duo sunt necessaria, arma 'et leges, &c.' with which words accords Justinian, in his Proœmium, from whence that is taken in Plowden, fol. 315, in the Case of Mines. One reason why he saith royal mines belong to the king, is, because he is the head, and the people his members. And he is to preserve the subject two ways: by arms to defend them against all hostility; and by law, to preserve them from injuries. 3 Rep. fol. 11. The body, lands, and goods of the king's debtor were liable to execution; 'qui thesaurus regis 'est pacis vinculum et bellorum nervi,' Rep. 11. The king's treasure is the ligament of peace, the preserver of the honour and safety of the realm, and the sinews of war; and is of high estimation in law, in respect of the necessity thereof; that the embezzling of treasure trove, though not in the king's chest, is treason. And treasure, and other valuable things, are so incident to the crown, that they cannot go from the crown. He hath on the land, wardships, escheats, amerciaments, &c. for the maintenance of his honour and dignities royal. For the sea he hath whales, &c. These do little towards an army to defend the sea. The reason why the king hath the customs, is for the protection of merchants upon the sea, against

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pirates and enemies of the realm. So I shall conclude this point, That the ordinary defence, both for care and charge, of sea and land, doth appertain to the king.

The next is this, which is my fourth head; That the extraordinary charge of defence regularly ought to be supplied by parliament, and cannot be done without it. Albeit subsidies be of gift and grant, yet this is of right and reason; the king is *pater patriæ*. If the son give to the father when he wants, it is his duty. 19 Hen. 6, the rector of Cheddington's case, whether the king may grant a discharge of a fifteenth? If the king may grant a discharge to one, so he may do to all. It is against law the king should not have subsidies of his people, in case of necessity and danger; the same law that willeth the king should defend the people, tells us we should grant to the king aids for the defence. This is to be done in parliament regularly; and that this extraordinary charge cannot be imposed but in parliament, these are their objections. I come now to the statute De Tallagio non Concedendo, which without question is a statute, being in our printed books; and in the Petition of Right, 3 Car. it is recited as a statute, and established: the words of that are, 'Nullum Tallagium sine 'assensu Parliamenti.' And 14 Ed. 3, cap. 1, there the king expresses himself, he will not impose any charge or aid on the subjects, but in parliament. Fortescue reciteth this to be the law, 'No charge without parliament.' And Bodinus, lib. 1, fol. 97, saith, "That the statutes of England are as a buckler to defend the subject against the king, for laying any charge upon them but by parliament." And in his sixth book he magnifieth this kingdom for the due observing this law. Other kings, in this point, have no more power than the king of England, for that it is not in the power of any prince in the world, and his pleasure, to raise taxes on the people, no more than to take another man's goods from him. And yet, nevertheless, if the necessity and danger of the commonwealth be such, as it cannot stay for the calling of a parliament, the king in his wisdom and foresight may lay a charge without their consent; and this is by the law of *jus gentium*, the rule of law and reason holdeth 'quod 'omnes tangit ab omnibus debet supportari.'

And so I come to my fifth head, If the defence be of necessity, and the king's treasure doth not suffice to defray the charge, then, instead of the rule 'quod omnes tangit, &c.' this rule succeeds, 'qui sentit commodum, sentire 'debet et onus.' If the treasure of the king will not defray the charge, I do not conceive he is bound to sell or pawn his crown, or his lands, though some princes have been so courteous to do it, and paid it again.

You say at the bar, he must spend all, and more if he had it. I will put this case in the 10th Rep. One is bound at the common law by prescription to repair a wall against the sea, yet in case of necessity, in avoidance of public mischief, the prescription ceaseth; yet in this case, if reparation must be done, then cometh this rule, 'quando impotentia excusat, tunc 'qui sentit commodum sentire debet et onus.' And if he be not able to do it, the charge being so extraordinary, shall he not have contribution? The law compelleth not impossibilities. So the king is bound to defend the kingdom by land and by sea: but if the defence be so great, and the danger tends to the subversion of the kingdom, and the king not able to make defence, the king and his subjects ought to contribute to this charge, in due proportion. 'Ubi 'est eadem ratio, ibi est eadem lex.' If the law shall make this provision for a small level of ground, *à fortiori* for the commonwealth, in the time of extraordinary danger and necessity.

Sixthly, In this joint charge of defence, the land ought to assist the sea: nay, it is not possible that any island should be defended without wooden walls of the navy at sea. Canutus the Dane entered the Thames mouth with an army, and afterwards went and landed in Dorsetshire: and again shipped his men, and entered the Severn: then he went into Worcestershire, then he sailed back again to other parts of the kingdom: so he that is master of the sea, may make great spoil upon the land at pleasure. The Netherlanders having a great navy, the Spaniards fortified strongly; as soon as the wind served they set sail, and were 80 miles off before the Spaniards could march with their forces to make resistance; the Netherlanders presently got a strong place, and afterwards sailed to another place, and took that also. These are no new examples, for islands to be masters of the sea. Our grand army in 1588, at Tilbury, what good had they done, if the Spaniards had been masters at sea? It is not possible for an island to be safe, without a navy at sea, as appeareth in sir Walter Raleigh's History of the World: and if the sea must defend the land, why should not the land be contributory for the defence of the sea and land? There are several precedents where writs have gone to inland counties, to charge them to go to the custody of the sea. Claus. 48 Hen. 3, 24 Ed. 1, 26 Ed. 3, &c. Writs have gone into Berks, Oxon, &c. inland counties, to command them to contribute towards the defence of the sea.

To the seventh, That in case of instant danger, the imposition cannot be by parliament, I will here consider the nature of the danger, as Mr. Solicitor readily pursues it; if it concerns the essence, subversion, destruction, and ruin of the kingdom, or the dishonour of the kingdom, 'Quando Hannibal ad portas,' for the senators then to sit down in their robes, is rather a charge to the commonwealth, than aught else. It is no time then to call a parliament, no well-advised man will think it fit; here are 'pericula visa,' the danger is certain, none will say it is fit to call a parliament.—This kingdom of England hath been four times conquered, and therefore we have reason to foresee the danger; first, by the Romans, then

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by the Saxons, then by the Danes, and last by the Normans.

The moralists do make three parts of Providence. 1. 'Memoria præteritorum.' 2. 'Perspicientia præsentium.' And, 3. 'Providentia futurorum.' It much concerns the king, the head of the commonwealth, to be circumspect in the prevention of public danger; conjectures and probabilities are to be regarded. Now put the case upon a probable and violent presumption; a potent enemy is prepared and ready to come. Is it not fit there should be a defence prepared instantly? Besides, there may be just reason of state, why an enemy is not fit to be revealed in parliament; for if great preparations be, and very probably against us, then to discover them to be an enemy, is to give them occasion to become a challenger. No man can know the certain event of things. One may be a friend, in shew, to the kingdom, or a neuter, not yet openly discovered; yet we may be mistaken in our opinion of them. I leave this to your consideration, whether it be fit, or no, to discover our thoughts, in parliament, of an enemy?

The eighth thing is, That in these cases, of necessity and danger, the king, *jure gentium*, may charge the subject, without his consent in parliament, by his regal prerogative; for in the king there are two kinds of prerogatives, *regale et legale*, which concern his person, lands and goods.

Now for the prerogatives royal of a monarch, they may be resembled to a sphere; the *primus motor* is the king. It is observed, that every planet but one hath a little orb by itself, that moveth in its petty compass: So the center is the commonwealth, the king is the first mover. I will repeat some of these prerogatives, for they are by all laws, and by our laws.—The first regal prerogative is this, that containeth all the rest, That the king may give laws to his subjects: and this doth not detract from him, when he doth it in parliament. 2. To make peace and war, 19 Ed. 4, 6. 3. To create supreme magistrates. 4. That the last appeal be to the king. 5. To pardon offences. 6. To coin money. 7. To have allegiance, fealty, and homage. And, 8. To impose taxes, without common consent in parliament. These are the principal, and there are many more of them, and allowed by law. Comines, fol. 179, saith, 'That if the cloud be seen but afar off, the king, 'without the consent of the subjects, cannot 'tax them; but if the cloud be over-head, the 'king may call certain wise persons to him, and 'tax his subjects.' You say, That if the king doth move a war offensive, there's time enough to call a parliament; if defensive, the cloud is seen long before. But, oh, good sir! is this always true? Is not the cloud sometimes even over the head, before descried? If you read Comines, he will tell you, That in times of peace we ought to fortify. 'But in these 'cases, where the danger is imminent,' saith Bodinus, lib. 1, cap. 47, 'the king ought not 'to expect a parliament, but is to raise monies 'suddenly, and such impositions laid upon the 'subjects are just and necessary.' This is the opinion of those writers, who wrote not according to the law of any one kingdom, but according to the law of reason. I could vouch these two authors, concerning the right of sovereignty which they gave to kings, to impose charges on the subjects, without consent of parliament, in time of necessity.

But what if the king will levy money, upon pretence of defence, in time of danger, and dispose of it otherwise, and the danger not so apparent? I say, so pious and just a king will never pretend a danger, if it were not *re vera*. And if any man will think the king will charge himself and his subjects to no purpose, far be it from my thoughts to think so. This money, thus taxed, is employed accordingly, for the defence of the kingdom, together with the king's own money; which he would not do upon pretence.

Again, the king is *pater patriæ*, therefore, by the law of nature he is entrusted with the defence of the kingdom: and this power to tax his people, is but a consequence of that.

To say, in time of extraordinary danger and necessity, 'Boni viri sunt sibi leges,' I say, for every man to be his own judge, is for every man to do what he listeth. Mr. Holborne tells you, That if it rests in the king's power thus to tax the subjects, whereas Mr. Hampden is now taxed 20*s.* he may the next year be taxed at 20*l.* for, saith he, 'If the king may tax when 'he will, then he may what he will.' It is an ill consequence you make of it; you magnify parliaments, great reason we have for it; let us do so of kings: let none think dishonourably of kings; no question they will regard the laws of God; and to make such objections, is not handsomely handled.

Now we come to Precedents, and Acts of Parliament. For precedents, my brother Weston hath taken pains to repeat them, therefore I shall not.—Two precedents the defendant's counsel have much relied on, Rot. Parl. 2 Rich. 2, pars 1. I have here the Record; and in truth, it were a great ease to the judges, and to the cause, to avouch them truly. This of Richard 2, was in his minority; and no order being taken for the defence of the kingdom against the next summer, nothing was found in the king's Exchequer: a council was called, and for conclusion, they say, They cannot remedy this mischief without a parliament: whereupon a parliament was called; and in the mean time the king having monies lent him, he gave security to repay it.—Consider this, the king was at this time but an infant; it was in a very troublesome time, many of those that were parliament-men made default to attend, excusing themselves, that they had other business. This then that was done was but a resolution in troublesome times; this is no such binding business, that it should be made so much of.—And Rot. Parl. 2 Hen. 6, m. 22, a commission went forth for the providing of barges; and the commons petitioned to avoid

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this charge, and prayed that the commission might be repealed. And the king upon this calls in the commission. Shall this be a disclaimer of the king's right? He saith, he will speak with his lords. This is only a satisfactory answer. Besides, the king was but an usurper. Now to say this answer of the king's is a resolution in the case, is a great mistake.—He that will go through this load of precedents that have been vouched on both sides, he had need to have more time than Mr. Holborne, who spent four days.

You have alledged precedents both before the Conquest and since: that of the Danegelt, though it was a heavy yoke, yet it was necessary to be borne: whether it was granted by parliament or no, *non constat*. I say, it is a good precedent, and I hold it good without parliament.—Some distressed kings, as king John, Henry 2, and Richard 2, they did indeed do that by borrowing, which they might have took of right.

Now, to give an answer to the statutes of 25 Ed. 1, and 14 Ed. 3, and the Petition of Right of 3 Car. Admit, I say, there were an express act, That the king, were the realm in never so much danger, should not have aid from his subjects, but in parliament, it is a void act; will any man say such an act shall bind? This power is as inseparable from the crown, as the pronouncing of war and peace is: such an act is manifestly unreasonable, and not to be suffered; saith Doctor and Student, To follow the words of the law, were, in some cases, injustice, and against the good of the commonwealth; wherefore, in some cases, it is necessary to leave the words of the law, and to follow that which reason and justice requireth: and to that intent equity is ordained, which is no other but an exception of the law of God, or law of reason, from the general rules of the law of man: Which exception is tacitly understood, in every general law. This imposition without parliament appertains to the king originally, and to the successor *ipso facto*, if he be a sovereign in right of his sovereignty from the crown. You cannot have a king without these royal rights, no, not by act of parliament.

Again, these acts bind not, for that favourable construction, in case of the king, is to be had in all cases, Doctor and Student, fol. 27. It is not possible to make any general rule in law, but it shall fail in some particular case: if a law were made in a city, that no man, under pain of death, should open the gates of the city before sun-rising, yet if the citizens, before that hour, flying before their enemies, came to the gates of the city, and one, for saving the citizens, open the gates before the hour appointed, yet he offendeth not the law, for that case of necessity is excepted from the said general law by equity. So for the statute in Edward the third's time, not to give any relief to a sturdy beggar, upon pain of imprisonment; yet if one relieves him with clothes in the extremity of cold winter, to save his life, he shall be excused by the same statute. By such an exception of the law of reason and equity, as aforesaid, is this power reserved to the king.—Impossibilities are to be excepted out of all laws: 'Nemo tenetur ad impossibilia.' Poverty and impossibilities, as one answered, were more mighty goddesses than either force or love.

But now you will say, where is this danger? How doth this necessity appear? If you would find it, you need not to enquire for it either by sea or land; but in this very record, the writ sheweth, and the most favourable construction is to be had for the king; as in Plowden's Comment. 336, the Case of Mines of gold and copper.—Now all this while I have been in the general, and in a manner in propositions; I come now to application. Before I descend to it, I shall shew upon what part of the record I shall ground myself. Though in the Mittimus it be 'salus regni periclitabatur,' which is said to be metaphorical, for that it asketh no great answer; it is good enough, as in the writ of Oyer and Terminer, 'omnes qui habent damnum vel salvationem,' are bound to contribute. Will you bind the king to the language of J. S.? May he not express himself in what legal manner he pleaseth?

You say, that this phrase of *salus regni* is too general: if it be alledged, and you demur upon it, you confess this for the most advantage for the king; as in the Case of Mines. It is not alledged in the Scir' Fac'; this might have been made a good question.—But without all these, I conceive the writ 4 Aug. containeth the causes for this great preparation, and expresseth them in particular. What if it were no more but this, lest we should lose the dominion of the seas? What is it to be called Dominus Maris, and not to maintain it, but to suffer this princely honour to perish, and others to become masters of it? What havoc and confusion would follow? And this is the true intention of the issuing forth of this writ.

Next, 'Consideratis etiam periculis, &c.' that is, the danger is so evident, and so great, in these warlike times, that of necessity defence must be made, both by sea and land.—Next is great oppression used at this time, 'Datum est nobis intelligi quod prædones, &c.' that the pirates do take and spoil our merchants, carry our men into captivity: what will you say to this? Let them take our men, and let us have a parliament, and we will bring them home again: the land was never without thieves, nor the seas without robbers.

Next, 'paratum periculum et preparans, &c.' Now these ships go for the defence of the sea against this danger, 'et vestrum et vestrorum.' The writ saith the whole kingdom is in danger, both by sea and land; and you have confessed this by your demurrer.—But you complain before you are hurt, because you have seven months liberty, a parliament might be called in that time: now in this time of imminent danger, it is no time to call a parliament.

You say it hath continued for three years.

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Put the case the danger continueth for three years, and then ceaseth, and then the king ceaseth to lay a charge, and the danger begins again the next year; what! Shall not the king require aid as the danger increaseth?—And now to conclude, without repetition: it doth appear by this record, that the whole kingdom is in danger, both by sea and land, of ruin and destruction, dishonour and oppression; and that the danger is present, imminent and instant, and greater than the king can, without the aid of his subjects, well resist: whether must the king resort to parliaments? No. We see the danger is instant, and admits of no delay. Shall we go home, and sit together in careless security? Not so. But let us resort to our pious and just king, whose prerogative and right of sovereignty is to defend the realm, and to maintain his subjects liberties. And so I give Judgment for the king.

The ARGUMENT of Sir ROBERT BERKLEY, Knt. one of the Justices of the Court of King's-bench, Feb. 10, 13 Car. 1637, in the Exchequer-Chamber.

THE CASE.

In Aug. 11, of the king's reign, there issued out of the court of Chancery his majesty's writ, directed to the sheriff of the county of Bucks, and the head officers of villages and boroughs in that county, 'et probis hominibus,' that is, to all the king's good subjects, 'in omnibus 'villis, burgis, et aliis locis in com' Bucks.'—I may call this writ, a special writ, or a commission upon the case. It is not a *sic volo;* it beginneth with divers weighty reasons or causes, *pro ratione*, of the issuing of it; as, 1. His majesty had intelligence that certain pirates, 'et maris grassatores,' as well Mahometans as others, were *congregati* upon the sea, 'quod 'ab olim per gentem Anglicanam defendi con-'suevit;' and did daily rob and spoil the ships and the goods of the subjects of the king, and of his confederates, and did captivate the persons of those whom they took.—2. His majesty did *conspicere*, that those men did 'navi-'gia indies præparare, ad mercatores ulterius 'molestandos, et ad regnum gravand' nisi citius 'remedium ponatur.'—3. His majesty did consider the perils, 'quæ undique illis guerrinis 'temporibus imminebant, ita quod regi et sub-'ditis suis defensioni maris et regni, omni fes-'tinatione, quâ poterit, conveniebat accelerare.' —4. His majesty's royal resolution was, 'De-'fensioni regni, tuitioni maris, securitati subdi-'torum, et salvæ conductioni navium et mer-'chandizarum providere.' 'Maxime pro eo 'quod' the king and his progenitors 'domini 'maris predict' semper hactenus extiterunt, et 'plurimum tæderet regem, si honor iste regius 'suis temporibus dispereat, aut in aliquo minu-'atur.'—5. Lastly, his majesty called to mind a 'Regula juris et rationis; Onus istud defen-'sionis quod omnes tangit, per omnes debet 'supportari, prout per legem et consuetudinem 'regni Angliæ fieri consuevit.'

Upon these solid reasons, as upon a firm foundation, the Mandamus of the writ is grounded, and followeth in the next place.

The Mandamus is, 1. That all they to whom the writ is directed, should among them, 'pa-'videre unam navem de guerra,' of such a burden, and with so many men, and other particulars, as are mentioned at large in the writ —2. That this ship, so furnished, be ready at Portsmouth by the first of March then following, and from that time, for 26 weeks, to go with his majesty's and other subjects ships, and to attend the direction of those to whom his majesty should then commit the custody of the seas, for tuition of the sea, and defence of the realm.—3. That all this be performed, 'ac 'custagia' of themselves 'tam in victualibus 'quam hominum salariis, et aliis ad guerram 'necessariis.'

After the Mandamus, an Assignavimus, or commission to the sheriff and the head officers cometh, and then directions to them.

The commission to the sheriff is *inter alia*. That he shall make an assessment 'secundum 'facultates cujusque,' for contribution to the expence of the provisions aforesaid, shall appoint collectors, shall levy the money to be assessed (if it be denied) 'per distrectiones 'aliosve modos debitos,' and shall 'carcere 'mancipare' those who shall be 'contrarii et 'rebelles.'—The directions to the sheriff begin with a clause of 'Nolumus.' The king forbids that the sheriff shall levy more than is necessary for the expences: that any money levied shall be appropriate to any other use. 'quovis quæsito colore:' and then, lastly, in case that more be collected than shall be useful, the king commands that restitution be made of it.

After this bill, 9 Martii 12 of the king (which is above a year after the ship should have been ready at Portsmouth) a writ of Certiorari issued out of the Chancery, directed to the several sheriffs *pro tempore* of Buckinghamshire. —That Certiorari recites the writ of August 11. And for that the king was informed, that some had not paid the sums assessed upon them, but refused to do the same; the king commands the said sheriffs respectively to certify into the Chancery the names of such refusers, and the sums assessed upon them. The sheriffs accordingly make returns in a schedule annexed to the Certiorari. In one of the schedules there is, *inter alia*, 'Stoke Maude-'vile, Mr. John Hampden, 1*l*.'

After this, by writ of Mittimus out of the Chancery, tested in May last, the tenure of the writ of Aug. 11, with these words, 'quod qui-'dem brev' pro eo quod regn' nostr' Angliæ et 'popul' nost' ejusdem periclitabatur emanari 'curavimus inter alia brevia ad hujusmodi pro-'visionem, et assessament' faciend' per singulos 'comitatus Angliæ,' &c. And also this record of the writ of Certiorari, with the return of it, and schedule annexed, are sent into the court of Exchequer.—By that Mittimus the king commands the lord treasurer and barons, *quod in-*

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spectis those records, they should 'facere ulte-'rius inde pro levatione, collectione et recep-'tione' of the sums unpaid, 'prout de jure, et 'secundum legem et consuetudinem regni An-'gliæ fuerit faciend' et non aliter.'—By which *(prout)* but especially by the *(non aliter)* the king's honour and care of justice are singularly eminent; for the levying the money anew is not commanded, nay, it is forbidden, unless, 'Jus, 'Lex, et Consuetudo Angliæ.' do warrant it.

After this, and in the same month of May last, the barons awarded a writ of Scir' Fac' into Buckinghamshire, against those whose names are in the schedule aforesaid, thereby commanding the sheriff to warn them to appear in the Exchequer by a day, to shew cause, if they can, why they should not be charged with the payment of the sums of money assessed upon them and unpaid.—The Scir' Fac' is always a judicial writ; and certainly the barons have proceeded very judicially and gravely, in awarding of it. In weighty cases, especially, if they be not of common impression, proceeding *lento pede* is truly judicial.—Upon that Scir' Fac' Mr. Hampden is returned garnished.—He appearing, and having heard the several writs and records before-mentioned, without taking the common or any other protestation, hath demurred generally.—The words of his demurrer are, That *materia contenta* in the same records, 'minus 'sufficiens in lege existit ad ipsum onerandum.' —He doth not say, that *materia* is *minus vera;* but, acknowledging the matter contained in the writ to be true, he putteth the cause *de bono et malo*, upon sufficiency or insufficiency, in point of the law, for charging him.—Mr. Attorney for the king hath joined in demurrer.—Upon this demurrer, one main or grand question, and some other inferior questions, have been started.

Because I have time little enough for the grand question, I will not trouble you with arguing, or so much as singling out the other inferior questions. My brother Weston hath spoken to some of them, I concur with him.

The grand question is shortly this: Whether, as this case is, or in this special case, (as it is upon the pleading) the charges imposed by the king upon his subjects, for provision of shipping, without common consent in parliament, be good in law, yea or no?

This is a question of extraordinary weight, of infinite consequence, the greatest that ever came before judges of ordinary courts of justice.—'Qui ad pauca respicit, facile pronun-'ciat;' but he that will determine in this question, must 'respicere ad multa, eaque magna et 'ardua.'—Upon the debate of this question at the bar; elaborate, learned and strong arguments have been made on either side. And truly, for my part, I have laid the question to my heart. All the arguments which have been made in it, I have been present at, and specially heeded. All the records which have been brought to the judges, on either side, I have read over as seriously as I could. I have likewise considered of the reasons and authorities in law, pertinent to this case. And upon my pains, deliberation and study, I have concluded with myself, and in mine own understanding am satisfied, and think I shall satisfy others, that as this case standeth, upon the records in the pleading, or in this special case; the charge imposed is good in law, and consequently that Judgment ought to be given against Mr. Hampden, *quod oneretur*.

For my clear delivery and expression of myself, I divide all that I shall say into these four heads.—I. I will state the case, and will settle the proper question of it, as the pleadings are. (The true stating and settling of a case conduceth much to the right answer of it.)—II. I will consider the policy and fundamental rules of the common law, applicable unto that which upon stating the case shall appear to be the proper question.—III. I will consider the acts of parliament, the answer to petitions in parliament, and the several Magna Charta's of the liberties of England, which concern the king's proceeding in this case.—IV. I will answer the material objections, which have been made on the other side.

Upon my FIRST General Head.—I hope that none doth imagine, that it either is, or can be drawn by consequence, to be any part of the question in this case, whether the king may at all times, and upon all occasions, impose charges upon his subjects in general, without common consent in parliament? If that were made the question, it is questionless, That he may not.—The people of the kingdom are subjects, not slaves, freemen, not villains, to be taxed *de alto et basso*.

Though the king of England hath a monarchial power, and hath 'jura summæ majesta-'tis,' and hath an absolute trust settled in his crown and person, for government of his subjects; yet his government is to be 'secundum 'leges regni.—It is one of the questions in the 'juramentum regis,' at his coronation, (see the old Magna Charta, fol. 164.) 'Concedis justa 'leges et consuetudines regni esse tuendus? And the king is to answer, Concedo.—By those laws the subjects are not tenants at the king's will, of what they have.—They have in their lands 'Feodum simplex,' which by Littleton's description is, 'hæreditas legitima, vel pura.—They have in their goods a property, a peculiar interest, a 'meum et tuum.' They have a birthright in the laws of the kingdom. No new laws can be put upon them; none of their laws can be altered or abrogated without common consent in parliament.

Thus much I speak to avoid misapprehensions and misreports upon that which I shall say in this case; not as if there were cause of saying so much upon any thing challenged on the king's side. We have in print his majesty's own most gracious Declaration, that it is his maxim, that the people's liberties strengthen the king's prerogative, and that the king's prerogative is to defend the people's liberties.

Secondly, Though Mr. Hampden's counsel have spent all their powder in citing a multitude of records, beginning with one in king

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John's time, and so downwards, to prove, That the king's ministers have paid, that the barons have been by writs commanded sometimes to pay, sometimes to make allowances, out of the king's moneys or dues,—in cases of foreign auxiliary, and voluntary wars: in cases of particular or ordinary defence of the realm, as upon rebellion of subjects, or inroads by enemies, into parts, marches, or maritime; such enemies I mean, as are not greatly formidable, as are apt to run away when they hear of any force coming against them: in cases of setting forth ships, for scouring the seas from petty pirates, so that merchants may have safe passage: in cases where victuals, or other provisions, were taken from particular persons, by way of purveyance, for soldiers, or for the king's army: in cases of borrowing of money by the king's officers, for war, or ordinary or extraordinary defence: in cases of taking money or goods against the owner's consent, by warrant for the king's use, for war, or other manner of defence: in cases where particular men's ships, horses, or armour, were lost in the wars: in cases where private men's houses were used in the king's service: lastly, in cases of general and extraordinary defence, where the king had sufficient aids for that purpose granted to him in parliament. Although I confess it be true, that the king in all these cited cases, must pay of his own, without imposing upon the subject; yet I say that those cases come not close to our case: for every of those cases hath a manifest, particular, and just reason; but none of these reasons are applicable to the case now in question, as is easy to demonstrate, if a man would enter into every of these particulars; which I forbear, for saving of time.—And these records being taken away, the multitude of the vouchers on Mr. Hampden's side will be greatly abated.

Thirdly, The case of the ancient tribute called Danegelt, of which Mr. Hampden's counsel hath spoken, though it come nearer than any of the former mentioned cases, yet it much differs from the charge imposed in our case.

It hath been said on Mr. Hampden's side. 1. That Danegelt was not imposed, but by common assent of parliament. 2. That after it was so imposed, it was released by Edward the Confessor. 3. That it hath been now so long uncollected, that it is scarce known what it was.

To the first I answer, That the proof urged that it was created by parliament, is at the best but a conjecture. It hath been said, that the words of Leges Edw. Confessoris, c. 12, are in one place, 'statutum est Danegeldum annuatim reddi, &c.' and in another place, 'Danegeldi redditio primitus instituta est, &c.' And *statutum* is a proper word for an act of parliament, a statute. But in my understanding it is apparent, that it had not creation by common assent in parliament, but only by regal authority; or at the most by the king, with his great lords assents, which in those, and after times, was frequent. My reasons are, 1st. In Tilburiensis, or the Black Book of the Exchequer, l. 1, c. 28, the words are express, 'A regibus 'Anglicis statutum est, &c.' no mention of any others who joined in that *statutum*. 2dly, It appears by the said Leges Edw. Confess. c. 12, that at the beginning of Danegelt, 'omnis 'ecclesiæ libera erat;' the reason given, 'quia 'magis confidebant ecclesiæ orationibus, quam 'armorum defensionibus:' and yet in the addition to the said Leges, it appears that William Rufus imposed that tribute upon the church also, and that without common assent. For the words are, 'Danegeldum concessum est ei 'a baronibus, non lege statutum neque firmatum;' and certainly those barons by whom it was *concessum*, were not all the baronage, for it is plain, that the bishops and mitred abbots did not consent. 3dly, In that clause where 'statutum est' is used, in Leges Edw. Confess. the Danegelt is said to be 12*d.* 'ex unaquaque 'hida;' and afterwards it doth appear that it was made 4*s.* by William Rufus, 'ex unaquaque hida, ecclesiæ non excepta;' which increase was most unjust, if no more but 12*d.* was limited by common assent at first.

To the second, I answer, with sir Henry Spelman's distinction, there were two kinds of Danegelt; one, 'ad pacandos Danos;' another, 'ad arcendos Danos,' and other pirates. It may be, that the Confessor released that 'ad pacandos,' for the Danes troubled not this kingdom in his time, they had enough to do then at home, and so there was no cause of collection of any taxes 'ad pacandos Danos:' and though it was *de facto* exacted by the Danish kings before Edward the Confessor, viz. Canute, Harold Harefoot, and Hardicanute, it was unjustly taken by them, the cause of grant of it ceasing in their time of sovereignty here; and that might be the cause of the Confessor's dream, that he saw the devil dancing upon the money collected in his time for Danegelt: which supposition of a vision occasioned him to release it, as it is written. But certainly the Danegelt 'ad arcendos,' &c. was not released by Edward the confessor: for it appears in Tilburiensis, before cited, that 'Danegeldum sub indigenis regibus solvebatur 'usque ad tempus Willielmi primi:' if 'sub 'indigenis regibus,' then under the Confessor. —Again, it appears in Leges H. 1, c. 16, that Danegelt was in that king's time a duty to the king: for the words are, 'Danegeldum si ad 'terminum non reddatur recta emendetur;' *ergo*, not released by his predecessor Edward the Confessor. I further find in Randolphus Cestrensis, that 'Stephanus rex, regnum ineus, 'Danegeldum, i. e. 2*s.* ad hidam, quos antecessores sui singulis annis accipiebant, in æternum 'condonavit:' which 'condonavit' shews that he as a king *de facto*, had a right to it, *ergo*, not formerly released. But for the validity of such a release by k. Stephen, a manifest usurper, tending to the diminution of the crown, especially if it were of a tribute granted to the crown by act of parliament, see 9. E. 4, f. 2.

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To the third I answer, That it is true, it is obscure what the Danegelt was; you have heard by what has been cited, mention of 1*s.* 2*s.* and 4*s.* to be the sum of it; and truly, I think, it was more or less, according to the occasion of the money for the defence: the tribute 'ad pacandos Danos,' I believe at first was but 12*d.* out of every hide, yet afterwards increased by the three successive kings, Danes themselves, for I find it was at first but about 10,000*l.* per ann. it after was raised to 30,000*l.* then to 40,000*l.* and lastly to near 50,000*l.* which huge sum was in these times a burden insupportable to the people. But however, the uncertainty of the sum, especially if you understand that which was collected, 'ad ar-'cendos Danos,' is a clear proof, that it was not created by act of parliament, for then the sum thereby certain could not be mounted.—All historians do agree, that the original time of Danegelt was in k. Ethelred's reign. I observe, that k. Ethelred shewed himself weak and improvident, in that he looked not to raise means for defence of his realm against the Danes in time; but when the Danes were masters, then he began to provide against them. And for that cause divers of our historians write, that he was called by a nick-name, Ethelred the Unready. But, on the other side, we the subjects of England, who enjoy ourselves and what we have in peace, through his majesty's royal care and providence, have cause to yield to our sovereign k. Charles, the honourable name of Charles the Ready, or Charles the Provident.

But, to return, the differences between the antient Danegelt and the charge in our case are apparent and many; for the Danegelt was,

1. Annual: ours is due only in case of necessity. 2. It was collected out of hides of land, and thence called Hidage: ours is collected out of personal as well as real estates. 3. It was a tribute of money: ours a provision of shipping and armour in kind. 4. It was against pirates: ours is for common defence of sea and land. 5. It was not general: clergy and clergymen were originally exempt: ours is general, upon all without exception.

Lege the words of the authorities under written, from whence many observations and good conclusions may be drawn touching Danegelt.

Leges Edw. Confess. c. 12. 'Danegeldi red-'ditio, propter piratas primitus instituta est, 'patriam enim infestantes vestationi ejus pro 'posse suo insistebant; ad quorum insolentiam 'reprimendum statutum est Danegeldum an-'nuatim reddi sc. 12 denarios ex unaquaque 'hida totius patriæ, ad conducendum eos qui 'piratarum irruptioni resistendo obviarunt. De 'hoc quoque Danegeldo libera erat omnis ec-'clesia, quia magis confidebant ecclesiæ orati-'onibus, quam armorum defensionibus.—Hanc 'libertatem tenuit Anglorum ecclesia, usque 'ad tempus Willielmi junioris. Danegeldum 'concessum est ei baronibus, non lege statu-'tum, neque firmatum; sed habuit necessitatis 'causa ex unaquaque hida 4 solidos, ecclesia 'non excepta.'

The Black Book of the Exchequer, written in king Henry 2's time, in that part which is Tilburiensis's work, or the Magister ad Discipulus, it is lib. c. 28, not c. 11, as it is misprinted in learned sir Henry Spelman's Glossary.—'Ad Danos arcendos, a regibus Anglicis 'statutum est, ut de singulis hidis jure quodam 'perpetuo duo solidi argentei solverentur in 'usus virorum fortium, qui perlustrantes mari-'tima impetum hostium reprimerent.—Qui 'igitur principaliter pro Danis institutus est hic 'redditus, Danegeldum dicitur, hic sub indi-'genis regibus solvebatur usque ad tempora 'regis Willielmi primi. Ipso namq; regnante, 'tam Dan' quam cæter' terræ marisq; prædon' 'hostiles cohibetur incursus. Cum ergo diu 'solvisset terra, sub ejusdem regis imperio, no-'luit hoc ut annuatim solveretur, quod fuerat 'urgente necessitate bellicæ tempestatis exac-'tum, nec tamen omnino propter inopinatos ca-'sus dimitti.—Raro igitur temporibus ejus vel 'successorum ipsius solutum est, hoc est cum 'ab exteris gentibus bella vel opiniones bello-'rum insurgebant.—Verum quocunq; tempore 'solvatur ab ipso, liberi sunt qui assident ad 'Scaccarium, ut dicitur, et vicecomites, &c.

Leges H. 1, c, 16. 'Danegeldum, i. e. 12*d.* 'ex unaquaq; hida per annum, si ad terminum 'non reddatur, wita emendetur.'

Fourthly, I affirm, with some clearness, under favour, That the charge now demanded is not within the ancient acceptation or signification of the words, Aids, Mises, Prizes, Taxes, or Talliages, which it is to be agreed cannot be exacted by the king, without consent in parliament. Neither is it within the compass of the word Subsidy, which may not be levied, but upon grant of it in parliament. Aids, if you take the word in a general sense, they were of two kinds: 1. Such as were aids and services too, as 'pur faire fitz chevalier, pur file marier.' That kind of aid, common persons, who had seigniories, had right unto, as well as the king. No colour of comprehending this kind of aids, within the word, Aids, pertinent to this question—To the 2d kind of aids, were sums of money from the subject to the king, by way of help, 'ad agendo regis;' as for making of castles, building of bridges, helps for voluntary or auxiliary wars, or for the king to do his pleasure with, and the like.—See Parl. Roll 11 Hen. 4, n. 45, 20,000 marks granted to the king by the name of an Aid, 'ent a fair son 'pleasure.' And Rot. Parl. 25 Ed. 3, n. 12, where the application of the word Aid to such a purpose, is distinguished from other payment to the king.—Mises were presentations in kind of a benevolence, upon a king's first coming to his crown; such are yielded at this day in Wales, to a prince of Wales.—Prises are taking of part of the subjects goods from them to the king's use, without pay; hence prisage of wines at this day.

'Taxes et Tallages, in Quinzim. B. 9, 34 H. '8, Nota par exposition de ceux del Eschecq;

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'que tax et tallage n'est auter, mes dismes, 'quinzim, ou auter subsidie, grant' per parlia-'ment. Et le quinzim est des layes, et le disme 'est de clergie et est d'estre levy de leur terr' et 'le disme et le quinzim de lais est del biens, sc. 'decimam partem bonorum in civitatibus et 'burgis, et 15 partem bonorum des laies in 'priam que fuit levy in aucuns temps sur lour 'biens, viz. del aids sur lour terres que fuit 'vald troublous, mes ors cest levy, secundum 'ratum terrarum suarum per verges de terr' et 'auter quantites, issuit que ore, tout science 'lour certenty in chun vill et pais par tout le 'realme mes il est encore levy in aucuns lieux 'sur lors biens, mes implusiors lieux, sur lors 'ters.—Subsidies quid chun conust, sc. cer-'taine some sur le pound del rat' de terr' ou 'biens, come app' in les Acts de Parliament de 'grant del subsidie.'

Fifthly, It cannot be said, that the present case is to be stated so, as unless the charge commanded be obeyed, an assured infallible ruin and subversion of this kingdom will happen, and that instantly. In such a case, 'quid non' is lawful; and happy he who by doing any exploit, can save the ship from sinking, the body from falling.

Sixthly, It is to be observed, That the principal command in the shipping-writ, is not to levy money, it is to provide a ship; which ship being to be provided at the charge of a multitude, in regard the thing cannot be done any manner of way, but by the means of that which is 'mensura rerum,' namely, money, therefore the instructions in the shipping-writ are not only apt, but necessary; that an assessment be made, whereby proportionable sums of money may be collected, for the provision of the thing commanded: And thereupon it may be said, that the sum assessed upon every one, and in our case upon Mr. Hampden, is not a debt *vi termini*, but is rather a duty to be performed, as a means conducing to the principal end: The refusal of performance of which duty, is a refusal to obey the principal thing commanded, 'Qui negat medium, destruit finem.' And the principal thing commanded, being of a kind concerning the commonwealth; the king, who is the head, the sovereign of the commonwealth, and who hath as incident to his regal office, power of coercion, is by law to exercise such his power of coercion, to inforce such as refuse to join with others in performance of that which is commanded for the commonwealth.—And this being the true state and way of the proceedings, in the present case; it is apparent, that though the Scir' Fac' against Mr. Hampden be in the king's name, yet it is not to have execution as for the king's money, or as for a debt due to the king from Mr. Hampden: But as is manifest, if the whole contexture of the writ of Scir' Fac' be observed, it is nothing else, but to bring on a declaratory payment. That Mr. Hampden ought *onerari* to the payment of the 20s. assessed upon him. So that, with his 20s., together with the other money of Buckinghamshire-men, assessed also upon every of them particularly, the ship commanded from the county of Buckingham may be provided.

Seventhly, and lastly, Having declared of what nature our case is not, I come now to tell you what the state of it is. The true state of our question must be made out of the whole record, or pleading of the case, the matter of fact wherein the defendant hath confessed, (as I noted in the beginning.) In the Writ of Aug. 11 Car. and in the Writ of Mittimus, there are causes expressed, of the issuing of the Writ of Aug. 11, or the Shipping-Writ; those causes are several, but not to be severed, all of them are to be laid together into the balance.

1. 'Piratæ congregati,' upon the English seas.—2. 'Piratæ navigium indies preparantes, 'ad mercatores ulterius molestandos, et ad reg-'num gravandum.'—3. 'Periculu' are 'Un-'dique regno Angliæ, in his guerrinis tempor-'bus.'—Those 'pericula' do 'imminere regno, 'nisi citius remedium ponatur;' where the word 'citius' is a comparative word, relative to slow ways of remedy, amongst which parliaments is one.—5. 'Regi et subditis conveni, 'omni qua poterint festinatione accelerare, ad 'regni defensionem, maris tuitionem, et secun-'tatem subditorum.'

Out of all those positions it appears, That there is in the case real and manifest peril; not 'panicus terror,' fear without cause; 'Tempora' are 'de facto guerrina,' there is 'de facto 'navium congregatio.'

Again, we must observe, That in this case, 1. The command is, 'ad proficiscendum cum 'navibus regis:' So the king himself is to join with the subject in the common defence: Here is not a 'quod tibi fieri non vis:' Here is rather a *contributio*, than a *tributio*.—2. The ships and arms to be provided are to continue the subjects own in property: The king doth not assume the property of them to himself; he only commands them to be made and used for the common defence. This appears by the words ('ad proficiscendum cum navibus nos-'tris.') So the writ sets a distinction between 'naves nostræ,' (that is, the king's) and the ships to be provided. See the like of this, m. 28 & 29 Ed. 1, Communia, with the King's Remembrancer, for gallies commanded upon the like occasion; and P. 5, E. 2, and P. 13, E. 2, with the King's Remembrancer, 'inter 'brevia directa baronibus.'—3. The subjects are commanded, in this case, to be at the expences, 'tam in victualibus, quam hominum 'salariis ad guerram necessariis.' This I shall prove clearly anon, to be consonant to law, and warranted by many precedents, in the like cases.—4. All the counties of the kingdom, that is, all the kingdom in general, is charged, not any spared; the clergy, the king himself, are to join in the provisions.—5. The final end and scope of all this preparation is 'Defensio regni, 'tuitio maris, retentio dominii maris, securitas 'subditorum, salus reipublicæ.'

But Mr. Holborne hath objected, That 'salus 'reipublicæ periclitabatur' is not to be taken as part of this case, because it is not in the writ

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of Aug. 11 Car. but is inserted into the Mittimus, above two years after; and he saith, That Mr. Hampden could not know 11 Car. that at that time 'salus reipublicæ periclitaba-'tur;' and therefore he is not to be blamed for refusing to pay his assessment, which was before the Mittimus, and grounded only upon the writ of Aug. 11 Car.

He further observed, That in the subsequent shipping-writ, that clause is expressly now put out. To this I answer. 1. It is true, that 'salus regni' is not in express terms, or in those identical words in the writ of Aug. 11, but it is expressed in that writ in words equipollent. 2. If it were not contained in that writ in words equipollent, yet it enforces the words in that writ in matter pursuant, or not new, or different from it; and so is out of the rules of departure, wherein if it were, it were a good exception in strictness of pleading. 3. That clause in the Mittimus by way of declaration or signification to the barons, what the reason was, that moved the king to issue the first writ; and the barons are to take notice of it, as well as of the clause in the Mittimus, whereby the king signifieth to them, that he had sent the like writs as that of Aug. 11 to all the counties of England: And this is a declaration of that meaning which the king had in the beginning. By Dowman's Case, Co. 9. after assessment executed, or a fine levied, a declaration may be made, to what use that fine or assessment was.

In a word, the state of our Case is thus; 'Dominium maris, et salus reipublicæ periclitabatur, convenit regi et subditis, omni qua 'poterint festinatione accelerare ad defen-'sionem regni, tuitionem maris, et securitatem.'

Now whether to set the commonwealth free and in safety from this peril of ruin and destruction, the king may not, of his own royal authority, and without common assent in parliament, impose a charge upon his subjects in general, to provide such shipping, as is necessary, in his royal judgment, to join with his majesty's own ships, and to attend them for such time as his majesty in his royal wisdom shall think fit, and also to enjoin them to be themselves at the expences, 'tam in victuali-'bus quam hominum salariis, et aliis ad guer-'ram necessariis?'

I would be loth to irritate any, differing in opinion from me, with provoking or odious terms; but I cannot more fully express myself, (and so I desire it may be taken as an expression, and not as a comparison) than in saying, That it is a dangerous tenet, a kind of judaizing opinion, to hold, That the weal public must be exposed to peril of utter ruin and subversion, rather than such a charge as this, which may secure the commonwealth, may be imposed by the king upon the subject, without common consent in parliament. So that the security of the commonwealth, for the very subsistence of it, must stay and expect until a parliament provide for it; in which interim of time, it is possible, nay, apparently probable, yea, in a manner to be presumed, that all may be, yea, will be brought to a final period of destruction and desolation.

All know, that the Jews were so strict, that they would not use means for defence of themselves, and their country, upon their Sabbath. Their enemies took the advantage, and ruined their state.

The SECOND General Head.—I now come to my Second general head, wherein I proposed to consider of the fundamental policy, and maxims, and rules of law, for the government of this realm, and of the reasons of law pertinent to our case, which are very many. I will briefly and severally point at those which make impression in me.—1. It is plain, that as originally, even before the Romans time, the frame of this kingdom was a monarchical state, so for divers hundreds of years past, upon the Romans desertion of it, and after the heptarchy ended, it was, and continued, and still continueth monarchical. And our gracious sovereign is a monarch, and the rights of free monarchy appertain unto him; and yet still with this, that he must 'leges ad consuetudines 'regni servare, et præcipue legis et consuetu-'dines et libertates a glorioso rege Edwardo,' (that is, Edward the Confessor) 'clero populo-'que concessas;' as appears in the old Magn. Chart. fol. 164, tit. 'juramentum regis quando 'coronatur.' 2. Where Mr. Holborne supposed a fundamental policy in the creation of the frame of this kingdom, that in case the monarch of England should be inclined to exact from his subjects at his pleasure, he should be restrained, for that he could have nothing from them, but upon a common consent in parliament.

He is utterly mistaken herein.—I agree the parliament to be a most ancient and supreme court, where the king and peers, as judges, are in person, and the whole body of the commons representatively. There peers and commons may, in a fitting way, 'parler lour ment,' and shew the estate of every part of the kingdom; and amongst other things, make known their grievances (if there be any) to their sovereign, and humbly petition him for redress.

But the former fancied policy I utterly deny. The law knows no such king-yoking policy. The law is of itself an old and trusty servant of the king's; it is his instrument or means which he useth to govern his people by.—I never read nor heard, that Lex was Rex; but it is common and most true, that Rex is Lex, for he is 'lex loquens,' a living, a speaking, an acting law: and because the king is 'lex loquens,' therefore it is said, that 'rex censetur habere 'omnia jura in scrinio pectoris sui.'

There are two maxims of the law of England, which plainly disprove Mr. Holborne's supposed policy. The first is, 'That the king 'is a person trusted with the state of the com-'monwealth.' The second of these maxims is, 'That the king cannot do wrong.' Upon these two maxims, the 'jura summæ majestatis' are grounded, with which none but the king himself (not his high court of parliament without

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leave) hath to meddle, as, namely, war and peace, value of coin, parliament at pleasure, power to dispense with penal laws, and divers others; amongst which I range these also, of regal power to command provision (in case of necessity) of means from the subjects, to be adjoined to the king's own means for the defence of the commonwealth, for the preservation of the 'salus reip.' Otherwise I do not understand how the king's majesty may be said to have the majestical right, and power of a free monarch.

It is agreed, that the king is, by his regal office, bound to defend his people against foreign enemies; our books are so, F. Na. fol. 118, 'Est 'a intendre que le roy doit de droit; saver et 'defendre son realme com' vers le meere, 'com' vers enemies.'—Juramentum Regis, cited before, 'servabis ecclesiæ Dei, clero, et po-'pulo, pacem ex integro secundum vires tuas;' if 'ex integro,' then against all disturbers of the general peace amongst them, most chiefly, in my judgment, against dangerous foreigners.

Bracton and Glanvill, in the front of their books, published, That the king must have arms as well as laws; arms and strength against foreign enemies, laws for doing justice at home. Certainly if he must have these two necessaries, he must be enabled with means for them, and that of himself, not dependent 'ex 'aliorum arbitrio;' for it is 'regula juris, lex 'est, quando quis aliquid alicui concedit, con-'cedit, et id sine quo res ipsa esse non potest.'

3. Though I have gone already very high, I shall go yet to a higher contemplation of the fundamental policy of our laws: which is this, That the king of mere right ought to have, and the people of mere duty are bound to yield unto the king, supply for the defence of the kingdom.—And when the parliament itself doth grant supply in that case, it is not merely a benevolence of the people, but therein they do an act of justice and duty to the king.—I know the most solemn form of parliament, and of the humble expression of the commons, of their hearty affection, and good will to their king, in tendering to him their bills of subsidies or fifteenths.

Rot. Parl. 9 Hen. 4, n. 7. There is a notable record of the very right of the commons, in the form of grant by parliament of supply to the king: Archbishop Arundel, then Lord Chancellor, in his speech to the houses, took for his theme 'Regem honorificate,' it being then a time of instant necessity.—The commons, in their grievances, complained of the default of safeguard of the sea, towards which they had granted a subsidy before; 'Et pour 'tant,' (Note this for the reason, it was not spoken simply, as Mr. St. John urges) but 'pur 'tant que ills ne sont obliges a cel guerre sus-'teyner, mes sont discharg' de re exant;' and they petitioned, That accordingly it would please the king to discharge the commons, but the king did not discharge them, *quod nota*. After this, the Record goeth, that there was a conference between the king and lords, of the state of the realm, and of the defence of it. And in that conference, the king asking the lords advice, they answered, That a tenth and half a tenth was necessary from the boroughs, and a fifteenth and half from the rest of the people. This conference and advice being reported to the house of commons, the record is, 'Ils fuer grandement distorbe en dist' ceo des-'tre en grand derogation de lour liberties.' The disturbance was so great, that the king himself took pains to pacify them. Upon this Record it appears, and I confess, that the commons offering up of the bill of fifteenths, and so of subsidies, to the king in parliament, is a most material form, and serves to make good and happy expressions of love and unity between the head and members, the king and his subjects. But still I say, that it is the king's right to have supply; that supply is a duty, not merely a benevolence from the people, in case of necessary defence of the kingdom.—And this is not my single opinion.

19 H. 6, 64 B. Hody Ch. Baron, 'Le roye est 'inherite,' that is, hath right of inheritance to have fifteenths in his court of parliament: for the same law which wills that the king defend his people, wills also, that the people grant to him of their goods, in aid of their defence.—Besides, I prove mine opinion, if any man deny it, unanswerably, out of the very writ of summons of parliament: in it, 'Arduæ et urgentia negotia, regem statum, et defensionem regni Anglliæ et ecclesiæ concernentia,' are mentioned to be the cause of parliament.

Now I pray you observe.—In the writ of summons to the peers of the kingdom, the words are, 'Super dictis negotiis tractaturi ve-'rumq; concil' impensuri;' but in the writ for choice of knights and burgesses to serve for the commons, the words are, 'Ita quod milites pro 'se et communitate comitatus prædicti, ac dicti 'cives et burgenses pro se et communitate ci-'vitatum et burgorum plenam potestatem ha-'beant' (what to do?) 'ad faciendum et consentiendum his quæ tunc ibidem de communi 'concilio regni nostri contigerint ordinari super 'negotiis antedictis.'—So the words are, 'fa-'cere et consentire,' to matters agreed on concerning the defence of the kingdom; there are no other matters mentioned in the writ for summons of their representative body: no such words as are in the peers writs are in theirs; yet I cannot say, and so I desire to be conceived, but that according to the Record of 9 Hen. 4, the commons may also humbly offer their advice to the king; they may shew their grievances, and the state of the commons: but it is plain, that the principal duty belonging to the commons is, 'facere et consentire,' otherwise there would have been in their writ, as well as in the peers, 'super dictis negotiis tractaturi, 'verumque consilium impensuri.'—Upon this I put the case, and argue thus: the kingdom wants present provision, necessary for present defence, to be in readiness; this provision, the case so falling out, must be so speedily made, as that it would be dangerous, in regard of what

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may happen, to stay for an assent in parliament. Well, in this case there is a duty from the subject, and a necessity that the thing must be done, but the necessary form for the subjects assent in parliament cannot be pursued; I demand what must be done, or what may be done in this case, without breach of law?—Is the duty lost for want of time to observe the form? For my part, I understand not any reason that the duty, in such case, should be lost; but I should agree, that were not this a duty, *vi termini*, which is to come from the subject, in such a case, but only a mere benevolence, then that such benevolence could not by law be exacted without the essential part of it, viz. the subjects assent in parliament.

4. I confess, that by the fundamental law of England, the parliament is 'commune concilium regis et regni,' that it is the greatest, the most honourable and supreme court in the kingdom; that no man ought to think any dishonourable thing of it: yet give me leave to say, that it is but a Concilium; to say so is no dishonour to it: the king may call it, prorogue it, dissolve it, at his pleasure; and whatsoever the king doth therein, is always to be taken for just and necessary.—We must consider, that it is a great body, moves slowly; sudden dispatches cannot be expected in it.—Besides, though the parliament cannot err, parliament-men may *de facto*: every particular member of the house hath his free voice; some of them may chance to make scruples, where there is no cause; it is possible that some of them may have sinister ends; these things breed delays, so they may disturbances. (I would to God, the late woful experience of this kingdom had not verified these speculations.) Yea, there have been, in former times, censures of parliaments themselves: the good parliament, temp. Ed. 3, 'parliamentum indoctorum,' temp. Hen. 4, and in the same king's time, if we believe my lord Coke, 11, fo. 113. Brangwit, *id est*, the White-Crow act. These matters are considerable in such cases as ours is.—Wherein apparently 'Mora trahit periculum,' and to follow the rule, 'Festina lente,' is most dangerous.

5. The point of 'retentio dominii maris' (which is in the case) is not of an ordinary consideration; for, besides the antient inheritance and right which the crown of England hath in it, it is obvious to every judgment, that in the continuance or not continuance of it to the crown, not only the *bene esse*, but even the *esse* itself of the commonwealth doth consist; and therefore it behoveth the subjects *accelerare* to the tuition of it: slowness is an argument of stupidity, or want of that sensibleness of the diminution of that right which every subject ought of right, and hath a concerning reason, to propose to himself.

Notable are the words in the Scotch rolls, 10 Ed. 3, numb. 3. In a writ by the king to a great part of all the kingdom; 'Considerato, quod progenitores nostri reges Angliæ dominii maris et transmarini passagii, totis præteritis temporibus extiterunt, et plurimum nos tangeret, si honor noster regius nostris temporibus in aliquo laderetur. Quodque omnes homines de regno pro defensione ejusdem, contra hostium invasiones, tenentur exponere se et sua.'—The writ wherein these words are, was a command or charge laid upon the subject, without any warrant of parliament for it.—It was a writ directed to all earls, barons, knights, and others, 'ab ore aquæ Thamesis versus partes occidentales,' which included divers inland counties.—It issued upon occasion of David de Bruse's having a great navy afloat, and therewith having entered Jersey and Guernsey. The writ is a command to those to whom it is directed, 'Tantis et tam gravibus periculis imminentibus debite ponderatis,' to treat with the archbishop of Canterbury, and other great men assigned by the king, 'super defensione regni et populi.' The writ concludes thus, 'Scire vos volumus, quod si rebelles aut difficiles fueritis in præmissis in tanto et tam grandi necessitatis articulo,' the king will repute those 'rebelles, aut difficiles, tanquam suos et regni inimicos.'

6. Not to speak of necessity in general, which is of itself a relaxation of laws, and serves for a dispensation, even by the equity of the law itself: in our case there is a necessity in point of government.—I shall put you a case, where an express clause in an act of parliament hath been doomed void, because it was against a matter of necessity in point of government. 2 H. 6, 6, The earl of Northumberland's case. *Nota*, 28 Ed. 3, and 42 Ed. 3. penal acts were made, that none should exercise the office of sheriff above a year, although that he have a *non obstante*; that clause of 'although' is void, and a *non obstante* may be of that *non obstante*: no reason can be for this, but because it takes a necessary part of government out of the king's hands.

7. 'Salus reipublicæ,' by all laws, is 'suprema lex, et summè necessaria.' It is, where it interposeth, 'lex legis.' It takes away particular interests, before itself give place for that cause.

8 Ed. 4, 36 Hen. 8. Dyer. A bulwark for defence may be built upon another man's ground, 'invito domino.'—No dower or third-ing to a woman of a castle of defence; it may indanger 'salus reipublicæ,' by dividing such a piece.—An alien merchant takes a lease for years, of a house for his trade: this is a good lease, so long as he tradeth, and there is no enmity between his king and ours; but when he ceaseth trading, or if war happen, the king shall have the interest of the lease. The reason, it is possible, that 'salus reipublicæ' may be concerned, if the alien's interest in it should continue.

8. If there were not 'salus reipublicæ' in our case, yet there is in it at least 'bonum publicum' intended. I will put a case, where subjects are bound without their assent, for the 'bonum publicum' sake. 44 Ed. 3, 19. Chamberlain of London's case, Coke 5, f. 63. Inha-

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bitants of a town, without any custom, may make ordinances or by-laws of any thing, *pro bono publico*; and in such case, those who are absent, and so unconsenting, are bound, the 'bonum publicum' is the cause.

9. Prevention of further general mischief, which may ensue, trencheth, even by construction of law itself, upon other men's rights. For that cause, pulling down a house which is on fire, to save other men's houses, is lawful. Highley's case, Co. 10, 139. One is bound by prescription, to make or repair walls, damms, or such like against waters: this man is not able to do it; a small breach happens, which either must speedily be made up, or a general mischief will happen. In this case by exposition of the statute of sewers, and by an equity out of the letter of the laws, grounded upon 'salus pop.' all those who are within the level are to be taxed, and to contribute for present; the ability of him, whose the right of the burden is, *non expectata*.

10. I find a writ in the register 'de repa-'ratione facienda,' which is cited in Bowles's Case, Coke 11, f. 82, b. whereby, if two jointenants be of a house, the one shall have a writ of 'de reparatione facienda' against the other; and the words of the writ are, 'ad re-'parationem et sustentationem ejusdem domus 'tenetur;' where the word 'tenetur' is observable. Every man hath an interest in the commonwealth, but the king's interest is incomparably beyond other men's; therefore the king may, by a like reason of law, call upon his subjects to join in contribution with him, towards the reparation and sustentation of the fabrick of the commonwealth.

11. In the great and common vouchee's case, 13 H. 4, 14, in the debate of this cause of the new-erected office of the measuring of cloths in London, which was brought to parliament; it is a memorable saying of Gascoigne the chief justice, 'The king may charge the people of 'his realm without special assent of the com-'mons, to a thing which may be profit to the 'common people.' This saying is cited and allowed in the Case of Monopolies, Coke 11, f. 86, b. and so it is very commonly upon arguments concerning such questions.

12. I observe, that though the precedents of writs and execution of them, for assessing the subject by the king's command, without warrant of parliament, are very many in several kings reigns; yet there is not any precedent of any civil action brought for any thing done in former ages, upon such commands of the king as is in our case, but only that one of the abbot of Robertsbridge's case, which hath been often cited; and in the pleading thereof it is acknowledged, that the assisting of men's lands and tenements to contribute 'ad custodiam 'maris' by the king's commands, without tax by consent in parliament, was good in law. And I note, that that case happened and was in agitation, and gave fair cause of demurrer, in an opportune time in demurring, if the law had been otherwise; for it happened at that very time, when the statute De Tallagio non Concedendo was made, or in hammering. If only one action brought heretofore, *una hirundo*, it were not to be regarded, though it had been against the king's power; but when that one is assertive of the regal power, it is to be respected more than as a single, I mean, as a *singularis probatio* of it.

Lastly, I observe, that upon grievances, or complaints in parliament, which have been almost infinite, and upon all occasions in former times, no one record hath been, or I think can be cited, that in case when charges have been imposed without common assent, for the necessary defence of the kingdom in an instant article of necessity, any king hath ever answered, or assented, that such charge hath been against the laws or liberties of the subject.—Neither the reclamation of the subject alone on his side, nor the single commanding rescripts of the sovereign alone on his side, are of authority to preserve the law; but if there be a concurrence of king and subject, that is it whereby a judge may ground his resolution.

As for that one of 2 R. 2, which cometh nearest in that kind, but hath not the king's acknowledgment; I note, that it was upon a deliberation, before the charge imposed: and truly I think that if the charge in that case had been first imposed and collected, upon complaint against it afterwards, it would never have been adjudged for unjust. Many things are questioned, and sometimes denied to be lawful before they are done, which *facta valent*, which being done, are good and valid in law. If a question be made of that which of itself is lawful, the very making the question makes it questionable, and may draw on an opinion that it is not lawful.

Rot. Parl. 4 H. 4, num. 28, et Rot. Parl. 6, H. 4, num. 9, you shall find, that the commons having considered of the wars of Scotland, the rebellion of Wales, the safeguard of the sea, *et especialment* the defence of the realm, they granted a subsidy, but with protestation that it should not be an example to charge the commons hereafter with any manner of subsidies for the wars of Scotland or Wales, or the safeguard of the sea, or the marines of Calais or Ireland, without consent in parliament. I observe, that there is not a word in this protestation, that the subjects should not be charged without consent in parliament for the defence of the realm, though there were a little before an express mention of it, and that with an *especialment*. On the other side, there is a cloud of precedents of . . . . . imbarking of private mens ships, in case of necessity of defence of the realm, and safeguard of the seas, command of making galleys and ballingers *sumptibus propriis*.

Arraying and apparelling of soldiers, and victualling and conducting them in this case of necessary defence, 'propriis sumptibus,' of several towns and counties, as well inland as maritime; the express words of the king's commands in such cases, by his writs directed to the respective sheriffs and head officers, are, That

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they should 'levari facere expensas de comitatibus,' sometimes 'comitatuum,' sometimes 'villarum,' as the case was: wherein note the words, 'levare facere;' and in what manner the sheriffs levies are, viz. assessment by himself, and collection by himself and ministers, I think few are ignorant.—Amongst which kinds of writs, some of 48 Henry 3, are remarkable for these words in them, 'Cumque adhuc necesse sit propter casus fortuitos ad securitatem et defensionem regni, defensionem habere promptam, contra alienigenarum adventum,' &c. Inter alia sic Rot. Claus. 48 H. 3, m. 2. A writ to the town of Bedford. So still the pressure is according to the occasion, instant provision raised whereby a promptitude may be, not staying a provision by parliament, which cunctation might be opposite to promptitude. Also the French Roll, 21 Ed. 3, pars 2, m. 9, Co. 11, shews, that whereas a subsidy out of the wools had been granted to endure for a certain time only, yet the king, 'necessitate compulsus, de consilio prælatorum, magnatum, et aliorum de concilio suo,' (not 'per commune concilium') did ordain 'quod subsidium prædictum levetur usque' a further time.

Close Roll, 1 R. 2, m. 18, many writs were directed to the bailiffs of the several towns of Cambridge, Huntingdon, Nottingham, Derby, Lincoln, Gloucester, Worcester, St. Edmond's-bury, and Thetford, reciting a former command of the king to these several towns, to provide several ballingers, 'ad custas validiorum et magis divitum hominum' of those towns. Now by those writs the king declared to them, that *videbatur* to the king and his council, that they who had 10*l.* and upwards in goods, should contribute, and not others; and commands those bailiffs to compel men of that ability to contribute, 'per districtionem si necesse foret, et aliis viis et modis, quibus melius viderint expedire.'

I spare iterations; I conclude my second general head with my subscription again proved by my judgment, by what I have said before: That when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, the king may, by writ under the great seal, command all the subjects of the kingdom at their charges to provide and furnish ships for the defence and safeguard of the kingdom, and may by law compel the doing thereof. And that in such case the king is the sole judge of the danger, and when and how the same is to be prevented. And how many more have subscribed to this tenet it is not unknown; the records of the general courts of justice of the kingdom, manifest to such as will look into them.

The THIRD General Head.—I have done with my second general head, and come now to my third; which is, to consider the acts of parliament, answers to petitions in parliament, Magna Charta laws, which concern the king's proceedings in this case.

1. St. Edward's laws have Danegelt mentioned in them; see cap. 12, but not another syllable pertinent to this case, saving that the church and people are free, have liberties and customs belonging to them of right, which is not by any denied.

2. I find that there was a Magna Charta Libertatum Regni made by Henry 1, the Beau-Clerke, in which is this clause, That 'Milites 'possiderent terras dominicarum suarum quietas ab omnibus geldis' ('guelt' signifieth a sum of money.) And yet amongst the laws of his time, as appeareth by Leges Hen. 1, c. 16, this is one which I cited before, 'Danegeldum, 'i. e. 12*d.* de unaquaque hida per annum, si ad 'terminum non reddatur wita emendetur' (which signifieth an amerciament.)

3. The Magna Charta of king John, made at Running-mead, hath been cited by Mr. Hampden's counsel, and urged to be an act of parliament; the words inferred out of it are, 'Nullum scutagium vel auxilium capiatur in regno 'nostro, nisi ad corpus nostrum redimendum, et 'primogenitum filium militem faciendum, et 'ad primogenitam filiam nostram semel maritandam; et ad hoc non fiat nisi rationabile 'auxilium,' &c.—The words pitched upon are 'nullum auxilium' a general negative; I have touched before the signification of the words, 'Aid, auxilium;' I will answer the words farther anon, together with other statutes, which have as general and further negative words.—Observe, But there is no question but Running-mead Mag. Ch. was no statute, nor ever was taken for one, saving in those parts wherein it and Mag. Ch. of 9 Hen. 3, do concur: to give but one reason, tell me when, after king John's time, were 25 barons appointed, according to that which is contained in Running-mead Magna Charta. If there were any great matter in 'nullum auxilium,' it is observable that those words are not in Magna Charta of 9 H. 3, and that is the Magna Charta which hath the frequent confirmations. In Confirmatio Chartarum 25 Ed. 1, there is mention of that Magna Charta of Henry 3, by name, and none of that king John's Magna Charta. Certainly there were some 'iniqua' in the Magna Charta of king John; the barons did in that king's time 'iniquum petere ut æquum ferrent,' otherwise that Magna Charta would have been also confirmed, as well as his successor Henry 3.—And I pray you note, that after the 'nullum auxilium' there follows on, 'nisi ad corpus nostrum redimendum;' If for that, then certainly much more for the redeeming of the whole body of the commonwealth, which is our case.

4. The Magna Charta of 9 H. 3, which is the often-confirmed Magna Charta, though it allow all the liberties of the subjects then claimed, hath no special words pertinent to our question, which is a matter observable; for charges for the defence of the kingdom commanded by the king out of parliament, were frequent both a and before that time. In it there are only general words of 'habeant libertates suas;' out of which words 'suas' I do observe, First, A right of the subject in his liberties, they are 'suæ.' Secondly, Those liberties which the

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subjects must 'habere,' must be 'suæ,' that is, such liberties as are fit for a subject, as are compatible with the relation between a king and a subject. The words are not *omnes libertates*, all manner of liberties, but 'suas,' that is, liberties proper for them, or such liberties as they are, in good construction, capable of. And indeed 'Quicquid recipitur, ad modum recipientis recipitur.'

14 H. 7, f. 11. The abbot of St. Bartholomew's had a charter from king Henry 2, that he should be as free in his lands, as the king was in his crown; yet these general words pass for no more than a subject is capable of; he must notwithstanding those swelling words, pay fines for alienation without licence, admit the king's valect to a corody, and such like. But in that Magna Charta of 9 Hen. 3, cap. 20, there is this clause, 'Et si nos adduxerimus 'vel miserimus eum in exercitum, &c.' which proves the king's right, even by that statute, to dispose of the bodies of his subjects for his army. Also cap. 30, there is a clause, that 'omnes mercatores' shall have safe conduct, and liberty 'ad emendum vel vendendum, sine 'omnibus malis tolnetis, per antiquas et rectas 'consuetudines, præterquam tempore belli;' which shews, that in 'tempore guerræ mala 'tolneta' might be set up, they were not then 'mala tolneta.' 'Dominus opus habet,' made them 'tolerabilia et toleranda;' in our case, we have 'tempora guerrina.'

5. Confirmatio Chartarum, which was 25 Ed. 1, is the next statute whereof there is any colour for Mr. Hampden; the words thereof are, 'Que pur nul besoigne tielx maners de 'aydes, mises, ne prises, ne prenderomer fors- 'que de com' assent de tout le realme, saves les 'anc' aydes et prises dues et accustomes.' But this statute hath not been stood upon, because of the 'saves les anc' aydes, &c.' That which is saved or excepted is clearly out of the body of the law.

6. But then comes the statute De Tallagio non Concedendo; which of what time it was, *non constat*. It was between 25 and 34 Ed. 1. I do agree that to be a statute or an act of parliament: The recital in the Petition of Right, 3 Car. binds up my judgment to affirm otherwise. The words of that statute are general, without any saving or exception, 'Nullum tal- 'lagium vel auxilium, per nos vel hæredes nos- 'tros in regno nostro ponatur seu levetur sine 'voluntate et assensu archiepiscoporum, epis- 'coporum, comitum, baronum, militum, bur- 'gensium et aliorum liberorum communiæ de 'regno nostro.' These words indeed are general: but for a true and just exposition of them, the occasion of the hard pressing to have that general statute is to be considered. King Ed. 1, had right to dukedoms and earldoms in France, and great wars he had with the French king about them. Great troubles also he had out of Wales and Scotland. He was in Flanders about auxiliary wars against the French king, both at the making of Confirmatio Chartarum, and of Tallagio non Concedendo. He had a little before, in the 22d of his reign, caused scrutinies to be made throughout the kingdom, to raise moneys for supply of his great and pressing occasions for these wars, which in truth did not immediately concern the defence of his kingdom; for if he would have let those wars alone, he might have had quiet enough for his kingdom of England. Upon the said scrutiny search was made, where and in those treasuries or hands monies were, whereby the king might be furnished; and indeed, the king's ministers took the moneys they found upon the scrutiny as borrowed for the king, though it were against the owner's wills to lend them; And amongst others, for the most part, they lighted upon the treasurers of religious houses, many of which had coffers well stored. The religious men being thereupon oppressed themselves, incensed the great men against the king; and by that means, and the palpableness of the injury, the great lords, especially the then constable and marshal of England, Bohun and Bigott, stood out against the king with a great deal of stiffness; and at last the king being in a streight, and to pacify one extremity with yielding to another, passed the act De Tallagio non Concedendo, without the exception or the saving of the antient aids which was in Confirmatio Chartarum. But it is plain, that these general words were never meant, either on the king's, or on the great lords and other subjects sides, to be absolutely general for all cases: for notwithstanding those words, the aids 'pur faire fitz chevalier et pur file marier,' continued, and so did the king's power to array and send soldiers, 'sumptibus villarum et co- 'mitatuum,' into remote parts of the kingdom, out of their proper counties, for the defence of the realm, as appeareth in the continual practice in that king's and his successors times; as, if I had time, I could make good by a long succession of precedents, appearing upon records. See a notable apology or remonstrance publicly made by king Ed. 1, m. 25, enrolled, concerning his proceedings at that time in this business, whereby that is made good, which I have before alledged. But besides this answer, I shall give a further answer to this and the other statutes, when I shall have perused all of them.

7. The next statute urged is 14 Ed. 3, in the second parliament of that year; in which statute there is a recital of a grant in the same parliament, of the ninth part of the goods of the commons for two years; the king willing to provide for the indemnity of the commons, willeth and granteth to the same prelates, &c. (wherein note the word the *same*) that the said grant which is so chargeable, shall not be another time had in example, nor that *they* (which must be construed the same prelates, &c.) be from henceforth charged, nor grieved, to make up any aid, or to sustain any charge, if it be not by common assent, and that in parliament; And that all the profits rising of the said aid, and of all wards, marriages, customs and other profits rising out of the realm of England, shall be spent upon the maintenance of the

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realm, and of the wars in Scotland, and France, and in no place elsewhere, during the said wars.

Note, that the general clause which is urged to be in this statute, cometh in the middle part of the statute, and is coupled with other matter, which was but temporary; and therefore in my judgment that general clause was meant to be but temporary, viz. during the continuance of the wars which were then on foot; and was never meant to be a perpetual discharge for ever of all manner of charges and aids, as appeareth for that, notwithstanding that clause, king Ed. 3, did shortly afterwards, and during all his reign, as frequently charge the subjects for defence of the kingdom, as ever he had done before: He had also his aids 'pur 'faire fitz chevalier et pur file marier,' after that; which if the words were to be expounded generally and perpetually, neither he nor his successors could have had. And it is worth the observation, that this statute is never mentioned in the Petition of Right, as Tallagio non Concedendo, and 25 Ed. 3, by names are: and yet if this had been a perpetual statute, there was as great reason to have mentioned it as any other statute.

8. The next statute urged is the Petition of Right, 3d of the king's reign.—This petition reciteth the statute De Tallagio non Concedendo, and the statute of 25 Ed. 3, against loans and other things: Then cometh the petition itself, which is an humble prayer to his majesty, by his subjects, that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament: And his majesty's gracious answer in parliament is, 'Soit droit fait comme est desire.' After this, his majesty, that knows his own heart and sincere meaning best, in his second speeches to both houses, amongst other things, saith, and that most justly and truly, "That it must needs be conceived that he had granted no new, but only confirmed the antient liberties."

I observe, there is no express clause in any of those statutes which I have before cited, that no charge shall be imposed without common consent, no not for necessary defence of the kingdom: And if such a clause had been offered to have been exprest, besides that I doubt of what validity it had been, I certainly believe, that neither king Ed. 1, nor king Ed. 3, nor our sovereign, would ever have yielded to so dishonourable and unjust an expression.—But all these several statutes being general, and having no particular expressions, I conceive that according to all rules of law for exposition of statutes, those three statutes, De Tallagio non Concedendo, 25 Ed. 3, and the Petition of Right, must have a reasonable intendment, and that by a common and just equity, for exposition of those three statutes, aids and charges, for so necessary a purpose as the defence of the kingdom; and 'salus reipublicæ' will be clean out of the law, as fully as if they had been precisely excepted: and if other exposition be made according to the letter only, it might truly be said of such a literal exposition, That *litera occidit*, that laws made for the good of the commonwealth, will prove the bane and ruin of it.

I will give you a taste of some expositions of statutes, with restrictions of the generality of the words of them, though they be general negatives. The cases I could put are very many, but I will cite only a few, and those such as are appliable to the reason of our case.

Dyer 361. The statute of Glocester saith, That tenants for lives or years, 'nullum facient vastum;' yet a waste, whereby the land leased 'melioratur,' is no waste within that statute.—The statute of Westminster the second saith, That tenant in tail shall not 'per factum, vel 'feoffamentum,' do any act to the prejudice of his issue: Yet 43 Ed. 3, Octavian Lambert's case is, tenant in tail of lands whereto a stranger hath title of entry; to gain a release of this title, and for defence of his estate, by his deed granteth a rent charge out of the lands intailed; this grant bindeth his issue, so that he shall hold the land charged, notwithstanding the general words of the statute.—There was a statute made 14 Ed. 3. That for every sack of wool carried out of the realm, the merchant shall find surety to bring into the kingdom bullion, that is, silver to the value of 2 marks, and to take for it 2 marks in coin. 36 Ed. 3, an act was made, That whereas the commons had granted a great subsidy out of their wools to the king for three years; the king granted, that after those three years, nothing shall be taken of the commons, but the ancient custom of 1 mark for a sack of wool. And 45 Ed. 3, another act was made, That no imposition or charge shall be put upon wools, others than the subsidy and custom granted to the king, *sans parliament*.—Upon long debate adjudged, That notwithstanding these two latter general statutes, yet the finding of sureties for bringing in of bullion, enjoined by 14 Ed. 3, was not taken away by either of those two latter statutes. And in that case, besides the former rule of equity put by me for exposition of general statutes, another reason is given, applicable also to our case, namely, That every statute shall be taken the most beneficially for the king.

Pasch. 13 Jac. In the Star-Chamber, whereas the statute of 1 Rich. 3, c. 2, saith, That the subjects shall not be charged, by any charge, executions or impositions, called a Benevolence, nor by such like charge; yet one Mr. Oliver St. John, a Wiltshire gentleman, being brought to the bar, *protenus*, for writing a letter to the mayor of Marlborough, against a course then holden, for trying what money rich and able men would give unto king James, of their voluntary free will; it was resolved by the whole court of Star-Chamber, with the then chief-justice's advice, that a commission to treat what men would give voluntarily to the king, was not within the statute of 1 R. 3, though the words were general; and Mr. St. John was grievously censured for his inveighing by his

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letter against the awarding of the commission.

I conclude this matter with an answer by Mr. Solicitor, aptly given to Mr. St. John, who urged this clause out of the laws of king W. 1, c. 55. 'Volumus ut omnes liberi homines regni 'nostri habeant terras suas, bene et in pace, 'liberi ab omni exactione injusta et ab omni 'tallagio, ita quod nihil ab eis capiatur vel exi-'gatur nisi servitium suum liberum, quod de 'jure nobis facere debent, et prout statutum 'est et a nobis eis datum et concessum jure 'hæreditario per communi concilium totius 'regni.'

You see here are general words referring to a general act of parliament; yet afterwards, c. 59, are these words, 'Statuimus ut omnes liberi 'homines totius regni sint fratres conjurati ad 'monarchiam nostram et ad regnum nostrum, 'pro viribus suis et facultatibus, contra inimi-'cos pro posse suo defendendum et viriliter ser-'vandum.' This latter clause shews the intention of the act of parliament formerly set down, that notwithstanding the general words of the act, it extendeth not to cases of common defence of the kingdom, or where 'Salus monar-'chiæ regis' or 'reipublicæ periclitatur.'

I have now done with the general negative statutes, strongly urged; and I think I have exempted the question of our case from the purview or intention of those statutes. But besides those statutes, Mr. Hampden's counsel hath urged some statutes that no soldiers, or men at arms, should be enforced to go out of their proper counties, without wages from the king. I will not let those, because urged, though pertinent in the generality only of the people's liberties, pass unexamined.

The statute of Winchester 13 Edw. 1, c. 6, was cited for that purpose. The words are, 'Every man shall have in his house harness to 'keep the peace, after the antient assize.' And sheweth what the antient assize was. And then there is a clause for fresh suits after felons, from country to country; and indeed, in case of fresh suit after a felon, none is bound to go out of his county. But as to the point of going without wages out of the counties for defence of the kingdom, not a word in my book in that statute.

Then cometh 1 Ed. 3, c. 5, the second parliament; the words are, the king wills that no man be charged to arm himself, otherwise than he was wont, in the time of former kings of England; and that no man be compelled to go out of his county, but where necessity requireth, and sudden coming of strong enemies into the realm; and then it shall be done as hath been used in times past, for the defence of the realm.' —Nota. That before this statute, the use was for men to go in such case, 'propriis sumptibus,' as appeareth by many precedents.

In the same year, 1 Ed. 3, c. 7, the commons complained of commissions to prepare men at arms, and to convey them to the king into Scotland, Gascoine, or elsewhere, at the charge of the shires; and that the king hath not before this time given any wages to the preparers and conveyers, nor soldiers, whereby the commons have been at great charge. To this the king's answer is, The king wills that shall be so done no more.—Nota. But note by the very complaint, that neither the complaint nor answer are applicable to case of necessity, for safeguard of the kingdom.

Then 18 Ed. 3, c. 7, That men of arms chosen to go in the king's service out of England, shall be at the king's wages, from that day that they depart out of the counties where they were chosen, till they return. This statute extendeth not to case of necessary defence. Besides, the provision is against going out of England, which is not in our case.

Then 25 Ed. 3, 8. No man shall be constrained to find men of arms, other than those that hold by such services, if it be not by common assent and grant in parliament.—This extendeth not to defence of the kingdom. Besides, it is a provision for particular men specially required. Likewise it is only against finding the bodies of men of arms. But pressing of soldiers or men of arms, to serve in all manner of wars, hath been always so frequent, both in old, late and modern times, that it were a needless labour to prove that which every man knoweth.

All these statutes of 1, 18, and 25 Ed. 3, are confirmed by parliament, 4 H. 4, c. 13, and yet Rot. Parl. 5 H. 4, numb. 24, (which is observable for the time, being presently after 4 Hen. 4,) it appeareth, that there had been commissions directed to gentlemen of the country for arraying, arming and conducting of soldiers to the coasts of the sea, and elsewhere, in divers counties; and that there were many forfeitures and clauses comprised in those commissions: the observation of which was perilous to the commissioners.—The commission were brought into the commons house, and by them entertained as grievances. The commons upon deliberation, did obliterate certain clauses in those commissions, and prayed the king, that from thenceforth no commissions of arrayage should issue otherwise than was contained in an amended copy, which they humbly offered ready drawn. And that copy was agreed to by the king in parliament, after conference with the judges, and advice with the lords thereupon; and the tenor of the said copy was enrolled. And in the precedent thereof appearing in the Parliament-Roll, and being as for the county of Bucks, fifteen gentlemen of the country are made commissioners: amongst them I find the name of Hampden, I believe an ancestor of Mr. Hampden, the party in our great cause.

But to return; in that commission there is a recital of invasion and burnings, which had been by enemies: and that to resist them if they should again invade, 'ac pro salvatione et de-'fensione regni et ligeorum,' the king assigneth commissioners 'ad araiandum et triandum 'omnes homines ad arma, et ad armari faci-'endum omnes illos qui de corpore sunt po-'tentes, qui de suo proprio non habent, unde

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'seipsos armare possint, viz. quilibet eorum 'juxta statum et facultates suas, et ad distringendum omnes illos qui in terris et bonis sunt 'potentes, et pro debilitate corporis impotentes, 'ad inveniendum armatos pro illis qui non sunt 'habiles,' (where, by the way, I note, that in case of common defence, the people, not the king, are to be at the costs.) And the commission directs further, That the commissioners shall train and divide the soldiers, and shall 'conducere eos tam ad costeram maris, quam 'alia loca, ubi et quoties necesse fuerit,' (here is sending out of the county of Bucks, I am sure) and shall muster them; and that the armed men shall be armed with their own proper arms, and not with the arms of others, upon pain of forfeiture of them, (note the clause of forfeiture) 'et ad arrestandum et capiendum 'omnes qui fuerint rebelles seu contrarii, et 'prisonæ committendum, ibidem moraturi quo-'usq; pro eorum punitione aliter duxerimus or-'dinandum' (here is power of imprisonment.) That commission commands likewise the commissioners to array themselves, 'et insuper' to make beacons, whereby 'gentes patriæ de adventu inimicorum poterint congruis temporibus præmunire;' and a further clause, that the commissioners shall 'ducere' the soldiers 'cum periculum advenerit, ad costeram maris 'et alia loca, in defensionem regni et patriæ; 'ita quod pro defectu armationis et ductionis 'damna patriæ non adveniat ullo modo.'—The commission I have taken, and now repeat at large, because offered by the commons themselves in parliament, instantly after the confirmation of Edw. the third's laws, 1, 18, and 25 of his reign before-mentioned, and all by the judges advice.

All powers of command imply the duty of obedience. I say no more, but as arms and travelling by land are necessary for the defence of land, so ships and sailing, ordnance and tackling, and the necessaries mentioned in the shipping-writ, are most requisite for defence at sea. And thus I have passed all the acts of parliament cited or pertinent to our case; I confess they are *leges ligantes*, and I think that in my answers to them, I have not broken the bonds of them, with the which I acknowledge both my conscience as a judge, and my estate as a subject obliged.

The FOURTH General Head.—I come now, in the last place, to my Fourth General Head, which is, to answer the objections made by the counsel on Mr. Hampden's side.—The objections were of three sorts; some grounded upon reasons of law; some upon authorities and inferences upon records; some upon mischiefs and inconveniences pretended.

Object. 1.—2 R. 3, f. 10 & 11, was objected; where, upon the distinctions of 'potestas in curia, et potestas in camera,' concerning the assessing of fines, it is said that 'justiciarii regis 'per eorum discretionem assideb' finem, et non 'dominus rex per se in camera sua, nec aliter 'coram se, nisi per justiciarios suos; et hæc est 'voluntas regis, viz. per justiciarios suos et 'legem suam unum est dicere.' And it was said, that in the present case, the king hath not proceeded 'per justiciarios,' but 'per se' or 'in camera.'

Answ.—I answer, That in our case there is not any thing done in 'Camera,' the shipping-writ issueth out of the court of Chancery; besides, we are not now in the case of assessing a fine. It is true that, if a presentment, indictment, or information, be depending in the king's court, and so far proceeded in, as that judgment of a fine is to be given, this is not to be assessed by the king 'in camera, but by the king's justices 'in curia.' Howsoever, if we go to distinctions, there is 'potentia absoluta,' and 'potestas ordinaria:' I hope none will deny, but that the king hath 'potestatem absolutam,' in many cases. Stat. Westm. 1. It appears a man may be committed 'per speciale præceptum domini regis,' and is not in that case bailable.—20 Hen. 7. The king is Capitalis Justiciarius Angliæ.

I put you the case of Hil. 2 E. 3, p. 6. One having money of the king's wherewith to pay soldiers, misused it, and committed many outrages in Lancashire; a writ issued to the sheriff of Lancaster to attach him; being by virtue thereof attached, and brought to the King's-Bench, he was there discharged: the reason given by Scroope the chief-justice was, because the attachment being grounded upon a suggestion, was against the law: no such writ ought to have issued, unless there had been some indictment, presentment, or information depending. But I doubt not, if the king had by his absolute power made a special precept in his chamber for commitment of this man, he could not have been discharged.—The truth is, the objection upon the distinction of 'curia et camera,' is not rightly applied to this case; it might as well have been urged against a commission of sewers issued at common law, out of the chancery. The matter is, what the law is concerning the king's power, for provision towards necessary defence.

Object. 2.—It hath been said, that divers payments and promises of payments have been made by the king in all ages, upon occasions of his wars and provisions for the defence of the realm and sea: and many records have been vouched to that purpose.

Answ.—I answer, First, It is true: but more payments have been made by the subjects also in the same cases; as will appear, if we go to vie by records: multitudes have, to that purpose, been cited on the king's side. Secondly, In some cases, as of borrowing, purveyance, or the like, payment by the king was of right; but in the cases merely for necessary defence, his payment, or promise of payment, was of courtesy and grace, and is not binding in precedent, no more than in the case of mines royal. It appears by many precedents, cited in the case of mines common, That many subjects, owners of land, wherein were mines of silver, shared with the king: some had a twentieth, some a greater, some a lesser part,

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and this was objected against the king's sole interest, which notwithstanding was adjudged; and the answer made to those records was, That it was of the king's courtesy and grace, not of right: one may do with his own what he pleaseth.—But I will put you at large one of the records, which hath been cited, and let it be considered for whom it maketh. 23 Ed. 1, rot. 77, Ex parte Rememorator' Regis. There writs issued to divers mayors and bailiffs to make gallies, ordained by the king, and 'concilium suum:' It doth not say, 'commune 'concilium,' to be made 'pro defensione regni 'et securitate maris;' and in the record there is a clause, 'custum quod ad hoc posueritis, 'cum illud sciverimus, robis in exitibus balliva 'vestræ allocari faciemus.' But note, that here is a command they shall first lay out the money: and note, that there is this further clause in the same writs, 'Volumus autem quod bordas et 'meremium, quæ ad hoc competunt, ubi-'cunque ea invenire contigerent, et cujus-'cunque fuerint in villa prædicta vel extra 'pro galeis illis faciendis, capiatis.' I pray you note that clause, for the express words of Magna Charta are, 'nos non capiemus boscum 'alicujus ad castra, vel ad alia agenda nostra, 'sine voluntate ejus cujus boscus fuerit:' and yet it is commanded, that they should take 'boscum alienum' in this case, and I think warrantably; for the words in Magna Charta are, 'ad agenda nostra,' but the making the galleys commanded, was not 'agendum regis' within, but 'agendum regni,' without the meaning of Magna Charta.

Obj. 3.—Disusage, or no precedent for many years of this course now attempted, hath been objected.

Answ.—I answer, as it is said 11 H. 4, 7, et 38, upon that objection against the force of the statute of 14 Ed. 3, about the king's presentations to lapsed churches, that an act of parliament disused may be put in use, and so that law disused may be put in use, especially in the king's case, for 'nullum tempus, &c.'—Also, the thing hath been done, though not this particular way, supplies have been made otherways; sometimes by collection of moneys, and means without warrant of parliament; sometimes by liberal provisions and grants in parliament, in late king's reigns by benevolences, before Richard 3's time, in the manner commanded, and after treated.

Object. 4.—The several means and incomes, which the crown hath, have been distributed; as that it hath tenures and escuage for wars, customs and tenures for defence at sea, fines in the hanaper for the charge of his justice; and thereupon it hath been said, there is no cause, if these incomes were well imployed, to raise moneys through new ways.

Answ.—*Utinam* those great means and incomes could serve the turn. My brother Weston made a computation what the five ports service cometh to, and thereby it falleth short to be to any purpose. As for escuage, it is attendance out of the realm but for forty days, and that in case of mean tenures, if the tenants proper lords attend the king, for therein every one is to defend his own seignor for that time. Alas! What is that for a kingdom? Besides, are we sure the occasion of defence will press but for forty days? Again, what if the mean lords themselves go not in person?—But since I have occasion of speech of escuage, I must put you in mind of two sorts of escuage, by the law. The first is that before touched, and is commonly called 'forinsecum servitium.' And it is only for Wales, Scotland, and other the king's foreign territories. The second is of another kind, and is applicable to this case, in regard of charging the subjects, without their parliament-consent. It hath not been called for these many ages; but in the Black-Book of Tilburiensis, l. 1, c. 26, you shall find concerning it in these words: 'Fit interdum, ut in im-'minente vel insurgente in regnum hostium 'machinatione, decernat rex de singulis feodis 'militum summam aliquam solvi, marchiam 'scilicet vel libram unam, unde militibus sti-'pendia, vel donativa succedant: mavult enim 'princeps stipendiarios quam domesticos, be-'licis apponere casibus. Hæc itaque summa, 'quæ nomine scutorum solvitur scutagium nun-'cupatur; ab hac autem quieti sunt ad scac-'carium residentes.'

Object. 5.—This is a general charge; it appears by the Mittimus, that every county in the realm hath the like writs, amongst which many, as this of Bucks, are merely inland counties, they have no places to make ships in, no means to convey their ships (if they could make any) to the sea: they have no mariners, nor tacklings, &c. and so an impossibility, or at least, an improper charge is put upon them: the Cinque-Ports, the maritime towns and counties are furnished, and are aptest to be put to this service.

Answ.—I answer several ways.—The inland counties may provide all those things which they have not of their own, with their money; 'Pecuniæ omnia obediunt, nummus' is 'men-'sura rerum.' Also there is great reason they should join, by the rule of 'qui sentit commo-'dum, &c.' I am sure if defence be not made, they may 'sentire incommodum.' So by the rule, 'quod omnes tangit, &c.'

11 H. 7, Sir Wm. Herbert's Case.—The reason in law of charging heirs in gavel-kind, and of contribution to charges upon land, equally liable, cometh to this case. Also the whole realm is but one body; the division of it into counties, was by king Alfred. The king may make a county *de novo*, by taking out of another; may make two counties of one, or one of two, if he please. Then take the whole as one body, the several members center in it; if one member suffer, every member of the same body suffereth with it. But methinks there is more reason to excuse, than to charge the ports and maritime parts; in this case they stand between the enemy and the inland parts, they are the next door to danger; and it is fit they should not be let blood, but should keep it

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all, to serve themselves and the inlands, and not have means taken from them, whereby they may be disabled.

Besides, I refer myself to the several precedents, single and at large, cited by my brother Weston; by which it appears, that the inland places have heretofore been charged with provisions of gallies, ballingers, &c. for the seas. By the commission of sewers, it appears, that this course agrees with proceedings in like case, by the common law. F. Nat. Register. All who are within the level of an inundation, rich or poor, without respect of persons, are to be proportionably assessed, upon that commission. —P. 15 Ed. 2, rot. 70, in bk. w. The Case of Rippon, in Yorkshire, is notable upon this reason; by it, it appears, that the law was, that all that had salvation by the plaintiffs being hostages to the Scots, were by law compellable to bear their ratable shares, to raise monies for the plaintiffs' ransom.

23 Ed. 1. cl. rot. 1, memb. 4, dors. In a writ to the archbishop of Canterbury, the words and matter are notable also to this point: 'Sicut lex justissima, provida circumspectione 'sacrorum principum stabilita, hortatur, et 'statuit ut quod omnes tangit ab omnibus ap-'probetur: sic et innuit evidenter, ut in com-'munibus periculis per remedia provisa com-'muniter obvietur.' As to the objection out of the Records, 'per remedia provisa commu-'niter,' that should be by parliament; I think the contrary is apparent out of the writ: for the writ requires the archbishop, with the clergy of his diocese (not province) by their proctors, inasmuch as the king of France, 'Classe 'maxima et bellatorum copiosâ multitudine 'congregatis, proponens linguam Anglicanam 'omnino de terra Anglicana delere,' to come, by a short day ensuing, to Westminster, 'tunc 'ibidem ad tractanda, ordinanda et facienda 'nobiscum, et cum cæteris prælatis et aliis in-'colis regni qualiter sit periculis hujusmodi ob-'viandum.' Note, here is no mention of 'pro-'ceres;' and besides, clergymen have no capacity of knights or burgesses places in parliament, therefore this was not a treaty appointed or intended in parliament; which is further enforced upon the words ('ad tractand', &c. 'nobiscum et cæteris prælatis et aliis incolis 'regni'). If a treaty in parliament should have been, it had been readier to have expressed 'in parliament,' or in 'communi concilio,' and not to have used the other improper expression.— Besides, I do not find that any parliament was holden at that time, nor at any time between 21 Ed. 1, and 24 Ed. 1, whatsoever was said by Mr. St. John to the contrary. But if this treaty had been, or were intended to have been in parliament, it is not concluding; for it could not be but in parliament, as hath been urged.

Object. 6.—This way draweth to many ill consequences; for it stirs murmuring and grudging of the people, by reason of the burthens upon them.

Answ.—The consequence would be worse, if the kingdom should be lost, (which I cannot mention without a *quod absit*) and *de malis minimum*. Besides, popular grudgings are many, if not most times causeless; they are not to hinder doing of right.

Object. 7.—This is to become an annual charge upon the people; there is cause of thinking so, because since 11 Car. we have had every year new shipping-writs.

Answ.—If the necessity continues, the charge must continue. The same reason serves for the continuance as was for the beginning of it. Yet I deny that of itself it may be annual.— 'Cessante causa, cessare debet effectus;' but 'continuante causa, continuandus effectus.' This must be left to his majesty's justice, which God forbid that any should think he will abuse.

Object 8.—It hath been agreed, that if there were 'flagrans bellum,' if we had ('quod absit') 'a Hannibal ad portas,' then this course without provision in parliament, were not against the law. But it hath been said, that we have neither 'flagrans bellum,' nor a Hannibal, in our case.

Answ.—Let us consider what the reason is, why it is not against the law in case of 'flagrans 'bellum,' or 'Hannibal ad portas.' It can be no other but to avoid a further mischief. The same reason holdeth in our case, wherein there is apparently an 'initium malorum;' and in such times as we now live in, or 'rebus sic 'stantibus,' no man of understanding, but must acknowledge that security is dangerous.

Object. 9.—Tonnage and Poundage, which was used in former kings' times to be granted by parliament, for a provision of a stock, for those purposes for which the shipping-writ now issueth, is taken *de facto* by the king's majesty, though it be not yet granted him.

Answ.—Read the words of the statute 1 Jac. et ult. at large. In them observe, 1st. a confession by the commons, That Tonnage and Poundage hath been paid to the kings of England time out of mind: I say, it is so confessed; I do not say, that in truth it was so. 2dly. Observe the word 'towards.' 3dly. A confession that the Tonnage and Poundage are not sufficient for those purposes, for which it was commonly granted. The occasions are now for vaster expences than were requisite at that time; and what Tonnage and Poundage will not now suffice to perform, must be raised some other way. Also it is to be known, for an answer to the objection against the taking of it, as if it were not taken *de jure*, that Tonnage and Poundage hath been always taken, with a *continuando* upon the change of a king, before such time as a grant came of it by parliament; upon the demise of the king, the payment or taking it never ceased, or was discontinued, until it came to be due by grant of parliament.

Object. 10.—It appears that a parliament might have been holden; there are about six months between the teste of the shipping-writ, and the 1st of March ensuing.

Answ.—This receiveth an answer in itself; for if the king had been pleased to have called

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a parliament, to have had provisions granted, and by or before the 1st of March 11 Car. provision had been granted, yet the thing commanded by the shipping-writ in August, to be ready in March, could have but begun in March to have been then prepared, and so a whole year apparently lost; in which time, God knows what might have become of this state.

Object. 11.—But what if the king surmise only, that there is such danger as must be prevented, when in truth there is no such matter?

Answ.—Hath not the king a conscience? The law believeth his affirmation, and for that cause they are not traversable, as appeared by my lord Dyer upon the *Ne exeas regno*. 'Rex 'est recordum superexcellens.' *Teste meipso*, is his language; it is against the duty of a subject to contest with him. Again, it is a rule of law, 'Cuilibet in arte sua credendum est;' it is the king's proper art, to have intelligence of foreign intentions, to foresee public dangers, to conclude and put in execution what is necessary for the preservation of his estate and people.

'Tu regere imperio populos, rex summe, memento:
'Hæ tibi erunt artes,' &c.

Also Mr. Hampden, by his demurrer in this case, hath confessed all the matters in fact, which moved the king to issue this writ, and are mentioned in the writ.

Object. 12—26 E. 1, Pat. Roll. m. 21, hath been urged: there it appeareth that the king, desirous to amend 'gravamina populo nomine 'suo facta,' sent commissioners to hear and determine what takings had been from the subjects made in the king's name, but without his warrant; and to punish it presently, and to do right to the parties: but as for that which should be found to have been taken by the king's warrant; 'Le roi voil que soit certifie, 'et il eut ferra tant que ils se tiendr' apaies per 'reason.'

Answ.—Note the distinction in this case between the repayment and satisfaction by the parties for that which was taken without warrant, and the repayment, if it were taken by warrant of the king. For in case that which was taken by colour of the king's warrant was against the law, it was as tortious to the subject, as that which was taken without the king's warrant; and in all justice, the subject ought to have been restored to his right, with as much expedition in one case as the other. Also, as hath been already answered, the words are not 'they shall be paid' but 'le roi ferra tant que 'ils se tiendre apaies per reason;' that is, as I conceive it, The king will give them a reasonable answer.

Object. 13.—Upon the words 'requirimus et rogamus,' in writs to the bailiffs of diverse towns, when they were sent unto to array and send men at the expences of the towns, it hath been urged, *ergo* the thing required is a matter of good-will, and not of right; in which case it would rather have been a Mandamus, or a Præcipimus, than a Rogamus.

Answ.—Note the Requirimus precedes. Also the word Rogamus signifies as properly a commandment, as a prayer. Linwood. Also the words are, 'effectuose requirimus et rogamus,' Also, 'Cum princeps orat, precibus præcepta 'colorat.'

But since those writs are urged, let them be read; and it will appear, that in the matter of them, pertinent to this question, they make directly for the king. Eid. for that purpose, Rot. Sco. 12 E. 2, m. 7, dorso, but chiefly Rot. Sco. of the same year, m. 13, dors. In the writ to London there, the king reciting that the Scots 'fines regni Angliæ cum ingenti ar-'matorum multitudine ingressi,' had taken the castles of the king, and of his subjects, and did still hold them, and had besieged more castles; and that the king, by the counsel of the prelates, earls, barons, and the peers of the realm, had ordained (not a word of the commons) to be at York such a day, with an army; and they had promised to be there with him 'sumptibus suis 'cum toto posse suo; nos considerantes quod 'pro tanta necessitate, fideles et subditos nos-'tros, ut in præmissis manus apponant adju-'trices decet requirere et rogare, ac de vobis 'specialiter confidentes, vos effectuose requiri-'mus et rogamus quatenus ad præmissa consi-'derationem debitam habentes,' they should instantly array 500 footmen, and send them to the king, 'sumptibus suis.' Nota, All this done without warrant of parliament; and more court-like words, certainly, were of purpose used in such a time as that was, of instant necessity, 'ad faciendum populum,' than either needed, or might have been used, if it had been so thought convenient.

Object. 14.—Out of Pas. 26 Ed. 1, rot. 35, Commun' ex parte Rememoratoris Regis. Reginal Gray being commanded by the king to levy and conduct to the king 1,000 men out of Bromfield and Yale; he, by his letter to the king, answered, that he durst not chuse 1,000 men there, without warrant; and that he would not *mewer*, that is, move, in those parts without pay.

Answ.—His writing that he durst not, is not to the right, but in his judgment it was not safe, or might be dangerous. Also, he durst not without warrant, it may be, he thought the king's letter, without his great or privy-seals, no sufficient warrant. Also, it appears in the record, that the king had sent him word before, that the treasurer should ordain payment; but it seems pay came not; and then it is likely soldiers would not stir without money: They commonly cry Guelt, and if they have it not, are apt to disband.

Object. 15.—Repayments commanded by the king 'ut conscientia regis exoneretur' *ergo*, the king could not take of right in these cases.

Answ.—The record is 29 Ed. 1, commun' ex parte Rememorator' Regis; there is a command for repayment, 'Quia pro urgentissimis 'negotiis et pro utilitate et defensione totius 'regni;' the king had received of the abbess and convent of Canonleighe 612*l.* and had pro-

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mised repayment; note those words; And also, for that the abbess had petitioned the king in parliament for repayment. So here was a promise originally for repayment also in this case; a very great sum of money it was which was taken from one single corporation, more than was proportionable for them; and therefore just and conscionable, that repayment should be: this great sum was taken upon a scrutiny, 22 Ed. 1, in places where it was thought that money might be had. And upon that the foresaid sum was borrowed (unwillingly, God knows, as to the lender) of this abbess, and of divers other religious. The like scrutiny was made, temp. E. 2, and the like course for repayment, as appears Rot. Parl. 8 E. 2. And indeed, it had been before those times, and so continued, a usual thing, for our kings to look into the treasure of the religious, when they had occasion of money; and sometimes to take their silver-plate, and rich offerings, for supply of instant wants. And the religious would not fail to press upon the king's conscience, until they had restitution.

Object. 16.—12 E. 3, Ro. Alman. m. 22, dors. A letter to the archbishop to move all the people to pray and give alms for the king.

Answ.—I say no more, but will read what the record is itself *loquitur*. 'Pater, &c. Cum 'populis regni, variis oneribus, tallagiis, et im-'positionibus hactenus gravetur, quod dolentes 'referimus, sed,' note this *but*, 'inevitabili ne-'cessitate compulsi, de eisdem oneribus ipsum 'relevare non valemus' so no wrong confessed; necessity excused it, and continuance of a wrong cannot be justified. The king desires the archbishop to move the people, 'ut tan-'tam necessitatem humiliter, benigne, patien-'ter et charitative sustineant:' note those adverbs, especially 'humiliter.' And they would have a good opinion of the king, and would pray and give indulgences, to the end he might prosper in his wars for recovery of his right in France. (Note, 'to the end, &c.') 'Oneribus prædictis '(quæ non ex malitia vel præsumptione volun-'taria, ipsos gravant) non obstantibus.'

Object. 17.—Out of the Parl. Roll 13 E. 3, m. 9, & 11. The remembrances of the parliament. One of the points to be considered and proposed by the king, was for course to be taken for a navy at sea, and for recovery of Jersey, which the French then had conquered.

Answ.—In this proposition the words of the king are, 'Et per tant serr' les comons dis-'charges del guard del mere;' by which words it is evident, the king conceived, that the commons were by law charged with the guard of the sea.—It is true, the commons answer, They pray 'in drt. del guard del mere,' that they be not charged to give counsel, it being a thing whereof they have no cognizance; but they give their advice, that they think the barons of the ports should do it, and therein they confess, that the guarding of the land belongs to the commons, 'sans gages demaunder ou prender.' They could not deny but that the sea must be guarded. They put not the charge of that guard upon the king, but would place it upon the ports. Of what strength or power the ports were in those times, I know not; but in our present age, it is apparent, they are not by many degrees, near able to defend the seas, which must notwithstanding be defended, and that defence can fall upon none but the whole realm.

Object. 18.—Upon the Parl. 15 Pas. 2 R. 2, pars 1, where the speech of Scroope, then chancellor, is set down; he therein declared the cause of the summons of that parliament, whereby it appeareth, that a little before there had been a parliament at Glocester, and no provision for common defence was there agreed on; that after the departure of that parliament the king had assigned some prelates and lords to be of his continual council, for the year following; the said council treating and having before their eyes, the great mischiefs and perils with which the realm was on all parts environed, and the summer approaching, and no ordinance made in parliament for salvation of the realm, and resistance of the enemies. And the said council durst not take upon themselves alone the ordinance of so perilous and high an act; but it was advised by them, after Christmas to assemble a great council of all the great lords of the realm, prelates and others; and upon a second warning there came well near all the prelates, as well abbots as others, the earls, barons, bannerets, and other sages* of the realm; and then there the great perils and mischiefs to the realm being disclosed, by reason of the great apparent wars by land and sea, whereof no ordinance was provided; and moreover, it being declared before them, by the officers of the king, and treasurers of the war, as to the state of the king, and of the realm, that nothing remained in the treasury for the war; it was said, in the same council, 'Pur conclu-'sion final, que ils ne poient cet mischiefe re-'medier, sans charger le common del realme, 'que charge ne puit estre fait ne grant sans 'parliament; et per tant per assent de eux le 'parliament ore este somon' et in le meane 'temps que suffic' army ser' ordeine al mere in 'defence, et salvation del realme et del navie, 'et del coasts del mere a quel costages touts les 'seignors apprompterant voluntarement al roy, 'divers grand sommes del money. Et issint 'font bon gents de London, et d'auters vills, as 'quod le roy per assent fuit in dit grand coun-'sell, aurit envoy pur ce cause. Et ad done a 'eux son royall grt. pur repayment.' It hath been said, that the present question is fully answered.

Answ.—I confess that this Record hath a great shew of proof, that though there be an apparent and instant time of danger to the very 'salus reipublicæ,' yet no charge upon the commons may be made, or granted, without parliament. And indeed, this is the strongest proof upon any record, that hath been urged on

* Sages here are sage men, not Judges, as was objected.

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Mr. Hampden's side. But I think it will receive an answer with indifferent affections, if these things be observed. 1. That this consultation and drawing in question of the using of means, was before any charge actually imposed: Which now I insist not upon, because I have formerly touched upon it.—2. The king was then in minority, the law was not then clear and settled concerning an infant king's power. You see it was debated, and not resolved, until the time of Ed. 6. Vide the case of the duchy of Lancaster. Plow. Com.—3. The example of Latimer was then fresh; and the lords, it may be, were over-wary, upon his precedent, though it could not parallel with theirs, if they had undertaken, upon so urgent occasions, to have charged the commons, without their consent in parliament.—4. Note the words of the Record, That the lords, appointed counsellors, could not advise or find any means; and it is certain, that no counsellors, none but the king himself, could command so high a matter. The king then was not there; he was at that time scarce out of his nurse's care.—5. The people at that time were wavering, and full of discontents; they had withdrawn themselves from parliament.—Alice Peers had a little before played her pranks; and the young king was not fortunate in his then governing servants.—Lastly, The thing necessary, viz. Security of the kingdom, was done by another way, viz. by lending of money, as in the Record: But put the case it had not been done one way or other, then of necessity the people must have been charged, though without, yea, though against their consent; for the kingdom must not be lost, an *ultimum refugium* must be found out, rather than so fatal and final a mischief and misery must be endured.

Object. 19.—Rot. Parl. 2 H. 4, n. 22. Concerning barges and ballingers, commanded to be made without assent of parliament. The commons petition saith, That this had not been done 'avant ceux heurs,' and prayed that the commissions might be repealed. The king's answer was, That the commissions should be repealed.

Answ.—It is plain that those commissions, before that time, ceased of themselves; for they were made in Richard 2's time, and died with him. All commissions from the king are but authorities which end with that king from whom they issue. Also note, that the said Henry 4's answer in parliament goeth further, viz. But for the great necessity which the king hath of such vessels for defence of the realm, in case the wars should hold, the king would commune with the lords of this matter, and after shew to the commons for their advice. Which words are notable to this question. It cannot be denied, but this answer to the commons' said petition in parliament is, in effect, a 'Roy soi avisera.'—I note that Rot. Parl. 1, R. 2, m 52, there is a gratification by the king, in confirming of franchises to those cities and towns, 'que sont ore' (that is, now in this time of parliament) charged with the making of ballingers in defence of the realm. Here in this parliament just occasions were given to the commons to have complained of this charge, with the making of ballingers, charged upon them before the parliament, if it had been a wrong: but they complained not of it, for aught appears; and the king's gratification is no proof that it was as by way of recompence for a wrong; but it is plainly an argument of the king's grace to them, by way of encouragement of them in their services for the commonwealth. The like appears, m. 3, 2, Chequr. K. Rem. 'inter brevia directa baronibus.'—Also it is to be known, that in all king's times, some matters have been preferred in parliament, from the commons to the king, as grievances, which in themselves have not been wrongs, or against the law: We find in our books, there may be 'damnum absque injuria.'

Object. 20.—Parl. 7 Ed. 4, n. 7. In the beginning of the parliament, the king himself spake to the commons, and, amongst other things, promised the commons, he would live of his own.

Answ.—The king's speech stayeth not there, but goeth further, the words are these: 'I purpose to live of mine own, and not to charge 'my subjects but in great and urgent causes, 'concerning more the weal of themselves, and 'the defence of them and the realm, than mine 'own pleasures; as heretofore by the commons 'of this land hath been done, and borne, to my 'progenitors, in time of need.' Which words are remarkable: not a syllable in them of doing this only by common assent in parliament, but relatively, as heretofore, &c. which how it hath been *de facto*, you have heard; namely, sometimes in parliament, and sometimes out of parliament.

The last material objection to be answered by my memory, is the authority of Fortescue in his De Laudibus Legum Angliæ, where he saith, cap. 13, 'That the king of England is *Rex po-* 'litice regens; and *regulariter*, to do what he 'please.' This needs no answer, it is agreed. But he farther saith, cap. 9, That the king may not 'populi substantias proprias subtrahere, re-'clamantibus eis vel invitis;' that he may not 'Tallagia et cætera onera eis imponere ipsis in-'consultis;' That he may not 'subjectum po-'pulum renitentem onerare impositionibus pe-'regrinis.'—I answer, that 'tis most true 'regu-'lariter, et regula non facit jus, et nulla regula 'quin fallit.'—Cases of necessity, cases of 'bo-'num publicum,' cases of 'salus reipublicæ,' are not to be comprised within ordinary rules. I have spoken so much hereof already, that now I will say no more, but conclude, that in cases of necessity, 'pro salute reip.' every subject must (even by rules of law) bestir himself; must contribute his best abilities: must set-to both his helping hands.—Rich men must expose their treasures. Able men of body must put on arms. Great counsellors must give their best advice. Women must not be idle. Old men and clergymen (if they have no other powers)

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must attend their prayers. And Judges must press and enforce the laws upon the subjects to compel them to contribute.

And so I have done at this time: and what I have said, I have spoken to the best of my understanding, and in discharge of my conscience in a case of 'salus reipublicæ.'—And it being high time now for me to give over, I conclude upon all my reasons and authorities cited, That as this case is upon the pleading of it, the charge of 20*s.* imposed on Mr. Hampden, towards the provision of a ship, commanded by the writ of 4 Aug. 11 Car. regis, is consonant to law, and consequently, that Judgment ought to be given against him, *Quod oneretur.*

The OPINION of Sir GEORGE VERNON, knt. one of the Justices of his Majesty's Court of Common-Pleas at Westminster, delivered in the Exchequer-Chamber, in the Great Case of SHIP-MONEY.

This is a cause of great consequence, and is one of the greatest that ever came in question in this kingdom, and the records are infinite that have been cited on both sides; but by reason of want of health, and disability of body, I have not been able to peruse the records as I intended, and to have prepared myself, in which I am to argue; and therefore I would desire time until this day seven-night, to peruse the records and compare my notes, wherein, as you may see, I have taken great pains, [producing his Notes to the Court] that I may be the better prepared to deliver my opinion in this weighty matter: and then, God willing, I will not fail.

[But it was answered by the Court, That in regard certain days have been peremptorily appointed at first for their Arguments, it could not be altered now, nor could they give him any further time.]

Whereupon he said, 'Seeing I may not have 'any further time, I must therefore deliver my 'Opinion in brief, according as I have conceived 'it in my conscience to be, which is as follow-'eth, viz.

'That the king, *pro bono publico*, may charge 'his subjects, for the safety and defence of the 'kingdom, notwithstanding any act of parliament; and that it is warrantable by Gascoigne, '13 Ed. 4, 14. and moreover, that a statute 'derogatory from the prerogative doth not bind 'the king; and the king may dispense with any 'law in cases of necessity, 2 Hen. 7, 11.'—And so concluded for the king.

A few Notes of the ARGUMENT of Sir THOMAS TREVOR, Knt. one of the Barons of his Majesty's Court of Exchequer, in the great Case of SHIP-MONEY.

After he had opened the record he said, the question upon it was, Whether Mr. Hampden should be charged with the 20*s.* imposed upon him, as this case is? This case, by reason of the weightiness of it, is adjourned from the Exchequer hither to be argued, and the advice of all the judges is required herein; many days have been spent in the arguing of this case, as it well deserves; six days by the defendant, and six days on the king's side.

It is some labour, in a case of this extent, to contract myself, according to my conscience and best knowledge: I shall seriously ponder the weight of this case, and digest it, as by the law is warrantable, and so grounding my judgment accordingly. And the judgment which I shall give, in fine, is, That Mr. Hampden ought to be charged with this 20*s.* and is to give satisfaction for the same. My lord Coke saith of a short case in his 11th Report, that though it be as short a case as ever was argued, yet the weightiest in any court for consequence: so it may be affirmed of this question, for the sum is but 20*s.* but the weight thereof is of far greater extent: it concerneth the whole kingdom.

Mr. Hampden hath demurred, and thereby hath granted all matters of fact to be true. The defendant's counsel have taken much pains for their client; and, without flattery, so have the king's counsel.—I acknowledge the laying of a charge upon the people by parliament is a safe way, if time and occasion will permit. Anno 1588, when the Invincible Armada, so termed, came into England, the provident care for the prevention thereof was out of parliament. Alas! it is not parliaments can keep us safe. Was not that detestable Gunpowder Treason, 3 Jac. devised to have been executed in the parliament time? the wisdom of the parliament did not discover this utter ruin and destruction, that had like to have happened to the king and kingdom, and to the overthrow of religion; but it was the great mercy of God that did it.

This kingdom hath been always monarchical: A democratical government was never in this kingdom. In the time of the Britons, 500 years before the birth of our Saviour, when Brute came from Troy into Britain (as one writes) it had a politic and regal government; this is confirmed by the Letter from the Pope to king Lucius. And our king hath as much power and prerogative belonging to him, as any prince in Christendom hath. It is the king's prerogative to appoint the beginning and ending of parliaments. So great a body can move but slowly. A great part of the seven months would be spent, or the parliament ended; and then we were but to begin to rig and trim our ships, to provide powder, shot, cables, &c. many of these, perhaps, to be had in foreign parts; masters and gunners, &c. to be got: ready money must be had for the providing of all these; this will require convenient time before this can be done. What hazard may the kingdom run all this while? what policy is there to make state affairs known to the people? They may thank themselves, they would not make a ship for the service, and then they might have had it for their own use afterwards. When the kingdom is in danger, the king may command a supply for prevention thereof; and who can tell better than the king how to prevent the danger? 'Ne-'cessitas non habet legem.' The king then

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must not forbear. The common law doth regard the common good above particular; as in pontage, murage and paveage.

The provision of shipping hath prevented us from danger hitherto, and I hope it will still. It hath increased the honour of the kingdom. It is known not only to ourselves, but to other princes, that our ships are of far greater burthen, strength, and better furnished, than ever was before. All which redoundeth to the king and kingdom's honour. The ship, called the Sovereign of the Sea, may be termed, the Sovereign of all Ships.

To conclude: the sum assessed for this business, I wish it may be paid by all chearfully, for it is for a general good, for the safety of the whole kingdom: the subjects are not prejudiced by it, either in their dignities, or properties in their goods: the king's prerogatives protect the peoples liberties, and the subjects liberty the king's prerogative: it is proper for kings to command and subjects to obey. We that are the judges of the kingdom have paid it, and therefore it is fit our opinions concur with our actions in this case. And so my advice is, that Judgment ought to be given that Mr. Hampden ought to be charged with the 20*s.* assessed on him.

The Argument of Sir GEORGE CROOKE, kt. one of the Justices of his Majesty's Court of King's-Bench at Westminster, in the Exchequer-Chamber, in the great Case of Ship-Money.

This case of Mr. Hampden's stands upon record, and what judgment may be upon this record is the question. I find no party in this case but Mr. Hampden. A Scir' Fac' is brought against him, to shew cause why he should not be charged with the 20*s.* assessed upon him, towards the finding of a ship. The occasion of that was the writ of 4 Aug. which is the foundation of all; and that is directed to the sheriff of Bucks, as to other sheriffs, to prepare a ship of such a burthen, for the reasons mentioned in the writ, 'Quia prædones, &c.' because the kingdom is infested with pirates, &c. 'Quod datum est nobis intelligi, '&c.' for that they do seek to draw men into captivity; and also lest we should lose the dominion of the sea; and for these reasons these writs are sent forth. For the time that they were to continue abroad, it is twenty-six weeks, so long the payment of the men to be at their charge; 'et quos rebelles, &c.' and if any do rebel, that they should be imprisoned. And so the record setteth forth further, that upon this writ a Certiorari went forth, and Mr. Hampden was certified not to have paid it.—Now upon all Mr. Hampden hath demanded Oyer of all the writs, and hath demurred.

I must confess, this cause is a very great cause, and the greatest cause that ever came in question before any judges. And for my own part, I am sorry it should come in question in this place, more requisite it was to have it debated in a public assembly of the whole state; for on the one side, it concerns the king in his prerogative and power royal; and on the other side, the subject, in his lands, goods, and liberty, in all that he hath, besides his life.

For my own part, I am sorry that I am enforced to dissent from my brothers that have argued before me a fitter course it were for me to have argued with them privately, who have argued so learnedly: and well. I have studied all that I could to have concurred with them; but speaking, according to my own heart, (for we are to give judgment upon our oaths) in respect of my reason and conscience, I cannot concur with them; it makes me at a stand with myself, because of the arguments of so many learned men before me, and to suspect my judgment, whether it be erroneous or no. Yet I must set down my own reasons, and upon them leave them to my lords that come after me to judge on.

Judgment is of the Lord; the hearts of men, and also their judgments, are in the hands of God; and when judgment is once past, we have done. For my own part, I know in this case we cannot do so well as we should, but to satisfy ourselves in our consciences and our understandings; and in this case we are to give counsel to the king according to our oaths, whether this charge be legal or not. If legal, the subject ought not to complain: if not legal, then not in the king's power thus to charge the subject.—The king's counsel have maintained this writ to be good; and the judges that have argued, in their judgments have maintained it. Then the king is advised by his judges, Whether this be legal or no? If legal, it is well; if not, then the burden lies upon us. For the king doth nothing but what he is advised.—The case hath been excellently, learnedly, and well argued on both sides; for that which was pressed by counsel on either side, did not much move, for they argue as counsel: and we are to give judgment upon our oaths, on what they have said.

But the judges opinions already delivered do much trouble me. When I have been of counsel, I have argued one way, and have thought myself very clear; when I have come as a judge, and argued, I have thought clear otherwise of the case. I desire to give judgment in this case according to God's direction, and my own conscience, and that is the best. And so I do not doubt but all my brothers have gone according to their conscience, which makes me suspect myself. But every man standeth or falleth to his own master. I desire God to guide me to a true judgment; and though, for the reasons aforesaid, I doubt myself, yet I am not of the same opinion with my brothers: but according to my conscience, I think that Judgment ought to be given for the Defendant; for which my argument shall stand upon these points.

1. I hold that this writ is not allowable by the common law, but is a writ absolutely against the common law. 2. Admit it was

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good at common law, yet it is against divers statutes. 3. I hold, that no necessity, nor no pretence of danger, can give this cause for the writ: for if the writ be against the common law, no pretence of danger can warrant it. 4. There is no warranty by prerogative of the crown, nor power royal, for this writ. 5. That this writ is the first writ that ever was devised in this kind, and first put in practice, either in inland counties or maritime parts. 6. That there is not any one precedent, nor any one record judicial, or judgment in point of law, for the writ; if not, then I hold it not fit to be maintained.

I come now to the writ itself. 1. I hold the motives of this writ to be insufficient to warrant the same. 2. The commands of the writ are merely against the law; because the commands of the writ are, to charge the subject to find a ship with men, munition, &c. against the words of the common and statute law. 3. If they were, yet the assessments of the writ are not warrantable by the law, and so no assessment: and if no good writ, then the Scir' Fac' will not lie. 4. I come to the Certiorari: and whether it be well-grounded, or no, is the question. And I hold, it doth not well issue, as this case is.

1. For the point of law. We that are judges are bound, according to the law, not according to our own imaginations, both to judge according to the law, and the law of this land, either of the common law or of the statute-law: and I see no book, nor know of any authority that doth maintain this writ; but contrariwise, there are books and authorities in law, that say, this writ ought not to be maintained. It is a rule in Littleton, that 'That which was never 'done before, cannot now be done.' I say, there cannot be produced an example of the like writ, I mean the writ 4 Aug. 11 Car. that ever went unto the whole kingdom, to make ships, &c. nor unto all the maritime counties, at one time; but it is the first precedent, either for inland counties, or maritime parts; and if no precedent before, then not by the law to be maintained.

2. It is against the common law of the land, which gives a man a freedom and property in his goods and estate, that it cannot be taken from him, but by his consent in specie, as in parliament, or by his particular assent: for the law puts a difference between a freeman and bondman. A bondman's goods may be taken without his consent; but not so of a freeman.

Then thus stands the case, and the question ariseth, Whether this writ to command the subjects in any inland county, to prepare a ship, and provide men, munition, &c. went out by their consent? And whether allowable or no, if without their consent, for this is a charge upon the subject. And I say, no common charge upon the subject ought to be but by a common consent, or in a parliamentary course. Mr. Lambert saith, that in the Conqueror's time the king could charge the subject with no unjust taxation, nor tailage, 'sed per commune 'concilium.' And that was a law not given by the Conqueror, but allowed by him, as to be the law of the kingdom.

In the Charta in king John's time, it is plain; the liberty of the subject is there confirmed, 'Nullum scutagium, nullum auxilium nisi per 'commune concilium.' It appeareth plainly by the books, that this cannot be done but by consent in parliament. Fortescue chief justice setteth down what the law of England is in that kind, as instructions for the young prince. Saith he, 'The king governeth his people by 'power, not only royal but also politic.' If this power over them were royal only, then he might change the laws of his realm, and charge his subjects with taillage, and other burdens, without their consent. Thus the king can change no laws, nor yet charge them with strange impositions against their wills. He setteth down, as the head is the chief of the body, so the king is the head of his people: He cannot take any thing from them, without their ordinary consent; the common consent it is in parliament. Cap. 3, an express clause there, *hoc individuo.* Shew me any book of law against this, That the king shall take no man's goods, but he shall pay for it, though it be for his own provision; or lay any burden upon his subjects, but he must do it by their consent in parliament. If this be the privilege of the subject, then it is express, the subjects ought not to have this charge imposed upon them, but by their common consent. Though it be said, a statute is the act of the king, the lords and the commons only give their consents; I say, it is the act and grant of the commons, as well as of the lords; for what consent is given there, is given by every man of the kingdom, by the power of the voice which they gave in chusing the knights of the shires and burgesses. There is a book case 13 Hen. 4, fol. 14, expressly, That no man shall be charged without his consent in parliament. Gascoigne, chief justice, gave it as a rule. Coke's Reports, Clark's case, No man to be charged in St. Albans, but with their consent.—In the Chamberlain of London's case, to put a small sum upon a merchandize, &c. when it is for the good and benefit of the people, is a thing to be allowed through a common ordinance to be good, so they have no loss by it; as in case of murage, pontage, paveage, and tolls of markets: Taxes upon the people for these are allowed, because they are matters for use of the people, and are not as a matter of charge imposed upon the people.

Fitz. Herb. Na. Br. The king hath the government of the whole kingdom, both in time of war and peace. None will deny but that he may command, that no man can doubt of; and therefore in that kind, in point of inundation, the king, by his writ, commandeth, That that shall be stopped, and be done by those that have benefit or loss by the inundation; and those only are to be charged, as come unto Kent: If an inundation be in Kent marshes, shall the county of Middlesex be charged there-

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with? No; but those that have profit by it, or have loss by it. Vid. the 10th Report.

Then here standeth the case; if that be so, the question is not now, Whether a common charge may be levied upon the subject, without consent: No question but a common charge may, if occasion, and every man ought to obey it.

But the question is, Whether, upon the allegations in this writ, there shall be a charge to impose money upon them in the mean time, without their assent? I say not, but by a parliamentary course: in that kind the common law doth not allow it. A notable case in 14 E. 2, Banc. R. rot. 60. Heb and Lever's case in Durham. An action of trespass was brought against Lever for taking away the chest of Heb's, with goods and money in it, he pleaded not guilty; the jury gave a special verdict, That the defendant took the money; but it was upon this occasion: The Scots had invaded Durham, and burnt divers houses about Durham; upon which the inhabitants of Durham assembled together to consult about their defence; and took an oath to obey the ordinance to be made by consent amongst them; whereof the plaintiff was one that swore, and gave his consent. Whereupon they made an order to give the Scots a sum of money to depart, but they would not be gone without ready money; whereupon they made a second ordinance, That every man's house should be searched, and where they found money, to take it: Thereupon the defendant took the money out of the plaintiff's house. The judges asked the jury, if this last order was done with the plaintiff's consent. They said it was done by reason of the occasion. Thereupon judgment was given for the plaintiff: That because it was not with his consent, that therefore they ought not to be charged. It came into the King's Bench, and they seeing of this special verdict, the judges of the King's Bench reversed the judgment; for why? What was done, was done by his own consent and proper act, because of his consent upon his oath; and therefore (said the judges) he had means to help himself against the commonality of Durham, and they to pay him again to his proportionable part. This proveth, That no man ought to part with his goods, but with his consent.

That of Rich. 2, which is not a statute, yet doth shew, that the law was at that time, as it is the same at this day. Advice was taken in a great assembly how to charge the commons: And it was answered, That they could not be charged, but by common consent in parliament. And it was the declaration of Scroope in the parliament-house, That without consent in parliament, the commons ought not to be charged; because the commons have a consent in parting with their goods. It is said in Doctor and Student, That the subject hath such a property in his goods, that no man shall meddle with them, but by his consent; which is the reason they recover damages when they meddle with their goods, not by their consent.

Another reason why the common law looketh into it is, because of the inconveniences that might insue, if this should be allowed. To charge one ship, by the same reason there might be ten ships charged. We have a pious king, and though he will not do it, yet the law looketh into this inconvenience. That of Danegelt began in the year 991. The first composition was 10,000*l*; the second 16,000*l*; the next 24,000*l*; the next 36,000*l*; and in 10 or 11 years, by five several risings, it came to 48,000*l*. And so, for aught that I do know, this may come to forty hundred thousand pounds. Therefore the law looketh to make certain the charges. The first double subsidy that ever was, was 31 Eliz. and the Chancellor of the Exchequer said, it did make his heart to quake to move for a double subsidy, one subsidy being granted so lately. The reason of it was, because the Spanish invasion was foreseen.—After the Spanish invasion was past, then came the second grant of a double subsidy; and he said, he hoped not to live to see a subsidy granted again. 33 and 39 Eliz. it came to three subsidies, and four subsidies, but if there had been ten subsidies, what was done, was done by parliament; and the law alloweth it because of the greater inconvenience. Then it is in the judgment of the parliament for the appointing of those subsidies, as the occasion requires.

The statutes of Tonnage and Poundage, as appears by all the statutes made in Rich. 2, and continued till Hen. 4, 5, 6, 7, and so downwards to king James's time, are to the end the king might have money in his coffers for the defence of the realm, and for the safe-guard of the sea, that he might not, upon a sudden occasion, be unprovided; because it is reason and fitting that kings should ever have money ready against any occasion. But now it is not granted, yet it is taken, the same profit is made still: and I do not doubt but the king doth imploy it for the defence of the kingdom, and safeguard of the sea. The difference between a charge and defence is much; for the first there is no law to compel the subject unto it, but by parliament: for the second, which is the defence, every man's person is bound in defence, 'exponere se et vitam ipsam,' upon peril thereof; but he is not bound to any charge without his consent. So in this kind I hold, as the law standeth, that no charge ought to be imposed, but by their common consent; for you will make it all one to take away the property of the goods, which you do *quodam modo*, though not *in specie*. Power is given to distrain the goods, and to sell them; and every man is liable to the discretion of the sheriff.

But admit this charge might be imposed by the common law, yet I do conceive it is prohibited by the statute; for I hold, as now my brothers the judges have held, that the statute De Tallagio non Concedendo, is a statute, notwithstanding what hath been argued at the bar to the contrary. It is apparent in our printed books; and in one of our books, the

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express time is mentioned when it should be made, viz. 25 Ed. 1, then it is said to begin. Taillage is an antient aid, and so is, 'pur file 'marier,' and 'pur faire fitz chevalier;' but no taillage without a common consent in parliament; so I agree with my brothers, that it is a statute.

Next this statute of 25 Ed. 1, which is said to be no statute, the kingdom of England hath ever held it for a buckler for them, that no charge (without common consent) should be laid upon them. And the reason wherefore this statute was made, was in respect of the great taxes imposed on the subject without consent, in time of war.

The next statute is 14 Ed. 3, cap. 1. A great subsidy was then granted. What was then done? The king doth grant for him and his heirs not to put them to any charge hereafter, unless it be by common consent in parliament.—Oh! but this is but for that king himself alone!—I answer, it is perpetual. If the king doth grant for him and his heirs, it doth go to all his posterity, and is a good act of parliament; so that is the second act of parliament in the negative, that no charge shall be laid on the subject, but by common consent in parliament.

That which is stood upon by my brothers, is 21 Ed. 3. That statute was made to grant a subsidy upon every sack of wool; and also taxes upon merchants goods transported, 6*d.* in the pound. This statute thus made, the king afterwards, because few of the sacks of wool were carried over before Michaelmas, sent forth a proclamation, that 6*d.* in the pound should continue till Easter, and no longer: but half a year after this was complained of to the king, and the king (by proclamation out of parliament) did take away the 6*d.* in the pound. 22 Ed. 3, in the February then next following, an express act of parliament (this subsidy so granted) to continue till Michaelmas, and by proclamation to continue, till Easter.—They confirm all till Easter, and no further continuance of it to be.—By this appeareth, that for so small a thing as 6*d.* in the pound for such a time as from Michaelmas to Easter, that it was a charge not to be borne but by consent in parliament.

4 Hen. 4, m. 28. A subsidy granted, that this should not be drawn into example to charge the people, but by common consent, and that in parliament.—13 Hen. 4, m. 10. There it is said, where a subsidy is granted, it shall not be granted henceforward for defence of the kingdom, or safeguard of the sea, but in parliament.—Then came a parliament. What did they complain of? The patent of the office of Alnerage, though it was but a small charge, yet they set down that this was contrary to the law, that no taxes, nor no aid should be imposed on the people, without consent in parliament: the commons were then very zealous in small matters.

2 Hen. 4, m. 22. *Hoc individuo.* At that time a commission went forth to divers towns in the kingdom, to provide, &c. When there came a parliament, 2 Hen. 4, they complain of those commissions that inforced them to do that which by the law they ought not to do; and prayed those commissions might be repealed: the answer is absolute, 'Let it be done.' 'Soit fait.'

The next is 1 Ric. 3. True, the king was an usurper. Benevolences were granted; but that was no charge, as ours is, and therein the commons claimed their liberties.—Lastly; the concluding law is that of 3 Car. the Petition of Right, that no person shall be taxed without consent of parliament: and when the king was informed of the former statutes how they were; thereupon this statute 3 Car. was made, which reciteth the statute De Tallagio, and divers other statutes; and it was referred to my lords the judges (most whereof are here) whether this law doth give more than formerly from the king. And we were all of opinion, that this law did give no more than what was formerly, and was only but a reviving of the ancient privileges of the subject; it added no more, but only revived what was formerly granted.

I do conclude, that no charge can be imposed upon the commons, without their consent in parliament. We that are judges, must go according to the intention and meaning of those laws. The meaning of the laws in this kind was, that no manner of charge, aid, or tax should be laid upon the subject, but by consent in parliament. The judges are to expound them according to their intention. But they say, the practice hath been otherwise. We say not now what *de facto*, but what *de jure* was done; and we, as judges, must not allow *de facto*, 'sed quid de jure factum fuerit.'

To answer the great objection, it is for the defence of the kingdom: here is such a necessity and danger, as will not admit the delay of a parliament.—I hold, for my part, that no necessity nor danger can allow a charge, which is a breach of the laws. I hold it absolutely, that for a general charge of money upon the people, it cannot be upon any pretence of danger or necessity. Mens persons may be used in the case of necessity or danger; for every man is bound to defend the kingdom, but no necessity can procure this charge without a parliament. The law provideth a remedy, in case of necessity and danger; for then the king may command his subjects, without parliament, to defend the kingdom. How? By all men of arms whatsoever, for the land; and by all ships whatsoever, for the sea, which he may take from all parts of the kingdom and join them with his own navy; which hath been the practice of all former kings: in their necessity they have taken ships from all parts of the kingdom. 10 Ed. 3, m. 2, Scot. 10 Ed. 3, m. 16, when there was a great navy of Scots and French appeared, and intended to come and invade the kingdom, the king appointed two admirals, one towards the North, the other towards the West, and to meet together at what place he pleased; and m. 16, sent into North-Wales and South-Wales to maintain one ship, either of them

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upon their own coasts of the sea, for the defence of the kingdom. And in Rot. Alm. 12 Ed. 3, writs went for the arresting of ships in all parts of the kingdom. Rot. Viag. 1 H. 4, m. 12, writs issued to all archbishops and bishops, shewing imminent danger, that they should be ready in arms, to come and assist 'ad custodiendum mare,' whithersoever he should appoint them. But in that time, when the danger was such, yet no ships appointed to be prepared throughout the land. And 5 Hen. 4, that all the men of all parts should come together in such a place: this was only an arraying of men to be in readiness. 3 H. 5, to the same purpose. And 1 Hen. 7, which was much stood upon, of a rumour of wars between the king of the Romans and the French king, which might, perhaps, in the end tend to an invasion of this kingdom, there was an arraying of men, from 16 to 60, and gathering of ships, and taking order for watch and ward upon the sea-coasts, but no command to make ships. 4 Hen. 8, pars 2, there the king by proclamation saith, that 'the enemy is ready to enter, 'ships are furnished with men of war to invade 'the kingdom.' What then? What was done then? It is no more, but that every county in England have men in readiness to assist, from 16 to 60, to defend the kingdom, and to have good watches and wards upon the sea-coasts.

But, I pray you, in all these times of Hen. 8, Hen. 7, Hen. 5, Hen. 4, were there ever any writs went forth for ships into any county? It doth not appear that any county was to prepare or make any ships; but only men in arms: so the law makes provision, in time of danger, by help of their persons, and with ships, not with a pecuniary charge; for that cannot hold for any, nor can be done without parliament. And if new ships must be made, it must be made by parliament. If so be the writs be to make ships, then let the sheriffs make them, and shew for their discharge upon record, that they are made and prepared. But to appoint by writs ships to be made, and by their directions appoint the sheriffs to levy money to pay off some of the ships, was never yet done, this being a precedent of the first impression. The law did always account the parliament able to provide and to give sufficient aid, and most fit to consult *de arduis regni*; and there is a consent of and grant of the commons to what is done, they are actors in it.

By the old law of Alfred, parliaments were to be held twice a year; and by express statute made 4 Edw. 3, 14, an express law was made, that every year a parliament should be held, especially if need required. And by another statute, for avoiding of grievances that daily happened, a parliament should be held once a year. Then it is to be conceived, a parliament may be called, and things may be charged that way.—And for the objection, that a parliament is not the speediest way to prevent the danger; the imagination of man cannot invent a danger, but course may be taken for defence, till a parliament be had. So, for my part, I hold this point of necessity, or danger, cannot be held a sufficient ground for this writ.

The next thing is this; yea, but this is maintained by prerogative and royal power. I say for that, by my oath I am bound to maintain all the true prerogatives of the king; and we that are servants to the king must maintain his prerogatives, and, to the best of our skill, not suffer them to be diminished. But I hold there is no such prerogative in this kind.

The prerogative is, that which the law presumeth, 'That the king can do no wrong.' and so it is in Bracton, 'Rex potest facere quod de 'jure potest facere.' 11 Rep. Magdalen-College Case, 246. Plowden's Comment. The king can do no wrong, nor any act to wrong the subject. Bracton, 'Hoc non potest agere 'quod non potest agere juste.' Therefore if this charge be against the law, so much to the prejudice of the subjects, as I conceive it to be, the king will never do it; for it is done by misinformation that it hath been usually done, and may be justly done. 21 Edw. 3, a patent is made, which is a wrong to the subject: the king, *de jure regis*, ought to revoke the patent; for the law hath that honourable conceit of the king, 'That he can do no wrong.' A king, therefore, to have a royal power or prerogative to do that by his writs, to command any thing to be done that is against the express laws of the kingdom, to the infringing of the liberties of his subjects, is not admitted by the law: the royal power is to be taken away; for as it is before said by Fortescue, he can change no law, nor charge his people, but by common consent in parliament. So, for my part, I hold that this same charge upon the subjects, by his royal authority, it is not allowable.

The king, we know, is a most just and pious king, that he will do nothing against his laws; if he did know it to be against law, he would never desire it. When a judge of the land was called in question, in queen Elizabeth's time, about denying some loan, delivering his opinion against the same, he said, it was against his oath, and against the law, to advise her majesty to it. With which she rested satisfied. If the judges say, by law the king may do this, he may do it: if they say no, but by act of parliament, he will never do it.—But it is said, the king taketh the course, 'more ma-'jorum.' There is not any precedent especially maintained, by any judicial record, that warranteth this course: and if there were any precedents, we are to judge according to the law, and not according to precedents; not to judge what hath been done, but what of right hath been done. 11 Rep. Magdalen-College Case, though there be many precedents, that maintaineth not a right; the question is still, Whether a right or not?

But admit that precedents could make it to be lawful, yet I hold there is not any one precedent to maintain this case.

For, first, I say there is no one precedent goeth to inland counties all over England, before

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now. I say, to maritime counties to prepare, as my brother Berkley confessed, that he knew none for any inland counties, but 1 Ric. 2, 11, 52, their writs went out to divers inland towns, but not to counties, to make ships; and besides these, were not any to inland counties.—To this I say, those writs that went out at that time were done by conveyance in parliament: for an order was made in parliament, that all that had any charters, the antient cities, boroughs, and towns, that had any charters of liberties, should there be examined; and appoints how, and by whom; and have their liberties confirmed without fine, if they would produce ships for the defence of the kingdom. But yet in this record not one inland county or maritime county is charged, nor no inland town, but those that would have their liberties confirmed.

Now to look upon the precedents of king John's time, 6 Joh. 9 Joh. 14 Joh. &c. here be the six precedents in court; and I have looked into every precedent on the king's side, to satisfy myself; and all those precedents are only for arresting of ships, that they should not go forth of the realm; and 15 Johan. all ships to be ready as the king shall have occasion.—Then we come to Hen. 3d's time: 13 Hen. 3, m. 5, 13, &c. there are six of these records, I have read them all; they are no more, but only to port-towns, to arrest ships, and the rest to have men at arms, in readiness upon the sea-coasts, and that but for forty days.

Then for the precedents of Edw. 1.'s time, all of them being examined, not any one of them go to the counties. 13 Ed. 1, 77, divers ships are appointed to be made, but it is *ad sumptum regis*, and only unto sea-towns; the record shews, that by the barons of the exchequer they have an allowance for it. 23 Ed. 1, m. 5, same roll, a writ to the sheriff of Norfolk, to compel them to maintain their sea-coasts. 14 Ed. 1, a writ 'ad congregandas centum 'naves paratas,' and armed men to be put in them. So to command in that kind the king may, and we must obey; he commands ships ready made, not to make them. Afterwards, 14 Ed. 1, rot. 17, several writs to the archbishops and bishops, to attend with their arms in readiness, to maintain the coasts. 14 Ed. 1, rot. 78, a writ to the county of Berks, a thing much stood on; it is only for matter of array, if it be well looked into, and no matter of making or finding of ships; and divers other writs in this king's reign, for maintaining of armies in their proper counties: and no man can deny but that every man in his proper county is to go to defend the kingdom. And also for having of all ships of above 40 tons in readiness: but to make new ones, in any inland county, is not warranted by any precedent, that I can see; though I have looked over all the records that have been brought unto me; no, not in maritime counties, to make ships.

For the precedents of Ed. 2's time, 9 Ed. 2, &c. to put them all together, they are only to congregate ships to be in readiness, but not to make new ships.—To come to Ed. 3's time. 7 Ed. 3, m. 9, command is to assist the admiral with their ships, as occasion shall require. 10 Ed. 3, 11, a precept to port-towns only, to bring their ships to Portsmouth, for 13 weeks, furnished with victuals, &c. 2 Ed. 3, 16, not to depart without licence. 10 Ed. 3, 12 Ed. 3, Rot. Alm. writs only to port-towns, 'ad custo-'diend' mare.' 12 Ed. 3, m. 12, a command to Henry Hussey, &c. 'ad congregand. ho-'mines,' and to attend on the sea-coasts. But these were the causes of making the law, 14 Ed. 3, that there should be no further charge laid on the subject: so that all before that statute do not prove our case. 15 Ed. 3, a custody of the ports commanded, and warrants to arrest ships. 16 Ed. 3, command to the earl of Dover, &c. to prepare ships against an enemy that intends to come to subvert the kingdom, and to set up beacons; which is the first original of beacons that I observe. All these precedents in Ed. 3's time, were but to keep men and ships in readiness, and to bring them to the sea-coasts. 46 Ed. 3, m. 3, that the French made great preparation, whereupon they are commanded all to array, both clergy and laity, to guard the sea-coasts. And in those times, when there was more likelihood of danger than now, no writs came out then, but only to array men, and keep them in readiness. 50 Ed. 3, to array men in Norfolk to defend the coasts. 29 Ed. 3, command to the bishop of Durham, and into Cumberland and Northumberland, to have their men in readiness. A number of these precedents in that king's reign.—For Rich. 2's time, it doth not appear by any one record there is any thing for ships, but only for the custody of the sea.—And for Hen. 4, Hen. 5, Hen. 6's time until 2 Eliz. they are all concerning matters of arms, not to make ships. And when the rebellion in the North was in the queen's time, then by writs men were commanded to be in readiness, for defence of the kingdom.

The next thing we come to is the writ itself. For my part, I hold it to be illegal; mark the recital of the writ, it is no more but 'quod da-'tum est nobis intelligi,' &c. not a plain affirmation, as apparency of it. Then the motives are, because the pirates do infest the seas: Such motives as never were in any writ before. All former writs were not to provide great navies in respect of pirates; there is no such great danger of them. 15 Ed. 1, it is there set down, when pirates infested the seas, they took order that there should be only 10 ships to scour the coasts. 16 Ed. 3, &c. Command that men should be arrayed, lest the enemy should invade the kingdom; but no mention made of pirates, for they will be removed with a few ships. Mark the times when great pirates were upon the sea, they would be glad to sculk away when the king's navy came towards them. Now that this should bring the king's navy to sea, is against the law of the land, and are not motives sufficient to induce a charge of this kind.

Secondly, The very commands of the writ itself are unlawful, in respect of the inconveni-

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ences to an inland county; whereas there was never any inland county charged in that kind before, as coast-towns that have been heretofore charged with soldiers, and had none, were discharged. When Bodmin in Cornwal was charged with finding of a ship, they shewed they never had ship nor mariners there, and that divers of them were imprisoned for not finding such a ship; whereupon commission issued to the admiral to examine the truth thereof: And because it was found they had no mariners, they were discharged. But Mr. Solicitor answered, this was done by the admiral, beyond his commission; but 13 Ed. 3, the same year, there was a writ awarded to Chichester in the county of Sussex, to find a ship, and they complained they had not any ships used to arrive there, nor mariners therein inhabiting; and thereupon they were discharged, upon a writ out of the Chancery: So I say, inland counties that are not wont to have ships, the law doth not appoint them to do that which they cannot do, nor will not expect from them that which is impossible.

The pursuance of this writ is against law; it appoints them to provide a ship, hire men, and provide victuals and wages for them, 26 weeks, &c. I say, this is against law plainly, and against divers statutes, and no law doth warrant it; for soldiers, which are the king's servants, ought to have their pay from the king, the general rendezvous. 15 Johan. m. 3, ships commanded to be at the ports upon the king's pay. Tenants by knights service, after forty days, were to be at the king's charge. 17 Ed. 1, 16 Ed. 3, it appeareth there, the king, upon the invasion of the Scots, many men being lost, appointed soldiers, and their wages paid, and what to Durham, and what to Newcastle, &c. 31 Ed. 1, in the Exchequer, writs went out to levy men to resist the Scots, and they would not stir without their wages. 16 Ed. 3, to pay soldiers wages. 2 Ed. 3, rot. 16, there it is set down in parliament what soldiers have received for their wages. 26 stat. 18 Ed. 3, cap. 7, soldiers are not to go out of their counties without pay. 10 Ed. 3, the men of Bucks stood upon it, and would not go out of their county to the coasts of Southampton without wages. Rot. Alm. 12 Ed. 3, m. 12. A writ to compel all men to make munition for ships, for the town; and thereupon H. and B. they were commanded to maintain the men of the same town. Claus. 13 Ed. 3, m. 14, men of arms for the defence of the sea-coasts complained their wages were not paid them: ordered, the town from whence they came should pay them. The statute of 11 H. 7, cap. 1, provides, that soldiers that go out of their own counties to attend the king in his war, shall have their wages from the time they go from their houses, to be paid by the king's own officers.

I hold that this assessment is not lawful and allowable; then if the assessment thus made falls to the ground, the power to the sheriff to assess doth; and he may do it as he lists, put more upon one than another, therefore an assessment in that kind is not legal. Then the clause, 'Si rebelles fuerint, &c.' to imprison them, then to give power of imprisonment to the sheriff: Clauses have been in former writs, in cases of arrays, to distrain, if they refuse to pay; never in case of levying money, to imprison for it; it is clearly against Magna Charta to be imprisoned, unless he be indicted, or by due process of law.

The next thing is the last clause of the writ, 'If more be gathered than shall be needful, to 'be returned amongst those that have paid it?' That sheweth the ship must be done: we are now upon the record, and by this record it doth not appear that a ship is made. It appears Mr. Hampden was assessed 20s. towards the making of a ship. It is said, If the money be paid, others can provide ships. This is not according to law, to command a ship of war of 450 tons, and to turn it into money; for if a ship were made by a county, the county should have it again, but in this case it is otherwise; this Scir' Fac' is brought to have the money.

For the Certiorari, it is directed to a sheriff out of office 'que del residue de ceo,' and ought not so to be, for all writs are directed to the present sheriff; so for the old sheriffs to shew cause what they have done, and the new sheriffs to make their return, he is the immediate officer of the court. Admit the Scir' Fac' should go forth, it would do something, 'one-'rare, &c.' to whom, or how, nothing here; but 'Scir' Fac' quare onerari non debet;' but to whom 'onerari,' it doth not appear.

Besides, if the sheriff levy money in that kind and bestow it on a ship, it is well. If not so bestowed, then those that received the money are accountable to those of whom they had it. In Ed. 3's time, soldiers received money to go to service in war, yet staid at home, but were compelled to repay it to the county where they received their wages. Also two high constables having received money for soldiers, were indicted for not employing it accordingly, and adjudged to restore it to the county where they received it, and to find sureties. So it doth not appear that this ship was builded, there is no preparation for a ship; the sum assessed is not legal; then the writ is not legal, because it varieth from all the precedents formerly; it varieth in the time, of 26 weeks, before that but for 13 weeks; in the manner, for soldiers wages to inland counties, which was never before. I say, it varieth from all the precedents in that kind. And so I hold this particular writ is not sufficient, nor warranted by the law, and that Judgment in this case ought to be given for Mr. Hampden.

The ARGUMENT of Sir GEORGE CROOKE, knight, one of the Justices of his Majesty's Court of King's-Bench at Westminster, in the great Case of SHIP-MONEY, as it was presented to the King's Majesty.

The Case is this upon the Record.—The king by writ under the great seal, dated 4 Aug.

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anno 11 of his reign, directed to the sheriff of the county of Bucks, and to all the men in that county, commandeth them in these words:

Motives of this Writ, which are five.—'Quia 'datum est nobis intelligi, quod prædones qui- 'dam pirati ac maris grassatores tam nominis 'Christiani hostes Mahumitani quam alii con- 'gregati naves et bona et mercimonia non so- 'lum subditorum nostrorum, verum etiam sub- 'ditorum amicorum nostrorum in mari quod 'per gentem Anglicanam ab olim defendi con- 'suevit nefarie diripientes et spoliantes et ad li- 'bitum suum deportavere hominesque in eis- 'dem in captivitat' miserrimam mancipantes. '2. Cumque ipsos conspicimus navigium in 'dies preparantes ad mercatores nostros ulte- 'rius molestand' et ad regnum gravand' nisi 'citius remedium apponatur eorumque conatui 'virilius obvietur. 3. Consideratis etiam peri- 'culis quæ undique his guerrinis temporibus im- 'minent, ita quod nobis et subditis nostris de- 'fensionem regni omni festinatione qua poteri- 'mus accelerare convenit. 4. Nos volentes 'defensione regni, tuitione maris, securitate 'subditorum nostrorum salva conductione na- 'vium et merchandizarum ad regn' nostrum 'Angliæ venient' et de eodem regno ad partes 'exteras transeunt' (auxiliante Deo) maxime 'providere; cum nos et progenitores nostri re- 'ges Angliæ domini maris prædicti semper hac- 'tenus extiterunt, et plurimum nos tæderet si 'honor iste regius nostris temporibus depereat 'aut in aliquo minuatur. 5. Cumque onus 'istud defensionis quod omnes tangit per omnes 'debet supportari prout per legem et consuetu- 'dinem regni Angliæ fieri consuevit.

Charges of this Writ, which are three.— 'Vobis præfat' vicecom' balliv' burgensibus 'majoribusque probis hominib' et omnib' aliis, 'quibuscunque supra mentionat' in burgis vil- 'lis, villatis, hamlettis et locis supradictis eor- 'umque membris. 1. In fide et legiantia ves- 'tra quibis nobis tenemini. 2. Et sicut nos et 'honorem nostrum diligitis. 3. Nec non sub 'forisfactur' omnium quæ nobis forisfacere po- 'teritis firmiter injungend' mandamus.

Commands of the Writ, which are five.—'1. 'Quod unam navem de guerra, portagii 450 'doliorum. 2. Cum hominib' tam magistris 'peritis quam marinariis valentioribus et ex- 'pertis, centum et octoginta ad minus. 3. Ac 'tormentis tam majoribus quam minoribus pul- 'vere tormentario ac hastis et telis aliisque ar- 'maturis pro bello sufficientibus. 4. Et cum 'duplici eskippamento, nec non victualibus us- 'que ad primum diem Martii jam proxim' se- 'quen' ad tot homines competen'. 5. Et 'abinde in viginti et sex septimanas ad custagia 'vestra, tam in victualibus quam hominum su- 'lariis et aliis ad guerram necessariis per tem- 'pus illud super defensionem maris in obsequio 'nostro, in comitiva custodis maris, cui custo- 'diam maris ante prædict' primum diem Martii 'commettemus et prout ipse ex parte nostra 'dictaverit moratur parari, et ad portum de 'Portsmouth circa decimum primum diem Mar- 'tii duci facias. Ita quod sint ib' in eod' die 'ad ultimum ad proficiscend' ex inde cum na- 'vibus nostris et navibus aliorum subditorum 'nostrorum. 1. Pro tuitione maris. 2. Et 'defensione vestrum et vestror. 3. Repul- 'sioneque et debellatione quorumcunq' merca- 'tores nostros et alios subditos et fideles præ- 'dict' in dominia nostra ex causa mercaturæ se 'divertentes vel ab inde ad proprium declinan- 'tes super mare gravare seu molestare satagen- 'tium.'

Clauses of the Assess.—'1. Assignavimus 'autem te præfat' vicecom' Bucks ad assidend' 'omn' hom' in villis de Agmondesham, Wen- 'dover et Marlow Magna et in omnibus aliis 'villis villat' burgis hamlettis et aliis locis in 'com' Bucks prad' et terræ tentes in iisd' na- 'vem vel partem navis præd' non habentes vel 'in ead' non deservientes ad contribuend' ex- 'pensis circa provisionem præmissorum neces- 'sar'. 2 Et super' præd' vill' burg' hamlett' 'et locor' membris eorumq' sic ut præfertur ad 'assidend' et ponend' viz. quemlib' eorum juxta 'statum suum et facultates suas. 3. Et por- 'tiones super ipsos assessat' per districtiones 'aliosve modos debitos levand'. 4. Et collec- 'tores in hac parte nominand' et constituend'. '5. Ac omnes eos quos rebelles et contrarios 'inveneris in præmissis in carcere mancipand' 'in eod' moratur' quousque pro eor' delibera- 'tione ulterius duxerimus ordinand'.'

Preclose of the Writ for the Ease of the Subject.—'Et ulterius mandamus quod circa præ- 'missa diligenter intendatis et faciatis et exe- 'quemini cum effectu sub periculo incumbente. 'Volumus autem quod non colore præd' man- 'dati nostri. 1. Plus de iisd' hominibus levari 'fac': quam ad præmiss' sufficien' ad expensas 'necessar'. 2. Aut quod quisquam qui pecu- 'niam de contribuentibus ad præd' custag' fa- 'ciend' levaverit ead' vel partem inde penes se 'detineat. 3. Vel ad alios usus quovis quæsi- 'to colore appropriare præsumat. 4. Volentes 'quod si plusquam sufficiat collectum fuerit hoc 'inter solventes pro ratu portionis ipsis con- 'tingen' exsolvatur.'

By virtue of this Writ, Mr. Hampden is assessed to 20*s.* for his lands in Stoake Mandevile in that county, which, not being paid, is certified amongst others into the Chancery, upon a writ of Certiorari, dated 9 Mar. 12 Car. by a schedule thereunto annexed. And by a writ of Mittimus, teste 5 Mar. 13 Car. this writ of 4 Aug. 11 Car. and the writ of Certiorari, and the schedule annexed, is sent into the Exchequer, with a command there to do, for the levying of sums so assessed and unpaid, 'prout 'de jure et secundum legem regni nostri An- 'gliæ fuerit faciend';' whereupon a Sci' Fa' issued out of the Exchequer, reciting the said writ, to warn Mr. Hampden amongst others, to shew cause why he should not be charged with this money. Upon this he being summoned, appeared, and demandeth the hearing of those writs and schedule, which being read unto him, thereupon he demurreth in law. And whether judgment upon this whole Record be to be given

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against John Hampden, that he is to be charged or no, that is the question; for he is the only party in this case. And there is no cause why any man should say that the question is, Whether judgment should be given for the king, or the defendant? for as this case is, the king is no party to the Record, but only it is a judicial process out of the Exchequer, grounded upon the former Record, for the defendant to shew cause why he should not be charged: which hath been very elaborately argued by the defendant's counsel, who demurred, that he should not be charged; and by the king's counsel, very learnedly and elaborately argued, that he should be charged.

This case is a case of great weight, and the greatest case of weight that ever we read, argued by judges in this place; and therefore, adjourned into this place for advice of all the judges: For of their side it is alledged, That it concerneth the king in his prerogative and power royal: and on the other side, That it concerneth all the king's subjects in their liberties, their persons, and their estates; for which it hath made some of us to wish and move among ourselves, that it might have been by his majesty's favour, heard and determined in another place by his majesty, and his great council of his realm, where all convenience and inconvenience might have been considered of, provided for, and prevented for present and future times, and not to be argued only by us, who are accounted his majesty's counsel at law; wherein if any thing be done amiss, the fault must light upon us, as mis-advising the king therein. But seeing it hath pleased his majesty, that the same should be argued and determined in this place, whose pleasure we must obey, I must give my best advice upon my oath to the best of my skil; wherein I hope not to trench upon his majesty's prerogatives, which we are all bound by our oaths, to the best of our skills, to maintain, and not to suffer them to be diminished; nor upon his royal power; but truly to deliver what I conceive the law to be, concerning the case in question.

Wherein I must confess I have been much distracted, having heard so learned arguments on both sides at the bar, and so many records and precedents cited on either side; but they did not so much move me, for the counsel have on either side proposed such reasons, as they thought convenient for the maintaining of their opinions, and perhaps with a prejudicate opinion; as I myself by my own experience when I was at the bar, have argued confidently, and as I then thought the laws to be on that side for whom I argued. But after being on the bench, and indifferently weighing all reasons and authorities, have been of a contrary opinion; and so the law hath been adjudged contrary to that opinion which I first confidently conceived.

But that which hath moved me most, and maketh me distrust my own judgment in this case is, that my brothers that have argued before me, who have argued upon their oaths, and I presume have seen the records and precedents cited on either side, have all argued one way; with whose opinions I should willingly have concurred, if I could have satisfied my own judgment with their reasons; but not being satisfied, I have learned that I must not come with a multitude against mine own conscience, for I must stand or fall with my own master. And therefore I shall shew reasons, and leave myself to the judgment of my lords and others my brethren. And whatsoever shall be adjudged I must submit unto, and so do with all others, and do now declare my opinion to be, that as this case is, judgment ought to be given for the defendant. My reasons and grounds that I shall insist upon are these:

1. That the commaud by this writ of 4 Aug. 11 Car. for to have ships at the charge of the inhabitants of the county being the ground of this suit, and cause of this charge, is illegal and contrary to the common laws, not being by authority of parliament. 2. That if at the common laws it had been lawful, yet now this writ is illegal, being expressly contrary to divers statutes prohibiting a general charge to be laid upon the commons in general, without consent in parliament. 3. That it is not to be maintained by any prerogative or power royal, nor allegation of necessity or danger. 4. Admitting it were legal to lay such a charge upon maritime ports, yet to charge any inland county, as the county of Bucks is, with making ships, and furnishing them with masters, mariners and soldiers at their charge, which are far remote from the seas, is illegal, and not warranted by any former precedent. 5. I shall examine the precedents and records cited to warrant this writ, which have been all the principal grounds of the arguments to maintain the same. And I conceive there is the chief groundwork being in my notes, but I forgot it.

But before I proceed to the argument, I desire to remove two difficulties: First, That, by the demurrer the danger of the kingdom is confessed, and so it is to be allowed for a case of necessity. To this I answer, That the demurrer confesseth not matters in fact, but where the matter is legally set down; but if it be not a legal proceeding, then the demurrer is no confessing of the matter of fact. This appeareth in the book-case, 5 Hen. 7, fol. 1, and Coke lib. 5, fol. 96, in Burton's case. That a demurrer is no confessing of matters of fact, but where the matter precedent is sufficiently pleaded or laid down; and so it is held in all our books.

The Second difficulty is, That this case is so resolved by all our opinions under our hands, that this writ was legal; which was much pressed by Mr. Solicitor. To this I answer, That it is true that I have set down my opinion under my hand unto two cases, to the first voluntarily in Dec. 1635, which was thus: 'I 'am of opinion that where the good and safety 'of the kingdom in general is concerned, and 'the whole kingdom is in danger, of which his 'majesty is the only judge, there the charge of

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'defence ought to be borne by all in general.' This I hold to be agreeable to law and reason; this opinion I do still and shall always maintain; for where the kingdom is in danger, the king may command every person of his kingdom with all his force to come and defend it at all times and in all places of his kingdom where he pleaseth; and the king is the sole judge of the danger, and of war and peace; and if any do not perform his commands therein, he is fineable and punishable in a deep manner.

The second was in Feb. 1636, which is thus, 'That when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, his majesty may by writ under the great seal of England command all his subjects of this kingdom at their charges to provide and furnish such number of ships with men, victuals and ammunition, and for such time as his majesty shall think fit, for the defence and safeguard of the kingdom from such danger. And that his majesty may compel the doing thereof, in case of refusal and refractoriness. And that in this case his majesty is sole judge of the danger, and when and how the same is to be prevented and avoided.'

To this opinion, I confess, I then with the rest of the judges subscribed my hand; but I then dissented to that opinion, and then signified my opinion to be, that such a charge could not be laid by any such writ, but by parliament: and so absolutely in that point one other did agree with me, and dissented from that opinion; and four others, in some other particulars, from that which was subscribed. But the greater part seeming absolutely to be resolved upon that opinion, some of them affirming that they had seen divers records and precedents of such writs, satisfying them to be of that judgment; I was pressed to subscribe with them, for that the major part must involve the rest, as it was said to be usual in cases of difference, and for that the lesser number must submit to the major, although they varied in opinion; as it is in our court, if three judges agree in opinion against one, or two where there are five judges, judgment is to be entered *per curiam*, if the major part agree, and the other are to submit to it: and in cases of conference, and certificate of their opinions, if the greater part did agree and subscribe, the rest were to submit their opinions. And this by more antient judges than myself was affirmed to be the continual practice: And that it was not fit, especially in a case of this nature so much concerning the service of the king, for some to subscribe, and some to forbear their subscriptions: And that although we did subscribe, it did not bind us, but that in point of judgment, if the case came in question judicially before us, we should give our judgments as we should see cause after the arguments on both sides, and we were not bound by this sudden resolution.

Hereupon I consented to subscribe; but I then said, that in the mean time the king might be misinformed, by our certificate under our hands, conceiving us all to agree together and to give him this advice under our hands, and not know there was any dis-assented or was doubtful: but it was then said, the king should be truly informed thereof; and thereupon we that dis-assent, did subscribe our hands with such protestations as aforesaid, only for conformity, although contrary to the opinion I then conceived.

But this being before arguments heard on either side, or any precedents seen, I hold that none is bound by that opinion. And if I had been of that opinion absolutely, now having heard all the arguments on both sides, and the reasons of the king's counsel to maintain this writ, and why the defendant is to be charged; and the arguments of the defendant's counsel against the writ, and their reasons why the defendant should not be charged to pay the money assessed him; and having duly considered of records and precedents cited and shewed unto me, especially those of the king's side, I am now of an absolute opinion that this writ is illegal, and declare my opinion to be contrary to that which is subscribed by us all. And if I had been of the same opinion that was subscribed, yet upon better advisement being absolutely settled in my judgment and conscience in a contrary opinion, I think it no shame to declare that I do retract that opinion, for *humanum est errare*, rather than to argue against my own conscience. And therefore none having, as I conceive, removed those difficulties, I shall proceed to my argument, and shew the reasons of my opinion, and leave the same to my lords and brothers. Not one precedent nor record in any precedent time, that hath been produced or shewed unto me, that doth maintain any writ, to lay such a charge upon any county inland or maritime.

I have examined this particular writ, and the several parts thereof; and do conceive it is illegal, and not sufficient to ground this charge upon the defendant.

1. The motives of this writ are not sufficient to cause such a writ to be sent forth. 2. The command of the writ to prepare a ship at the charge of the inhabitants, which mentions victuals and men, is against the common laws and statutes of this kingdom. 3. That to lay a charge of finding victuals, and wages of soldiers and mariners, is illegal, and contrary to the common laws and divers statutes. 4. The power of assessment given to the sheriff alone, and to distrain for this, is illegal, and not warranted by any precedent. 5. The power of imprisoning is illegal, and contrary to divers statutes, and not warranted by the precedents. 6. That the preclose of the writ, and the practice of it, is contrary to itself, and *oppositum in objecto*. 7. If this writ were legal, yet the manner of the assessment by the sheriff as it is certified, is not warranted by this writ; consequently the sum cannot be demanded of the defendant by virtue of this writ. 8. That the Certiorari and Sci' Fac' issued not legally, and consequently no judgment can be given against the defendant thereupon.

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For the first point, that this writ, 4 Aug. 11 Car. is against the common law, my reasons are these:

1. Because this is the first writ since the Conquest that went out to any inland county to prepare a ship with men and ammunition, for aught appeareth by any record that hath been shewn. And where there was never any precedent, by the rules of Mr. Littleton, fol. 23, the law is conceived not to allow any such writ. And sir Edw. Coke in his Comment upon Littleton, fol. 81, saith, That where there is no example, it is a great intendment the laws will not bear it.—So I conceive here, there never having been a precedent before of any such writ to the sheriffs and inhabitants of a county, to prepare a ship with men and ammunition upon any occasion whatsoever, that it is against the common law to award such a writ.

2. For that the common law of England setteth a freedom in the subjects in respect of their persons, and giveth them a true property in their goods and estates; so that without their consent, or implicitly by an ordinance which they consented unto by a common assent in parliament, it cannot be taken from them, nor their estates charged; and for this purpose the law distinguisheth between bondmen, whose estates are at their lords will and disposition, and freemen, whose property none may invade, charge, or unjustly take away but by their own free consent, and therefore not warranted by law; which is proved by these authorities.

Coke in his Reports, lib. 8, fol. 92, in Francis' Case, sets down this rule, 'Quod nostrum 'est, sine facto seu defectu nostro amitti, seu 'in alien' transferri non potest.'

Mr. Lambert, fol. 24, setteth down the laws of England which were confirmed by William the Conqueror, hath these words: 'Inter alia 'volumus et concedimus, quod omnes monar-'chæ regn' sui præd' habeant et teneant terras 'suas et possessiones suas bene et in pace, libe-'ras ab omni exactione injusta et ab omni tal-'lagio' (not mentioning their *injusta*) 'ita quod 'nihil ab eis exigatur præter servitium suum 'juste debitum.' Hereby it appears there is an absolute freedom from all taillage.

17 of king John, in Mat. Paris, fol. 246, the king doth grant and confirm unto his barons and commons, *inter al'* these liberties following: 'Nullum scutagium vel auxilium ponamus in 'regno nostro nisi per commune concilium reg-'ni nostri, nisi ad redimend' corpus nostrum, 'filium nostrum primogenitum militem faciend' 'vel ad primogenitam filiam maritand'.' By this it appears what was then conceived to be amongst others their liberties, and then confirmed; which was, that no aid should be laid upon them but by parliament, for the parliament was then called Commune Concilium.

That the law is so, appeareth by the treatise written by Fortescue, who had been Chief Justice of England in king Henry 4's time, and after Chancellor of England, when he wrote the book, intituled, De Laudibus Legum Angliæ. fol. 25, cap. 9, he saith thus; That the king of England cannot alter nor change the laws of England at his pleasure, for 'principatu regali 'sed et politico ipse populo suo dominatur.' If his power were loyal only, then he might change the laws, 'Tallagio quoq; et cætera onera eis 'imponere ipsis inconsultis;' but adds, that the king of England 'sine subditor' assensu leges 'mutare non potest, nec subjectum populum 'renitentem onerari impositionibus peregrinis.' And cap. 13, fol. 31, he compares the king and subjects of England to the head and body natural: 'Ut non potest corpus physicum nervos 'suos commutare neq; membris suis proprias 'vires et propria sanguinis alimenta denegare 'sua, nec rex qui caput corporis politici mutare 'potest leges corporis illius, nec ejusd' populi 'substantias proprie subtrahere, reclamantibus 'eis aut invitis.' Thus he in this place; but in fol. 84, cap. 36, he seemeth to say, 'In hoc in-'dividuo, rex Angliæ neq; per se nec ministros 'suos tallagia, subsidia, aut quævis onera alia 'imponit, leges suas, aut leges epr' mutat, aut 'nova condidit sine concessione vel assensu to-'tius regni sui in parliamento suo expresso.' Which words seem so general, that in no case he can do it.

So it appeareth by the book case, 13 Hen. 4, fol. 14, That the grant of the king, which tendeth to the charge and prejudice of his people in general, is not good, unless it be by parliament. But it is agreed there, that grants of tolls, of fairs, of pontage, pickage, murage, ferrying, or such like, which are for the profit, good, and ease of the people, and profit of them that will take benefit thereof, and not compulsory to any to pay, but to them that will take the benefit; and being very small and reasonable sums, the law doth give allowance to them: but if they were great sums, that tend to the charge of the people, the law will judge them void.

This appeareth in sir Ed. Coke's Reports, lib. 5, fol. 63, in the Case of the Chamberlain of London, that an ordinance made by the common-council of London, where they have a custom by their common-council to make reasonable ordinances to bind all within the city, concerning cloths to be brought to Blackwell-hall, there to be viewed, measured and searched, before they were sold, and a penny upon a broad-cloth appointed for the officer that did that service; that such a charge was reasonable; for that it was for the public benefit of the city, and the commonwealth; and a pecuniary penalty laid for not performance of that ordinance was allowed.

Ibid. fol. 64, in Clark's case it is resolved, that an ordinance made by the assent of the plaintiff himself, and other burgesses of the town of St. Albans, for a small tax upon the inhabitants of the town, towards the erection of the courts, and other necessaries, for the term to be kept there, was allowed to be good, and did bind the plaintiff, being by the plaintiff's own consent, and for the public good of the town.

Also Coke, lib. 11, fol. 86, in Darcie's case citeth this out of Fitz-Her. Na. B. fol. 122,

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that every grant of the king hath this consideration in it, tacit or express, 'Quod patria per 'donationes illius, magis solito non oneretur.' And as by grant the king cannot charge his people, so neither can he by writ lay any charge upon his people, but by their consent, or where they have apparent benefit thereby. And that is the reason of the writ in the Reg. 127, and Fitz-Her. Na. B. 113. Where by breach of the sea-walls any inundation is of the country, the king, who is *pater patriæ*, and taketh care for the good and safety of his people, sendeth out his commission to enquire by whose default any such breach happened, and to cause all that had lands or commons to be contributory to the making up of the sea-walls; and this is done by a jury: but this charge cannot be laid upon a county or town in general, but upon particular men that have loss or benefit, or may have loss or benefit thereby: and this is done by inquiry of a jury, before the sheriffs, or commissioners appointed. So it is at this day, upon commissions of sewers, as appeareth by Coke, lib. 10, fol. 142, in the case of the isle of Ely. The taxation by the commissioners of sewers must be upon every particular man that hath or may have loss or benefit by such inundations, and making up of the walls; and cannot be laid upon any remote parts, which are out of the level of such loss or benefit; and it must be certain and particular upon persons: certain, by reason of loss or profit, and cannot be laid in general upon a town; but in those cases there is a particular loss or benefit, and in particular places, and but in petty charge. And then where the law alloweth that which in reason is to be done, that may be done without a special statute: for, 'De minimis non curat 'lex.' But in this case there is a general charge through the whole kingdom, which the law doth not permit, without common consent in parliament.

But it hath been alledged, that this charge hath been imposed for the public safety, and defence of the kingdom: and may not this be done when every one hath advantage by it? To this I say, when imminent danger and cause of defence is, there must be defence made by every man (when the king shall command) with his person: in such a case every man, as it is said in the precedents, is bound *per se et sua* to defend the kingdom. And I think no man will be unwise but that he will *exponere se et sua* for the defence of the kingdom, when there is danger; for otherwise, he is in dauger to look to *se et sua*: but to lay a charge in general upon the kingdom, either for making or preparing of ships, or money in lieu thereof, is not to be done but by parliament, where the charge is to be borne in general by all the subjects.

To prove further, that no man may have his goods taken from him but by his consent, appeareth by a record, Mich. 14 Ed. 2, rot. 60, in the King's-bench, in a writ of error brought upon a judgment given at Durham; where in an action of trespass, by William Heyborne, against William Keylowe, for entering his house, and breaking his chest, and taking away 70*l.* in money, the defendant pleaded Not Guilty; the jury found a special verdict, that the Scots having entered the bishopric of Durham with an army, and making great burning and spoils, the commonalty of Durham met together at Durham, whereof the plaintiff was one, and agreed to send some to compound with the Scots for money to depart, and were all sworn to perform what composition should be made, and to perform what ordinance they should make in that behalf: and thereupon they compounded with the Scots for 1,600 marks. But because that was to be paid immediately, they all consented that William Keylowe the defendant, and others, should go into every man's house, to search what ready moneys were there, and to take it for the making up of that sum; and that it should be repaid by the commonalty of Durham; and thereupon the defendant did enter into the plaintiff's house, and did break open the chest, and took the 70*l.* which was paid accordingly towards the fine. The jury was demanded, whether the plaintiff was present, and did consent to the taking of the money? They said no: whereupon the plaintiff had judgment to recover the said 70*l.* and damages, for that otherwise he had no remedy for his money; and the defendant was committed in execution for that sum. And thereupon the defendant, Keylowe, brought a writ of error in the King's-bench, and assigned his error in point of judgment; and there the judgment was reversed, and the reasons set down in the record were, first, because the plaintiff, Heyborne, had his sufficient remedy against the commonalty of Durham for his money: secondly, because he himself had agreed to this ordinance, and was sworn to perform it; and that the defendant did nothing but what the plaintiff had assented to by his oath, and therefore is accounted to do nothing but by his consent, and as servant unto him, therefore he was therein no trespasser: and therefore the judgment given in Durham was reversed, because he had assented to that ordinance, though afterwards he was unwilling; yet having once consented, his goods were lawfully taken. By which it appeareth, that if he had not particularly consented, such an ordinance would not have been good to bind him; although this was in a case of great danger, and for defence.

2 Ric. 2, pars 1. The Parliament-Roll proveth this directly; although it be no act of parliament, yet the record is much to be regarded, for it sheweth what the law was then conceived to be: for Scroop, the lord chancellor, then shewed to all lords and commons assembled in parliament, that all the lords and sages had met together since the last parliament, and having conferred of the great danger the kingdom was in, and how money might be raised in case of imminent danger, which could not stay the delay of a parliament, and the king's coffers had not sufficient therein; the record

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is, they all agreed, moneys sufficient could not be had without laying a charge upon the commonalty, which, say they, cannot be done without a parliament; and the lords themselves, for the time, did supply the said necessity with money they lent: which record proveth direct y, that this charge without an act of parliament is illegal.

So upon these reasons I conclude, that this writ, compulsorily to charge the subjects against their wills, is not warranted by any book, and therefore illegal.—If this writ should be allowed, great inconveniences would ensue, which the law will always avoid, and not permit any inconveniences.

1. If any such charge may be laid upon the counties by writ, without assent in parliament, then no man knoweth what his charge may be; for they may be charged as often as the king pleaseth, and with making of as many ships, and of what burdens, and with what charge of ammunition, men and victuals, as shall be set down. Wherein I doubt not, but if the law were so, the king being a very pious and a just king, would use his power very moderately; but judges in their judgments are not to look to present times only, but also to all future times, what may follow upon their judgments.—That this inconveniency may be, appeareth by the Danegelt, first appointed in times of necessity, to redeem them from the cruelty of the Danes, which often changed, and still increased: for A. D. 991, when it began, it was but 10,000*l*; in 994, it was increased to 16,000*l*; and in 1002, it was increased to 24,000*l*; and in 1007, it was increased to 36,000*l*; and in 1012, to 48,000*l*. So if this writ be well awarded, it may be at pleasure what bounds it shall have. Also there was never but one single subsidy and two fifteenths used to be granted in parliament, until 31 Eliz. and then a double subsidy, and four fifteenths were granted: sir Walter Mildmay, then Chancellor of the Exchequer, moving for it, and saying, 'his heart did quake to move it, not 'knowing the inconvenience that should grow upon it;' he shewed great reasons for his moving it, it being about the time of the Spanish invasion, and so it was granted. Afterwards, 35 Eliz. treble subsidies and fifteenths were granted. And 43 Eliz. four subsidies and eight fifteenths were granted; and yet these were not accounted grievous, neither would it have been, if it had been ten subsidies because in parliament, and convenient times and means appointed for the levying of them. Tonnage and poundage were granted to this end in 13 Rich. 2, and have continued ever since by several grants until this king's time, wherein it was unhappily questioned in parliament: but the end thereof was, that the kings might have money in their purses against times of need, for extraordinary occasions, especially for the defence of the realm, and guarding of the sea, as it is especially declared by the statute 1 Jac. and former statutes, and for other necessary uses, as the king pleased.

Object. But it is said, that tonnage and poundage is not now granted to the king, and therefore the king is enforced to these extraordinary courses.

Though it be not granted, yet I think it is taken; and I doubt not but to the same intent, and for the same purposes employed for which it was first granted; which was, for the defence of the kingdom, and guard of the sea. Therefore in case of danger and necessity, every subject, for the defence of the kingdom, is bound for 'legianciæ debito,' as some records say, and 'legianciæ suæ vinculo astricti,' as others speak; 'se et sua totis viribus et potestate ex-'ponere,' &c. And in such a case, the king may demand the persons of his subjects, and arrest their ships to wait on his to defend the seas; yet with this also, when they go out of their counties, to be at the king's charges: but to command the subject by writ, to build new ships, or to prepare ships at their charges, or to lay a common charge on the subjects in general, for matter of defence, or avoidance of danger, is not warrantable by the common law.

2. Another inconvenience is, That it is left in the power of the sheriff to charge any man's estate at his pleasure, taxing some, and sparing others, as his affections lead him; and sometimes, by colour thereof, levying more than he need, and enriching himself; which power the law never alloweth him, although it were in lesser matters: as to make an assessment for breach of sea walls; but to do it by a jury, and not by himself alone. So for these reasons, I conclude, this writ is against the common law, and so illegal.—I conceive, if the common law were doubtful in this, whether such a charge might be imposed by writ; yet now it is made clear by divers express statutes, That the king is not to lay any charge upon his subjects, but by their consent in parliament; and that is, by many acts of parliament in force, and not repealed: and there is no doubt but that the king by parliament may bind them and their successors, every king by oath being bound to perform the statutes of his realm.

The statute of 25 Ed. 1, cap. 5, which is in these words: 'Forasmuch as divers people of 'our realms are in fear, that the aids and taxes 'which they have given us before-time towards 'our wars, and other businesses of their own 'grant and good-will, however they were made, 'might turn to a bondage of them and their 'heirs; because they might be at other time 'found on the Roll; and likewise for the prizes 'taken throughout our realm by our ministers; 'we have granted for us and our heirs, That 'we shall not draw any such aids, taxes or 'prizes into a custom, for any thing that hath 'been done heretofore, by any roll, or any other 'precedent that may be found.'—Ibid. cap. 6. 'Moreover, we have granted for us and our 'heirs, as well to archbishops, bishops, priors, 'and other folk of the holy church; as also to 'earls, barons, and all the commonalty of the 'land; that for no business from henceforth

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'we shall take any aids, taxes, nor prizes, but 'by the common assent of the realm, and for 'the common profit thereof, (saving the ancient 'aids and prizes due and accustomed)' which are the express words of that statute. Now, what those ancient aids were, is well known, that they were 'ad redimendum corpus, ad 'filium primogenitum militem faciend' et ad 'filiam primogenitam maritand': Which aid concerns not the subject in general, but particular men were liable thereunto by their tenures. So this saving need not to have been; for the body of the act extended not to them, but to the general aid of the kingdom.

However, if this *salvo*, as it hath been objected, would preserve this aid now in question, yet the statute made afterwards, De Tallagio non Concedendo, being without any *salvo*, takes it away: which statute, Rastal in his Abridgment, fol. 441, in his title of Taxes, abridgeth in this manner: 'Anno 25 Ed. 1, it 'is ordained, that the taxes taken, shall not be 'taken in custom, nor but by the assent of this 'realm, except the antient aids and taxes: and 'there the tax of 40*s.* upon the sack of wool is 'released.—Ibid. 'That no taillage, by us or 'our heirs in our realm, be put or levied, with-'out the assent of the archbishops, bishops, 'earls, barons, knights, burgesses, and other 'free commons of our realm; that nothing be 'taken from henceforth, in the name, or by 'reason of Male tout' of a sack of wool. Sta-'tute De Tallagio non Concedendo.'

Object.—Mr. Solicitor laboured much to prove, that there was no such statute, De Tallagio non Concedendo: 1. For that it was not to be found on the Rolls of Parliament. 2. For that it was not set down when it was made. 3. That it was but an abstract out of Confirmatio Chartarum Libertatum. Mr. Attorney said, he would not deny it to be a statute, neither would he affirm it; but that yet it did not extend to take away the aid demanded, by prerogative or power royal for the defence of the kingdom.

Respons.—To this I answer, This was never doubted to be a statute until this argument; and that it is a statute, appeareth, 1. For that it is printed in the Book of Statutes, for a statute. 2. It is recited in the Petition of Right, to be a statute. To that it is not found on the Rolls, I answer, That many statutes that are known statutes are not found on the Rolls, as Mag' Char' is not. And as touching the time, I conceive it to be made 24 Ed. 1, cap. 1, for so it is set down in the great Book of Statutes, printed 1618, to be the first statute therein made, viz. in these words: 'No Taillage nor 'Aid shall be taken or levied by us or our 'heirs, in our realm, without the good will and 'assent of the archbishops, bishops, earls, ba-'rons, knights, burgesses, and other freemen of 'the land.'—And that it is a statute, all my brothers have agreed.

The only doubt then is, whether this statute extendeth to aid for the defence of the kingdom; which I think it doth: for it is the precise words of it, That no Taillage or Aid shall be imposed but by grant in parliament, which extends to all manner of aids: and by this law the subjects of England have defended themselves ever since, as with a buckler, as saith Bodinus, fol. 97, whereby it appeareth, that notice was taken of this law in foreign parts, and so held still to be a statute in force.

The next statute is 14 Ed. 3, cap. 1, which recites the grant of the great subsidy of the ninth fleece, the ninth lamb, &c. formerly granted; whereupon these words follow: 'We, 'willing to provide for the indemnity of the said 'prelates, earls, barons, and others the com-'monalty of the realm, and also of the citizens, 'burgesses, and merchants aforesaid, will and 'grant for us and our heirs, to the same pre-'lates, earls, barons, and commons, citizens, 'burgesses, and merchants, that the same grant 'shall not be had forth in example, nor fall to 'their prejudice in time to come, nor that they 'be from henceforth charged or granted to 'make any aid, or sustain any charge, if it be 'not by the common assent of the said prelates, 'earls, barons, and other great men and com-'mons of the said realm of England, and that 'in the parliament; and that all the profit 'arising of the said aid, and of wards, mar-'riages, customs, and escheats, and other pro-'fits, arising of our said realm of England, shall 'be set and dispended upon the maintenance 'of the safe-guard of this realm of England, and 'of our war in Scotland, France, and Gas-'coigne, and in no place elsewhere during our 'war.'—By this statute it appeareth that it is expressly provided, that the subjects should not be from thenceforth charged nor grieved to make any aid, nor sustain any charge but by common assent, and that in parliament; which is as express as may be, and exclusive to any charge otherwise; which I conceive was made against the appointment of making, or preparing and sending out of ships at the charge of the towns wherein they were, or sending men out of their own counties at the charge of the county.

Object.—Now whereas it is alleged by my brother Weston, and my brother Berkley, That this was but a temporary statute, and ended when the war ended, which appeareth by the last clause for employment of those profits towards those wars; I conceive it appeareth to be an absolute and perpetual statute, for it is granted for him and his heirs in perpetuity. And also it appeareth by Plowden in his Comment. fol. 457, in sir Thomas Worth's case, where a grant is by the name of the king, which is in his politic capacity; this extendeth against him, his heirs, and successors, although they be not named. Also the intendment of this law appeareth to be for the security of the subjects, from thenceforth for all future ages. And then the office of judges, as appears by sir Edward Coke's Reports, lib. 5, fol. 7, and Plowden's Comment. in Aston and Stud's case, is to construe statutes according to the true intent of the makers thereof, which was in this

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statute, that it should be a perpetual security for the subjects. And to little purpose it had been, to make a statute to continue but during the time of the war, or during the king's life.

Object.—Also where it is alledged that the statute of 14 Ed. 3, is not mentioned in the Petition of Right, which is some argument that it was not conceived to be a continuing statute.

Respons.—To that I answer, That in the Petion of Right it is said, That by the statute there recited, and other the good statutes of this realm, the subjects shall not be compelled to pay any taxes, taillage, aid, nor other like charge not set by parliament; in which this statute is as well intended as other statutes, and as far as if it had been expressly recited. Also it appeareth by all the books of statutes, that this statute is granted as a statute continuing, whereas others expired, are set down as expired.

21 Ed. 3, pars 2, m. 11. A subsidy being granted by parliament, viz. 40*s.* on every sack of wool transported before Michaelmas following, and 6*d.* on every 20*s.* of merchandize, for the safe-guarding of the merchants and defence of the coast, &c. After Michaelmas, viz. 31 Octob. 21 Ed. 3, by writ the collectors were commanded to continue the collection of those subsidies until Easter. But 26 Nov. 21 Ed. 3, the king by writ commanded the stay of the 6*d.* in the 20*s.* and to continue the collection of the subsidies upon the sacks of wool until Easter.

22 Ed. 3, Rot. Parl. m. 16. The parliament being holden in Lent, the commons complain of the continuance of this collection of the subsidies upon the sacks of wool longer than the parliament had granted it, and provided that it should not be continued longer than Easter, at the procurement of any person. By this it appeareth, that the parliament being careful that the time for levying of a subsidy granted, should not be enlarged by any power, much less would they admit of a writ to lay a charge without grant by parliament.

25 Ed. 3, m. 1. It was enacted that no man should be compelled to find men at arms, other than such as hold by such service, except it be by common assent in parliament. By this it appeareth, that if men be not compellable to find a man at arms, unless it be by common assent in parliament; much less is any bound to be contributory to the preparing of a ship with 180 men at arms, and victuals, and wages of soldiery for 26 weeks, unless it be by common assent in parliament.

Rot. Parl. 21 Hen. 4, num. 22. An act of parliament, as I count it, in the very point, is in these words: 'For that of late, divers commissions were made to divers cities and boroughs within the realm, to make barges and barringers, without assent of parliament, and otherwise than hath been done before these; however the commons do pray the king that these commissions may be repealed, and that they may not be of any force or effect.' To which it is answered, 'That the king willeth that the said commissions be repealed;' which is an absolute and perfect statute.

But then there are added these words: 'But for the great necessity he hath of such vessels for the defence of the realm in case that the war shall happen, he will treat with his lords of this matter, and afterwards will shew it to the commons to have their counsel and advice in this point.' So by the record it appeareth that the commons did conceive that no cities, boroughs, nor towns, without consent in parliament, were to be charged with the making of such vessels; to which the king agreeth. And from that day to this, until the making of these writs, in no age, although the kingdom hath been many times in danger of invasion, and hath been invaded, there do not appear any records that ever I have seen of writs directed to any towns or cities at their charges, to make or prepare any ships or vessels whatsoever.

Object.—And whereas it hath been objected, and especially insisted upon by my brother Berkley, that this latter part, that the king will treat with his lords concerning them, and after confer with the commons, is a gentle denial of that act; as the experience is at this day. 'Le 'Roy se avisera' is a denial of an act.

Respons.—Hereupon I answer, It is an absolute act, for it is an absolute assent to the petition. And that which came after was but a plausible excuse, for that such commissions had gone out; and this farther consultation never appeared to be made, nor ever any such writ or commission for such vessels to be made went out since, until this writ.

13 Hen. 4, m. 10. A grant is of a subsidy of wools, woolfels, hides, and other things there mentioned, and of Tonnage and Poundage for one year, for the defence of the marches of Calais, &c. and for the defence of the realm, and the safe-guard of the sea. And therein is this express Proviso, 'Provided that this grant 'of a subsidy of wools, &c. and Tonnage and 'Poundage, in time to come, shall not be taken 'in example to charge the lords and commons 'of this realm with any manner of subsidy for 'the safeguard of Calais, &c. nor for the defence of the realm, nor the safe-guard of the 'seas; unless it be by the will of the lords and 'commons of the realm, and that by a new 'grant to be made, and that in full parliament 'to come.' By this appeareth that it was then provided, that no charge should be laid on the lords or commons, no not for the defence of the realm, but by grant in full parliament.

13 Hen. 4, m. 43. A petition was in parliament reciting, that there was an office granted of Alnager within London and the suburbs of the same, with fees to that appertaining, where any such office never was, nor any such fees appertaining thereunto; and that by colour thereof, they levy one half-penny of the buyer and a half-penny of the seller, and upon sale of every hundred ells of canvass a penny of the seller, and a penny of the buyer, wrongfully against the statutes in the times of your highness's progenitors made to the contrary, by

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which it is ordained that no taillage nor aid shall be granted nor levied without assent and consent of the lords and commons of your realm, as by the statutes is fully declared; wherefore they prayed that such letters patents made thereof shall be void and holden for none. And this was granted; whereby it appeareth that it is declared then in parliament, that those statutes were and did continue; that no taillage or aid shall be levied without grant in parliament.

1 Ric. 2, c. 1. It is enacted in these words: 'Our sovereign lord the king remembering how 'the commons of this realm, by new and unlawful inventions, and inordinate covetize, 'have, against the laws of this realm, been put 'to great servitude and importunate charges 'and exactions, and especially by a new impost, called a Benevolence, whereby divers 'subjects of this land, against their wills and 'liberties, have paid great sums of money, &c. 'It is enacted and ordained, that the subjects 'and commons of this realm from henceforth 'shall in no wise be charged by such charges 'or impositions called a benevolence, or such 'like charge: and that such exactions called a 'benevolence, before that time taken, shall be 'taken for no example to make any such, or 'any like charge, from any of his subjects of 'this realm hereafter, but shall be damned and 'nulled for ever.' By this it appeareth that it is expressly provided that the subjects shall not be charged by way of benevolence, which is in nature of a free gift, nor such like charge; that is, no charge of money shall be laid upon the subjects upon any pretence whatsoever, be it for defence in time of danger or guarding of the sea.

The last and concluding statute is the Petition of Right, made in the third year of his majesty's reign, reciting, that it was enacted by a statute made in the time of Edward 1, commonly called Statutum de Tallagio non Concedendo, that no taillage or aid shall be laid or levied by the king or his heirs in this realm, without the good-will and assent of the archbishops, bishops, earls, barons, knights, and others the freemen of the commonalty of this realm. And by a statute of 25 Ed. 3, That none shall be compelled to make any loans to the king, because such loans were against reason, and franchise of the land. And by another statute, that none shall be charged by any impositions called a benevolence. By which statutes, and other the good statutes of this realm, your subjects have inherited the freedom that they shall not be compelled to contribute to any taxes, taillage, aid, or other like charge not set by parliament.—And then they pray, that none hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament. And after five other things there mentioned, the conclusion is; 'all which they pray as their rights and liberties.' Unto which the king answers, 'Let right be 'done as is desired.' Which is a full and perfect statute, shewing in this point the liberty of the kingdom prayed, and allowed; which was not done without the advice of the judges, whereof I was one, whose opinions were then demanded, and resolved that the same did not give any new liberty, but declared what the liberty of the subject was in this amongst others, that they should not be compelled to be contributory to any tax, taillage or aid, nor any like charge not set by parliament. All which statutes, those of 25 Edw. 1, 34 Edw. 1, and 14 Ed. 3, being in the negative and in force, I conclude that these writs to lay such a charge is against the law, and so the assessment by colour thereof unlawful.

Object.—Now whereas the precedent arguments have been that the kingdom being in danger, therefore these writs went forth for the making of ships, because there could not be so suddenly any parliament called, and the parliament is a slow body, and the kingdom may be lost whilst there is a consultation, and the danger is conceived to be very great, because that the writ 4 Aug. so mentions, that the pirates provided a great navy to infest the kingdom, and it is fit with speed to provide a remedy: and that the writ of Mittimus mentioneth, That 'salus reipublicæ periclitabatur:' and we must believe these suggestions to be true, for the king's certificate by this writ is 'recordum superlativum,' as Mr. Solicitor and my brother Berkley termed it, and must leave it upon the king's conscience if it be not true, to lay such a charge upon an untrue suggestion. And the defendant also by his demurrer hath confessed all the suggestions in the writ to be true; therefore it must be concluded the kingdom was in great danger, and present remedy must be had by making of these ships, and must be commanded by these writs, and not to stay for a parliament; and my brother Crawley said, it may be if a parliament were called, they will not yield to the going forth of such writs, although the kingdom was never so much in danger. And this charge in respect of the making of the defence is not within the intention of these statutes; and if it had been expressly mentioned within a statute, that such a charge should not be imposed, it had been a void statute, and contrary to the laws, that the kingdom should not be defended.

Respons. 1.—To all these I answer, That the matter now in question is upon the writ 4 Aug. Whether that be legal or not; and the suggestions therein be sufficient or not for the writ of Mittimus, mentioning that 'salus reipublicæ 'periclitabatur' at the day of the issuing of the writ 4 Aug. which is a year and an half after the first writ, doth not help it; and this not notified to the sheriff and inhabitants of the county to make them the more careful, and in a greater contempt if a ship were not provided, but it is only a notification to the barons of the Exchequer, that the same was the reason that the same issued forth.

Respons. 2.—The suggestions are not absolute, that any such danger was, or such navy

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was prepared by pirates; but only mentioneth, 'quia datum nobis intelligi,' that the pirates had done such mischief.

Respons. 3.—If such suggestions had been absolutely set down, yet we are not always bound absolutely to believe them; because many times untrue suggestions are put into writs and patents; and yet it doth not lie upon the king's conscience, neither doth the law impute any fact to the king, that any such be: for the law doth always conceive honourably of the king, that he cannot, nor will not, signify any untruth under the Great Seal; but he is abused therein, and the law imputeth it to them that so misinformed the king, and thrust in such suggestions into the Writ or Patent. And therefore all patents grounded upon untrue suggestions, are accounted void.

Respons. 4.—That the demurrer confesseth nothing but that which is legally and well set down; but if it be illegal the demurrer confesseth it not, but is well offered for that cause.

Respons. 5.—If the kingdom were in danger, yet a charge must not be laid in general upon the subjects, without their consent in parliament: for either the danger is near, and then the present provision must be made by men's persons, and the present ships of the kingdom, which the king may command from all parts of the kingdom, as need shall require; but cannot command money out of men's purses, by distraining of their goods, or imprisoning of their persons. But if the danger be further off, by reason of any foreign combinations, (as it is conceived it may be here) that provision must be made of ships by all the kingdom for defence; then, as Philip Commines, fol. 179, saith, That cloud is seen afar off, before that the tempest falls, especially by a foreign war; and such invasions cannot happen so soon, but that the king may call his sages together, and by consent make provision for such defence.

So I say here, If there be time to make ships, or prepare ships at the charge of the counties; then is there time enough for his majesty, if he pleases to call his parliament, to charge his commons, by consent in parliament, and to have a subsidiary aid, as always hath been done in such cases. And they are not so long coming or meeting, but they will make provision for defence, it being for all their safeties: For it appeareth by Coke, lib. 9, fol. 1, in his epistle, that king Alfred made a law, That a parliament should be held twice every year, and oftner, if need required, in times of peace: So that it was then conceived, that it was necessary to have parliaments to redress inconveniences.—Also by a statute made 4 Ed. 3, cap. 14, it is enacted, a parliament shall be held once every year, and oftuer if need be. And also by a statute made 36 Ed. 3, cap. 10, it is enacted, for the redress of mischiefs and grievances that daily happen, a parliament shall be holden every year, as another time was ordained by a statute, which, I think, referreth to 4 Ed. 3. Also it appeareth by the speed that was in the parliament held in the third year of his majesty's reign, when five subsidies were granted, two of them to be paid within few days after the session of parliament ended; and therefore might, as this case is, been ordered and provided for by parliament within 7 months, as the time was between the teste of the writ, and the time prefixed for ships to be prepared and sent.

Object.—And whereas it is objected, That perhaps the parliament would not have consented, and so the kingdom might have been lost.

Respons.—It is answered, That it is not to be presumed, that the parliament would deny to do that which is fit for the safety and defence of the kingdom, their own estates and lives being in danger, if the kingdom were not sufficiently defended: For it is a rule, 'Nihil 'iniquiam est præsumend' in lege.' So of the high court of parliament, That they would not deny that which is fitting. But I confess, I think that if it had been moved in parliament, they would never have consented to these writs, such never having been awarded before since the Conquest. And if they had consented, they would have taken a course how the same should have been made with the most conveniency, and not to leave it to a sheriff to tax them how he would.

Object. To that which hath been said, That this charge is not within the statute, and that a statute to inhibit such a charge, for defence were void,

Respons.—I answer, that it is true, That if a statute were, that the king should not defend the kingdom, it were void, being against law and reason. But a statute that money shall not be charged or levyed, nor that men shall be charged to make or prepare ships at their own charges, without common consent in parliament, I conceive were a good law, and agreeable to law and reason. And the king may by parliament, restrain himself from laying such a charge, but by consent in parliament. And then the king being a just and pious king, as ever governed the kingdom, which we that serve in his courts of justice have daily experience of, would not assent unto, or suffer any such charge, if he were truly informed the imposing of this charge were against any one law of his kingdom, as this is against so many; but would say, as it is said of the statute made 35 Ed. 1. That the pope should not be permitted to present to benefices; That he was bound by his oath to see that, and other laws in force, and not repealed, to be performed: That he would not suffer such charges to be laid, contrary to the laws and statutes of his realm: And would do as the late famous queen Eliz. did, when having required a charge upon divers of her subjects, by particular letters from the lords of her council, of several sums of money for present help towards her wars in Ireland, hearing that one of her judges, being convented before her lords for the payment of it, thereby discouraging others to pay it, answered it was against the laws, that the same should be imposed, there being an express statute against it,

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which he being a judge, was bound by his oath to signify; he being, as much as in him was, to be a conservator of the queen's oath in that behalf. The queen, I say, was very angry that such an imposition had been laid against law, and commanded it should be stopped from farther gathering; and to some that had paid their moneys, the same was restored. And therefore the principal and only fault in the charging of his subjects by these writs, if they be unlawful, as I conceive they are, is in those that devised them, and informed him that they were lawful, and such as his progenitors had from time to time used to send forth; and in his judges who have affirmed it to be lawful: Therefore upon this point I conclude, That this charge, by this writ, is illegal; and is no sufficient cause to charge the defendant.

Object.—Whereas it hath been much urged and argued by Mr. Sollicitor, and Mr. Attorney, That this writ is warranted by the king's prerogative and power-royal to send forth such writs for defence and safety of the kingdom in time of danger.

To this I answer, That I do not conceive there is any such prerogative; for if it were a prerogative, I should not offer to speak against it: for it is part of our oaths, that are judges, to maintain the king's prerogative to the best of our skill, and not to suffer the same to be diminished. But if it be as I have argued, That is against the common law, and against so many statutes, that the subjects should be inforced to sustain, or to contribute to any charge, without the special consent, or common assent in parliament, then there is no such prerogative; for whatsoever is done to the hurt or wrong of the subjects, and against the laws of the land, the law imputeth that honour and justice to the king, whose throne is established by justice, that it is accounted not done by the king, but by some untrue and unjust informations. This appeareth by the authorities of our books; for Bracton, lib. 3, fol. 107, who is an ancient writer in our law, said 'Nihil aliud 'potest rex in terris, cum sit Dei minister et vi-'carius, quam de jure potest;' and there a little after, 'Itaq; potestas juris sua est, et non in-'juriæ, cum sit author juris, non debet inde 'injuriæ nasci occasio, unde jura nascuntur.' Sir Edw. Coke, in the 11th book of his Reports, in the case of Magdalen College, where the question was, whether queen Elizabeth having taken a long lease of a college, being conceived to be against the statute 13 Eliz. it was sought to be maintained by her prerogative, but resolved it could not, it being against a statute, by which she was bound, though not named, and there fol. 72, it is said, 'hoc solum rex non 'potest facere, quod non potest injuste agere.' Plowden's Comment. fol. 246, 247, in the lord Berkley's case it is said, That the prerogative of the king cannot do wrong, and his prerogative cannot be any warrant to do any wrong to any. Plowden's Comment. fol. 487, in Mitchell's case, it is said by justice Harper, although the common law doth allow many prerogatives to the king, yet it doth not allow any, that he shall hurt or wrong any by his prerogative. 21 Ed. 3, fol. 47, the earl of Kent's case, it is said, That if the king, under his great seal, do make any grant to the hurt of any other, he shall repeal and avoid it, *jure regis*; for the king is accounted to be abused by untrue suggestions, when he is drawn to do any wrong to the hurt of any other; much more I say, when he is drawn to do any thing to the hurt of his subjects in general. Sir Ed. Coke, lib. 11, fol. 86, in Darcie's case, it is said, That every grant of the king hath this condition annexed unto it, 'tacite aut expresse, 'ita quod patria per donationem illam magis 'solito non oneretur, seu gravetur.' The book called Doctor and Student, fol. 8, setting down, That the law doth vest the absolute property of every man's goods in him, and that they cannot be taken from him but by his consent, saith, That is the reason that if they be taken from him, the party shall answer the full value thereof in damages. And sure I conceive, that the party that doth this wrong to another, shall besides the damages to the party, be imprisoned, and pay a fine to the king; which, in the King's Bench, is the tenth part of as much as he payeth to the party. So then, if the king will punish the wrong of taking of goods, without consent, between party and party; much more will he not by any prerogative take away any man's goods, without his consent, particular or general.

So I conclude, that I conceive, that there is not any such prerogative to award such writs to command men to sustain such charge, as to be contributory to it; and to be distrained and imprisoned for not payment thereof.—Also I conceive, That this is not an act of royal power; for if it be illegal to impose such a charge, then it is not accounted as a matter of royal power, but as a matter done upon an untrue suggestion, and a matter of wrong done: and wrong is not imputed to the king, for he can do no wrong; but it is imputed to them that advised him to this course.

Royal power, I account, is to be used in cases of necessity, and imminent danger, when ordinary courses will not avail; for it is a rule, 'Non occurrendum est ad extraordinaria, 'quando fieri potest per ordinaria;' as in cases of rebellion, sudden invasion, and some other cases, where martial law may be used, and may not stay for legal proceedings. But in a time of peace, and no extreme necessity, legal courses must be used, and not royal power. Therefore, whereas in the statute of 31 Hen. 8, cap. 8, which was made upon the suppression of abbeys, when rebellions were begun to be stirred, it is recited, That sudden occasions happening, which do require speedy remedies, and for lack of a statute, the king was enforced to use royal power; it was enacted for the reasons therein mentioned, That the king, by the advice of his counsel therein named, two bishops, two chief justices, and divers others, or the major part of them, by his proclamation, may make ordinance for punishing of offences,

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and lay penalties, which should have the force of a law, with a promise that thereby no man's life, lands or goods, should be touched or impeached, so that therein royal power was fortified by a statute: yet that statute took care that no man's life, lands or goods, should be taken or prejudiced; and that statute was thought inconvenient, and therefore the same by a statute of 1 Ed. 6, was repealed.—So Bracton, lib. 2, cap. 24, fol. 55. And the same is cited in Coke, lib. 7, fol. 11, in Calvin's Case, 'Regis corona est facere justitiam et judicium, et tenere pacem, sine quibus corona 'consistere non potest, nec tenere.'—Coke, lib. 7, fol. 5, in Calvin's Case, cited out of Fortescue, 'Rex ad tutelam corporum et bonorum 'erectus est;' which being so, he cannot take away mens goods, or charge them without their consent, by any prerogative or royal power.

Also there can be no such necessity, or danger conceived, that may cause these writs to be awarded to all counties of England, to prepare ships at such a charge, and with such men and ammunition, without consent in parliament; for the laws have provided means for defence in times of danger, without taking this course: for that the king hath power to command all, or any persons of his kingdom, to attend with arms at the sea-coasts, to defend the coasts, or any other parts of the kingdom; and also by his officers, to make stay or arrest, all or any the ships of merchants, and others having ships; or as many as he pleaseth to go with his navy, to any parts of his kingdom, for defence thereof; and to attend those to whom he appointed the guard of the seas, or the sea-coasts, at such times and places as they should appoint. And this has been always taken and conceived to be sufficient for defence, against any prince whatsoever; and yet the same was in times, when the navy of England was not so strong, as now by the blessing of God and the good providence of his majesty it is.—That this course was then so taken, appeareth by divers records, viz. 28 Ed. 1, m. 4, the Record reciteth, That the French king had prepared a great navy upon the sea, and purposed to invade the kingdom, 'et linguam Anglicanam de terra delere;' and thereupon the king commanded all the ships, and men with arms, to be in readiness to defend the kingdom.

Rot. Scot. 10 Ed. 3, m. 16, reciteth, That certain galleys in parts beyond the seas, were prepared with provisions of men, and arms, and other necessaries of war, and ready to invade the land: Command was, that divers ships should be in readiness to defend the same; and the ships of the ports of Ireland to be sent into England to help to defend the kingdom.

Scot. 10 Ed. 3, m. 22. A writ was to the bailiff of South Wales, (reciting, That the Scots and divers others confederating together, prepare themselves to arms and ships in a great number, and intend to invade the kingdom) to command them to have one ship ready upon the sea to defend their coasts. The like writ was then to North Wales.

Alm' 12 Ed. 3, m. 10. A writ to the mayor of London: 'Quia hostes nostri in galleis cum 'multitudine non modica congregati in diversis 'partibus regni hostiliter ingressi sunt, et civi-'tatem prædict' celeriter si possunt invadere 'proponunt.' The king commandeth them to shut up the city towards the water, and to put all their men in arms ready to defend, &c.

Alm' 13 Ed. 3, m. 13. A writ to the bailiff of Great Yarmouth: 'Quia pro certe didici-'mus quod hostes nostri Franc' et adherentes 'eisd' galleas et naves guerrinas in copiosa 'multitudine in partibus exteris congregarunt, 'et iis homines ad arma parari faciunt, et pro-'ponunt se movere versus regnum nostrum et 'navig' regni nostri et portus prope mare si-'tuat' pro viribus destruere, et id' regnum inva-'dere, &c.' command the same town to prepare four ships with 140 men, &c.—At the same time writs went forth to twenty other towns upon the sea-coasts. Franc. 26 Ed. 3, m. 5. Writ to the earl of Huntingdon and others, 'Quia adversarii nostri Franciæ nos et 'regnum nostrum invadere machinantes, mag-'num navigium præparari fecer' et armari, ne 'dum ad regnum nostrum Angliæ subito attra-'hend' sed ad nos et dominium nostrum et to-'tam nationem Anglicanam pro viribus sub-'vertend' &c.' commanding them to guard all the sea-coasts of Kent, and to array all men to be ready with arms to defend the sea-coasts.

5 Hen. 4, m. 28. A commission is to Thomas Morley and others: 'Quod cum inimici 'nostri Franciæ Britan' Scot' et al' sibi adhæ-'rentes inter se obligati magna potentia ar-'mat' super mare in æstat. prox' futur' ordina-'verunt regnum nostr' Angliæ invadere, &c.' commanding them to array men with arms to defend, &c.

4 Hen. 8, par. 2. The king by proclamation to the county of Kent, sheweth, that it is come to his knowledge of certain, that his ancient enemy, the French king, hath prepared and put in readiness a great and strong navy, furnished with men of war, to invade the kingdom of England; the king appoints the lord of Abergavenny and others, to put men in array, and to be ready to defend that county.

Anno 1588, when the great invasion was by the navy, termed The Invincible Navy, which was foreseen long before, this course of preparing ships by every county of the kingdom was not appointed; yet in all these times, when there appeared so great danger of invasion, there never went any such writ into any of the counties of England, to provide ships: But the navy of England, and army of England, was always accounted sufficient for the defence of the kingdom.

So I conclude this point, that I conceive this course cannot be taken by any prerogative or royal power, nor any allegation of necessity or danger.

For the fourth point, I conceive, that if it were legal to lay such charge upon maritime parts; yet to charge any inland county with making of ships, and furnishing them with more

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mariners and soldiers at their charges, which are far remote from the sea, is not legal, nor warranted by any former precedent; for it commandeth an unreasonable and impossible thing by them to be done: and then a writ, commanding such a thing as is unreasonable and impossible for the parties of themselves to perform, without help of other counties, is always illegal; for it is a rule, that 'Lex non cogit ad impossi-'bilia:' If one by covenant bind himself to do a thing impossible, the covenant is void.—This appeareth by the book case 40 Ed. 3, fol. 6, where the case is expressly, that if a man do covenant to do a thing impossible, the covenant is void, and the deed is void in that respect: also the book, m. 2 Ed. 4, fol. 2. If a feoffment be made upon condition to be void, if the feoffee did not a thing which is impossible, the feoffment is good, and the condition void: for it was the fault of the feoffer to annex such a condition. And this appeareth by the case of an arbitrement. If the arbitrator award, that one shall enter into bond, with such a one as his surety, to pay a sum of money, or to do any other act, it is void, as to the finding of a surety at the least; for it is not in his power to compel him to be his surety: therefore the law accounteth it unreasonable, and so void. And this appeareth by the book-case 17 Ed. 4, fo. 5, where it is so resolved.

So this writ commanding the sheriff and inhabitants of an inland county to find a ship with masters and mariners; whereas there are not any shipwrights that have skill to make ships, nor any masters or mariners ever there to guide a ship, for they are still conversant about matters of the plough, and feeding cattle, and husbandry, and are trained up by musters to skill of arms to defend the country, but not with sea affairs; for most of the county never saw a ship, nor know what belongs to musters or mariners; and the county is not bound to seek out of the county for such men; and perhaps if they should, they cannot tell where to have them: therefore, when such writs to inland towns have been awarded to find ships with masters and mariners, it being conceived by information that they were maritime towns, and had ships and mariners dwelling with them; the truth thereof being made appear to the contrary, they have been discharged, as appears by a record, 13 Ed. 3, part 2, m. 14, where a writ went to the admiral of the fleet: Upon complaint to the king by the men of Bodmin in the county of Cornwall, that they were unjustly charged to find a ship with masters and mariners, whereas that town was no port town, nor adjoining to the sea, but far within the land, nor ever had ships lying there, nor mariners, nor seamen, nor ever used to find any such for sea service, and that their major and officers were imprisoned for not finding a ship; thereupon the king appointed to have it enquired whether their allegations were true, and if it were true, signified that he would not have them be unjustly charged, but that they should be discharged thereof. Which sheweth, that it was then accounted unjust to lay such a charge upon a town that was an inland town, and had no mariner inhabiting in it; much more when such a charge is laid upon an inland county, which is much farther remote from the sea, and cannot perform by themselves that which the writ commanded.

Object.—But this record being objected by the defendant's counsel, Mr. Solicitor gave answer, that the same was because the admiral of his own authority had charged them, which was not according to his commission; for he was only to charge the port towns and sea towns: but that the same may not be done by the king's writ, the record doth not prove.

Respons.—But to this I answer, that I conceive it is all one when such a charge is laid upon a town by writ, which is an inland town, for so it appeareth by another record of the same year, viz. 13 Ed. 3, part 1, m. 14, where a writ was directed to the admiral of the fleet, 'Ab ore Themesis versus partes occidentales;' reciting, that where the king by his writ to the town of Chichester, commanded the mayor and commonalty there, that they should make 'unam 'navem et duos escularios de guerra parari,' with mariners and men at arms, to be at Portsmouth such a day, to go with the king's ships; and that they had complained that they had not, nor ever had any ships arriving in that town, nor had any seamen or mariners dwelling there; and that it appeared to the king, by inquisition of a jury returned into his Chancery, this their allegation to be true: therefore, because the king would not have them *indebitè gravari*, (for so be the words of the record) the king commandeth the admiral that they shall not be troubled nor distrained for not performance of such service. Whereby it appeareth, that if they being within a few miles of the sea, should not be charged to find such a ship, much less more inland counties that are farther remote from the seas, are justly to be charged with finding ships and mariners. Therefore I conclude this point, that I conceive this writ in that respect is not legal, nor warranted by any former precedent.

The fifth and great point hath been, and indeed the chief argument hath been, a multitude of records and precedents, which have been cited, that should warrant these writs; and that the king hath done nothing but what his former progenitors have done, and have lawfully done; and that he doth now but *more majorum*, and that which always in ancient times hath been done and allowed, and therefore ought to be done.—I confess this allegation much troubled me, when I heard these records cited, and so learnedly and earnestly pressed by Mr. Solicitor, and after by Mr. Attorney, to be so clear, that they might not be gainsaid: but that they proved a clear prerogative, or at least a royal power, that the king might do so, especially when my brother Weston, and my brother Berkley (who have seen the records) pressed some of them, and relied upon them for the reasons of their judgments; I say, I was much doubtful thereupon,

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until I had perused all these records sent me by the king's counsel, and satisfied my judgment therein.

But now I answer, that if there were any such precedent (as I shall shew there was not one shewed to me) to prove this writ to be usual, yet it were not material; for now we are not to argue what hath been done *de facto*, for many things have been done, which were never allowed; but our question is, what hath been done, and may be, *de jure*. And then, as it is said in Coke, lib. 4, fol. 13, in Witton's Case, it is said 'Multitudo errantium non parit errori patrocinium:' and lib. 4, fol. 94, in Slade's Case; multitude of precedents, unless they be confirmed by judicial proceedings, in courts of record, are not to be regarded; and none of these were ever confirmed by judicial record, but complained of.

But to give a more clear answer unto them, I say that in my opinion, upon view and serious reading of all the records that have been sent me on the king's part; for I have read them all over *verbatim*, and I presume they sent all they conceived to be material, and I have taken notes of every one of them, and diligently considered of them, I conceive that there is not any precedent or record of any such writ sent to any sheriff of any inland county to command the making of ships at the charge of the county; but this is the first precedent that ever was since the Conquest that is produced in this kind.

But it is true, that before 25 Ed. 1, there have been some writs to maritime towns and ports, and other towns, as London, &c. where they have had ships and mariners, to provide and prepare ships, and to send them to such places as the king pleased to appoint, upon any just cause of fear of any danger, for the defence of the sea and kingdom: and great reason, that they having ships and masters of ships and mariners, should be at the king's command, to bring all or as many as he pleaseth for the defence of the sea and kingdom, being those that had the most benefit of the seas, and likely to have the greatest loss if the sea and coast were not daily guarded; and those were appointed most commonly to be at the king's charge, but sometimes upon necessity they were appointed to be at the charges of the towns and ports adjoining: which I think was the true cause of the complaint in parliament in 25 Ed. 1, and of the making that statute for the staying of that course; for there is no record of any such writs afterwards in Edward 1's time, after that statute to maritime towns, to prepare or send ships at the charge of the towns.

But in the time of Ed. 3, then the war being between him and the French king in annis 10, 11, 12, et 13 of that king, where the most writs awarded to maritime towns, to send ships at their charges sufficiently furnished; and those I think were the principal cause of the making of the statute of 14 Ed. 3, cap. 1. And after that statute no such writs, nor any commissions for that purpose were awarded to any maritime towns, or inland towns, for the making of ships, but one; which record was much pressed by Mr. Attorney, and afterwards by my brother Weston, and my brother Berkley, to prove, that this course was, and might be practised after the statute of 14 Ed. 3, for sending forth such writs, and allowed: but that record is fully satisfied, for it was grounded upon an ordinance of parliament in 1 Rich. 2, m. 52, that all antient cities, burroughs, and towns, that would then, should have their charters confirmed without any charge of fine, save only to make a ship of war for defence of the realm: so this was not compulsory to any, but voluntary to those that would have their liberties confirmed. And afterwards, in 1 Hen. 4, commissions were awarded for making such vessels of war; but those issuing forth without any ordinance of parliament, were complained of in parliament 2 Hen. 4, and no such writs issued forth in any age, to any maritime towns, to make ships, or prepare ships at their own charge for the king's service, until these late writs.

This general answer I give to all the records; and now I shall take a short view of all the records that have been cited and sent to me, and leave them to the judgment of my lords and others, if any of them prove these writs usual and legal.

6 Joh. m. 1. 3 Joh. m. 3, 14 Joh. m. 2, 17 Joh. m. 7. Three of these are to arrest and make stay of ships, that they should not go out of the kingdom, but to be ready for the king's service; and the other was to bring ships of particular towns to the mouth of the Thames, for the king's service.

19 Joh. m. 4. A commission to guard the seas to Joh. de Marshal, and to the sheriff of the county of Lincoln, and to all others to attend his commands.

15 Joh. Writ to the barons of the cinque-ports, and divers other towns, to have their ships ready for the king's service.

14 Hen. 3, m. 14, 14 Hen. 3, m. 5. A writ to the bailiff of Portsmouth, to prepare one galley. A commission to the sheriff of Rochester, and another to the sheriff of Kent, to cause all men to be in arms in that county, and to assess them what arms they should find.

48 Hen. 3, m. 4. A writ to the sheriff of Norfolk, commanding him to cause them appointed to attend all the coasts in that county, who having served 40 days intended to depart, that they should stay eight days longer by reason of the danger, and longer, if need required. The like were sent to the sheriffs of Suffolk and Essex.

48 Hen. 3, m. 2. A writ to the mayor of Bedford, commanding him to provide for the expences of them that were sent from thence for the guarding of the seas; yet it is but for eight days more after the date of the writ.

48 Hen. 3, m. 3. A writ to the men of Essex, Norfolk, and Suffolk, appointed to at-

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tend for the guarding of the sea-coasts, reciting, that the king had appointed T. de M. 'Custod' 'maris et part' maritim'' within their counties, commanding them to assist him, and to perform therein what he required.

48 Hen. 3, m. 7. A writ to the sheriff of Cambridge and Huntingdon, to command all men of those counties, able to bear arms, to come to the king to London.

25 Ed. 1, m. 5. A writ to those of Essex, Norfolk, and Suffolk, reciting, that such persons were appointed 'ad custod' maritim' in those parts, commanding them to attend them. Another to the sheriffs of Norfolk and Suffolk, reciting, that certain constables were appointed to assess men at arms, sufficient for the guarding of the sea-coasts, commanding them to distrain and compel them assessed to go.

24 Ed. 1, m. 17. Writs to the sheriffs of Lincoln, York, and Northumberland, reciting, that he had commanded 'A. de B. ad congregand' 'et capiend' centum naves,' between Leigh and Berwick, 'et ad homines potentes in eisd' pouend',' commanding them to assist him therein.

24 Ed. 1, rot. 62. A writ out of the Exchequer to Adam de Guerdo 'et aliis gardianis' of the sea-coasts in the county of Southampton, to distrain the abbot of Reading, to find horses, which he was assessed at for that service.

24 Ed. 1, m. 16. Writs to all archbishops, bishops, earls, &c. in the counties of Somerset, Devon, and Cornwall, to attend with their horsemen and footmen, for defence of the sea-coasts in those parts, when they shall be required by the guardian of those coasts.

24 Ed. 1, m. 71. A writ out of the Exchequer, directed to all archbishops, bishops, earls, &c. in the county of Norfolk, reciting, that Peter de Rutlin was appointed 'ad custodiend' 'partium maritimar' illarum,' commanding them to assist him.

24 Ed. 1, rot. 78. A writ out of the Exchequer to the sheriff of Berks, reciting, that the king was informed by Adam de Griden, guardian of the sea-coasts in the county of Southampton, that those men in the county of Berks, who were assigned to come to the defending of the sea-coasts in those parts, came not as they were warned, commanding to distrain them, and compel them to come and to do the service.—The like writs were then awarded to the sheriffs of Wilts and Southampton, &c.

24 Ed. 1, rot. 31. A writ to the bailiffs of Great Yarmouth, reciting, that the king was informed, that certain in Flanders and France, in a great multitude, appareled like fishermen, intended to invade their town, warning them to gather their ships together, and all their arms, to defend themselves against such an attempt.

24 Ed. 1, inter com'. A writ to all sheriffs and bailiffs, &c. reciting, that he had appointed some therein named, 'ad congregand' numerum 'navium et galliarum majorum, &c.' commanding the sheriffs in their several counties to be assisting to them therein.

24 Ed. 1, m. 9. A writ of Supersedeas to the guardian of the seas in the county of Southampton, to discharge Hugh de Plessis to find arms for his lands in that county, for guarding of the seas, because he was in service with the king.

Nota, All these Records are for arrays, and congregating ships, but none to make or prepare ships at the charges of the counties.

24 Ed. 1, m. 26. A writ to the sheriff of Essex to discharge for the winter time those that stay at the sea-coast, with their arms to defend the coast; but commanding them to be in a readiness when they should be again commanded. The like writs were then awarded to divers sheriffs of maritime counties to the same purpose.

25 Ed. 1, m. 12. A writ to the sheriff of Lancaster, reciting, that whereas the king had formerly commanded him to go to all the ports and towns where ships were, commanding the bailiffs of the ports to have all the ships of burden of 40 tons at Winchelsea, by such a day; now commandeth the sheriff to see them made ready, and sent thither accordingly.

Ibid. m. 13. The like writs directed to the sheriffs of Lincoln, York, Northumberland, and Cumberland.

Ibid. m. 14. The like writs directed to nineteen other ports and towns in other counties.

21 Ed. 1, m. 20. A commission to send away men at arms in the county of Westmorland.

21 Ed. 1, rot. 77. In the exchequer, shewed by the defendant's counsel, writs went to several maritime towns upon the sea-coasts, and other towns where ships were usually made, to make ships and gallies; and that the king will allow and pay for them, when he knoweth the charge thereof.

Pat. 9 Ed. 2, part 2. A writ to all men in the towns upon the sea-coasts, and ports of the sea, between Southampton and Falmouth, reciting, that the king had appointed John de Norton to make provision for a navy in those towns and ports, at their charges, he commandeth them to perform what he in that behalf shall require.

Claus. 20 Ed. 2, m. 8. A writ to the bailiff of Yarmouth, reciting, that whereas the king had commanded all the ships of the burden of fifty tons, from the Thames mouth towards the West parts, to be at Portsmouth such a day, &c. and they had sent two ships: that the masters and mariners complained, that they could not serve without wages, and therefore appointed them to send them wages.

20 Ed. 2, m. 10. A writ to the bailiffs of Yarmouth, commanding them to send all their ships of the burden of thirty tons and above, to Orewell in Suffolk, with double tackling, victuals, and other things necessary for one month.

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The like writs at the same time to other towns, to the number of four and thirty.

20 Ed. 2, m. 10. A writ to the mayor of London, to provide three ships with men and ammunition to go with nine ships of Kent to guard the sea-coasts.

15 Ed. 2, m. 15. A writ to the sheriff of Norfolk, commanding him to warn all barons, bannerets, knights, and others of that county, to attend the king at Coventry, at such a day to go with the king.

15 Ed. 2, m. 15. Writs to the sheriffs of Norfolk and Suffolk, commanding them to arrest all barons, bannerets, knights and esquires, who were commanded to attend the king at Coventry, such a day therein named, and came not, to be before the king and his council to answer it.

The record saith, like writs were then awarded to divers sheriffs of other counties.

16 Ed. 2, m. 13. A commission to array all persons between the ages of sixteen and sixty, with arms convenient, to come to the king, when they shall be required.

19 Ed. 2, m. 6. A writ to the archbishop of Canterbury, commanding him to array all his servants and families, to be ready to defend the kingdom, if any invasion should be.

The like writs at that time to all the bishops.

2 Ed. 3, m. 92. A writ to the mayor and bailiff of Southampton, commanding them to cause all their ships of the burden of forty tons, and above, to be furnished with men of arms, and victuals, ready to defend the land, if any invasion shall happen.

Scot. 7 Ed. 3, m. 19. A commission to Hugh Courtney, to guard the seas in the counties of Devon and Cornwall, and commanding all others to assist him.

10 Ed. 3, m. 25. The like commission to Hugh Courtney, for guarding the seas in the same counties.

Ibid. A writ to Bartholomew de Insula, for custody of the sea-coast in the county of Southampton; and therein is a command to John Tichborne, and others for the county of Southampton, and to Will. de Parshire, and others for the county of Berks; and to Joh. Mareditt, and others, for the county of Wilts, to array men with arms, and to have them in readiness to defend the coasts of Southampton.

Scot. 10 Ed. 3, m. 2. A writ to Will. Clinton, guardian of the Cinque-ports and others, to survey all the ships of the Cinque-ports, and other ports from the mouth of the Thames to Portsmouth, and to cause them to be furnished with arms and victuals for 13 weeks, from the time they shall go from Portsmouth.

Scot. 10 Ed. 3, m. 2. A writ to the mayor of Winchelsea, to cause ships appointed for that town to be furnished with men and arms, and victuals, and other necessaries for 13 weeks.

Scot. 10 Ed. 3, m. 16. A writ to the admiral of the fleet from the mouth of the Thames to the west parts, to keep upon the seas the ships of the Cinque-ports, and other ships arrested to defend the kingdom against attempt of any invasion.—The like writ was then to the admiral of the fleet, from the mouth of the Thames to the north parts, with the like command to hold the ships together upon the sea.

Scot. 10 Edw. 3, 16. A writ commanding the ships of the ports of Ireland to be sent hither to guard the seas here.

10 Ed. 3, m 12. A writ to the bailiff of Yarmouth, to cause the men of that town to contribute to the charges of the ships and men, and victuals, sent from thence for the defence of the kingdom.

Scot. 10 Edw. 3, m. 22. A writ to all the bailiffs of liberties, and men of South-Wales, to have one ship riding upon the seas for defence of those parts.—The like to the men of North-Wales.

Scot. 10 Edw. 3, m. 21. A writ to the arrayers of men for the county of Berks, to compel them of that county, assigned and assessed for the keeping of the sea-coast in the county of Southampton, to go to Portsmouth by a day therein appointed.

Alm' 12 Ed. 3, m. 12. A commission reciting, that the king had appointed all the ships from the mouth of the Thames northwards, to be arrested, and to cause them to be furnished with ammunition, men and victuals, and to be brought to Yarmouth; and that the men of Lynn refused to contribute to the expence of the charge of the men sent in the ship from that town, and the furnishing of that ship; and therefore commands the commissioners therein named; to assess them that refuse to contribute and distrain them.

Alm' 12 Edw. 3, m. 13. The like to compel the men of Bardesey to contribute for the expences of the men of that town.

Claus. 12 Edw. 3, m. 17. The like to compel the men of the counties of Surrey and Sussex, to contribute to the expences of the men of those counties, that did attend for the guarding of the sea-coasts in those parts.

Vasc. 12 Edw. 3, m. 8. A writ to all archbishops, bishops, &c. and to the sheriff of Kent, and the barons of the Cinque-Ports, and all others in that county, commanding them to be assisting to J. de Cobham, to whom the custody of the sea in those parts is committed; and to defend those coasts against any foreign invasion that shall happen.

Alm' 12 Edw. 3, m. 10. A writ to the mayor of London, reciting the danger of invasion, and commanding to shut up the gates at the water-side, if the enemies approach.

Alm' 13 Edw. 3, m. 12. A writ to the bailiff of Yarmouth, reciting that he had by his writ commanded four ships of war of that town to be made ready with men, ammunition, and victuals for three months, at the charges of the town, to be brought to Orewell, and that they failed to come at the day, to the great peril of the land; therefore commandeth the bailiff to compel them at another day therein prefixed, to be at the same place.—There it is set down, that the like writs were awarded to the bailiffs

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of seventeen other towns, for sending their ships, being charged some of them for one ship, and some for two ships.

Claus. 13 Edw. 3, m. 38. A Supersedeas for the abbot of Ramsey, for being charged with arms for guarding the coasts in Norfolk, for his lands in Norfolk, because he was by command attending with all his forces in the county of Huntingdon, for the safety of these parts.

Claus. 13 Edw. 3, m. 14. A writ of supersedeas to the arrayers of arms in the county of Oxon, to discharge John Mauditt to serve there, because he served in Wilts.

Claus. 13 Ed. 3, m. 14. A writ to the arrayers of arms in the county of Wilts, which is only concerning the payment of soldiers wages, who then attended to guard the sea-coasts.

These being all the records shewed me, it appeareth that there were no writs issuing out in those times to any sheriffs of inland counties, or maritime counties, to make or prepare ships upon any occasion whatsoever, but only to maritime towns, to send their ships, or prepare their ships, at their own charges.

The records shewed me since 14 Ed. 3, do not shew any writs to be awarded to any maritime town to prepare ships at the charge of the towns, except the records of 1 Rich. 2, and 1 Hen. 4, which I have before answered; and they since that time shewed unto me, except such as I have mentioned in my argument, are these:

Scot. 10 Edw. 3, m. 14. A commission to Nicholas de Cartlope, to array men to resist the Scots.

Ibid. A writ to the mayor of York, to array all their men to be ready when they shall be required.

20 Edw. 3, m. 15. A commission concerning the arrays of men in the counties of Derby and Nottingham, and to punish them that come not when they are warned.

Rot' Franc' 21 Ed. 3, m. 31. A writ to the arrayers of men in the county of Southampton, to discharge the abbot of Battel, for finding arms for defence of the sea-coasts there.

Franc' 25 Ed. 3, m. 20. A commission to John Bodingham, for the custody of the port and maritime parts in Cornwall, and to array all men to be in readiness. There is set down, that the like commission is to others in several other counties.

Franc' 26 Edw. 3, m. 5. A commission to the earl of Huntingdon and others, to have the custody of the ports in Kent, and to array men, and to set up beacons; which is the first I observe of this kind.

Franc' 46 Ed. 3, m. 34. The like commission then to several other persons, to array men in several counties, as Warwick, Oxon, Berks, and Bucks.

A writ to the archbishop of Canterbury, reciting the danger of invasion by the French, to hurt the church and kingdom, commanding him to array all his clergy in his diocess, and to be ready to go with the king's forces, &c.—The like writs to all other bishops in the kingdom.

Franc' 50 Edw. 3, m. 47. A writ to the arrayers of men in the county of Norfolk, and to the sheriff of Norfolk, commanding them to command all great men, and others that have mansions upon or near the sea-coasts, to resort to them with all their families, for the defence of the coasts.—The like to the arrayers and sheriffs of ten other maritime counties.

Scot. 29 Ed. 3, m. 13. A commission to the bishop of Durham and others, to array men in Durham, Cumberland, and Northumberland, to resist the Scots.

Franc' 40 Edw. 3, m. 31. A writ to William Zouch and others, to remove with all their families to their houses upon the sea-coasts.

Nota, That all the records are for arraying men, and none for preparing ships.

1 Rich. 2, m. 7. A writ to the bailiffs of Scarborough, because their town was upon the coasts of the sea, and in danger of invasion, carefully to look to the custody thereof.

Eod' rot' m. 12. A writ to the mayor and bailiffs of Oxford, to repair the walls of the town, and to compel those that had lands there, to contribute to the expences thereof.

This record hath been much urged by Mr. Solicitor and Mr. Attorney, that if the king have such a power to command the walls of a town to be repaired, much more to command ships to be made, which are the walls of the sea, and consequently the walls of the kingdom.

But this is clearly answered; for that it is but a private town, and that which hath been formerly so walled, and for defence and safety of the town; and none were to be charged but those that had benefit thereby; and so it proveth nothing to the case in question.

Eod' rot. m. 42. One writ to the sheriff of Kent, and another to the sheriff of Essex, commanding them to perform an ordinance made by the king and his council, for setting up of beacons, and keeping watch about them.

Scot. 7 Ric. 2, m. 8. A writ to the archbishop of Canterbury to command all his clergy, between sixteen and sixty, to be arrayed and put in arms, both horse and foot, according to their qualities, to defend the kingdom.

Franc' 11 Ric. 2, m. 13. A writ to serjeants at arms, to arrest all ships of war in the ports of Plymouth, or Dartmouth, and other ports, in the county of Cornwall; and to bring them to Hunkshooke, to go with the king's majesty's ships.

In the same roll, divers other writs to divers other sheriffs at arms, to arrest the ships in divers other ports.

Scot. 21 Rich. 2, m. 3. A commission to the duke of Albemarle, to array men in the West-Marches, towards Scotland, to resist the Scots.

Rot. Viagii, 1 Hen. 4, m. 11. A writ to the sheriffs of Derby and Nottingham, reciting, That the king certainly understood that the Scots intended with a great power to invade

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the kingdom; commanding them to proclaim in all parts in their counties, That all men between sixteen and sixty, should put themselves into arms, competent according to their degrees and qualities, to be ready upon two days warning at any time, to defend the kingdom. The like writs were then directed to the sheriffs of Lincoln, York and Lancaster.

Claus. 1 Hen. 4, m. 12. A writ to the archbishop of Canterbury: "Satis informati estis 'qualiter inimici mei Franciæ et alii sibi ad-'hærentes, cum magna classe navium, cum 'magna multitudine armator' super mare con-'gregator' diversas villas per costerum regn' 'mei invadere, et nos et regnum meum des-'truere, et ecclesiam Anglicanam subvertere 'intendunt et proponunt;' thereupon commands, That the clergy in that diocess be arrayed and armed, and to be ready to go against the enemy.—The like writs to all other bishops in England.

Nota, Although this great danger be mentioned, yet no command to prepare ships.

Pat. 5 Hen. 4, part 2, m. 28. A commission to Thomas de Morley, and others, and to the sheriffs of Norfolk and Suffolk, and to the bailiffs of Great Yarmouth, reciting, 'Quod 'cum inimici Franciæ, Scotiæ, et alii sibi ad-'hærentes se obligat' magna potentia armat' 'super mare in æstat' proxim' futur' ordinaver' 'et intendunt reg' invadere,' &c. Command to survey the town of Yarmouth, and fortify it.

Nota, Here also, though such great danger and distance of time, yet no writs issued to any counties to prepare ships.

Pat. 3 Hen. 5, part 2, m. 37. A commission to array all men at arms in the West Riding in Yorkshire, to be ready to defend those parts.—The like commissions to others, in nineteen other several counties.

Pat. 13 Hen. 6, m. 10, Pat. 39 Hen. 6, m. 11. Pat. 39 Hen. 6, m. 12. Pat. 39 Hen. 6, m. 1. Commissions for arraying of men for the defence of the kingdom, if invasion shall be; and for repressing of rebels.

Pat. 10 Ed. 4, m. 12. Commissions to Geo. duke of Clarence, et al' to array men for defence.

Pat. 10 Ed. 4, m. 13. A commission to John lord Howard, to be captain of all the forces.

Pat. 49 Hen. 6, m. 22. A commission to marquess Mountague, to array and put in arms all men beyond Trent.

Pat. 1 Hen. 7, part 1. A commission to Richard Fitz-Hugh, and others, and to the sheriff of Yorkshire, to array and cause to be armed, all able persons, abbots and others, to be ready to defend the kingdom.

1 Hen. 7, part 1. A writ to the sheriffs of Norfolk and Suffolk, to proclaim in all parts in those counties, for that there was likely to be open war between Charles king of France and the king of the Romans, and great navies are prepared on either side; commands, That watch and ward be kept, and beacons kept to give warning; and that every man be ready, if need be, to come and defend the kingdom.

4 Hen. 8, part 2. A writ to the sheriff of Kent, commanding him to proclaim in that county, That the king being certainly informed, that the French king had prepared a great and strong navy, furnished with men of war, to invade the kingdom; therefore commandeth all men between the age of sixteen and sixty, to put themselves in arms, to be ready to defend the kingdom at an hour's warning.

11 Eliz. Commissioners went to take a view of all the horses in England fit for service, and to survey all the arms, to have them all put in readiness, as necessity should require.

Now it appeareth upon view and examination of all these Records, most of them being cited by Mr. Solicitor and Mr. Attorney, in their several arguments, there are none of them to prove the sending of any such writs to inland or maritime counties to prepare ships; although there have been many times great danger; nor yet any writs to maritime towns, after the statute of 14 Ed. 3, to charge them to find any ships at their charges.—So then I conclude this point, That I conceive this writ is not warranted by any former precedent.

Now I come to examine the point of this writ, Whether the same be legal and warranted by any former precedent: and I conceive it is not.

1. The motives mentioned in the writ are, 'Quia datum est nobis intelligi,' which is no certain information: 'Quod quidam prædones 'et maris grassatores,' did take the king's subjects, merchants, and others, and carried them into miserable captivity. 'Cumque ipsos con-'spicimus navig' indies præparantes ad merca-'tores nostros molestand' et reg' nost' gravan-'dum.'—All these, and those following, I conceive are not sufficient motives, and were never in any precedent before to have a royal navy prepared. For the former precedents are, that great princes in open time of hostility had provided great navies with ammunition and soldiery, with intent to invade the kingdom, as appeareth by the former precedents: and against such provisions it was necessary to provide the royal navy, the king's ships, and all the ships of the kingdom, to be gathered together to withstand them. But to make such preparations against pirates, it was never put in any writ before; for when pirates infested the seas, they came as it were by stealth, to rob and to do mischief; and they never dared appear but when they may do mischief, and escape away by their swiftness. But against them, the usual course hath been, that the admiral or his deputy with some few ships have secured the coast, and not to employ the whole navy. And this appeareth by a record, 25 Ed. 1, m. 9, William Leighbourn the admiral was appointed upon such an occasion with ten ships to lie upon the seas, for the safeguard of the merchants: and the usual practice hath been, when

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they hover upon the sea, by sending a few ships of war to scatter them, and make them fly away. And there is no fear of the loss of the dominion of the sea, by any act pirates can do; neither is it convenient that every county of the kingdom should provide ships against them.

2. The command of this writ is to provide a ship of 450 tons at the charges of the county, furnished with masters and mariners; which is impossible for them to do for the reasons before alledged, and therefore is illegal, and not warrantable by any former precedent.

3. The command of this writ to find wages for soldiery for 26 weeks after they came to Portsmouth, when they are out of their county, and in the king's service, is illegal; being against the course of precedents in divers times, and against divers express statutes, and this appeareth by divers records.

15 Johan. In the writs of summons of the tenants by knights service, it is expressly mentioned, that after forty days service, for so many days they were to do service by their tenure, they should be satisfied *ad denarios regis.*

Pasch. 26 Edw. 1. Amongst the writs of the exchequer it is there set down, that the footmen of Cheshire being 1000, who were appointed to go for the defence of the borders of Scotland, would not stir out of their counties without wages; and there it is set down, that one therein named was sent down with money to pay the said footmen.

Mich. 26 Ed. 1, inter Bria' irrot' in the exchequer, by reason of the invasion of the Scots, many thousands of soldiers were taken from divers parts of the kingdom *ad vadia regis.* And there it is mentioned, that clerks were sent down with money to pay the soldiers of several counties their wages.

30 Edw. 1. In the exchequer in account, the wages for land soldiers for several counties, and the wages for mariners, are set down, what the wages that were paid came to by the day, and by the week, both by sea and by land.

Trin' 31 Ed. 1, inter Brevia in the exchequer, the wardens of the marches of Scotland signified to the barons, that the men of Cumberland and Westmoreland, appointed for the defence of the marches, would not stir out of their counties without wages; whereupon order was given for wages for them.

19 Edw. 2. Commissions went out to pay soldiers, who served out of the several counties, for defence against Scotland.

Hil' 2 Edw. 3, rot. 16. In the exchequer; it was ordered in parliament, That whereas some soldiers had received of some of the king's officers, money for their wages, they were fain to give bonds for repayment, and that those bonds should be all-redelivered.

1 Edw. 3, cap. 5. That no man shall be compelled to go out of his county, but where necessity required by sudden coming of strange enemies into the county; and then shall be done, as hath been done in times past: which, I conceive, is to be at the king's wages, when any are out of their counties.

But to clear all doubts, the express statute of 18 Edw. 3, cap. 7, is, That no men of arms, hobbellers and archers, chosen to go in the king's service out of England, shall be in the king's wages from the time they go out of the counties where they were chosen, until they come again.

19 Hen. 7, cap. 1. Those that had any grants of lands from the king; and 11 Hen. 7, cap. 1, those that had any offices of the grant of the king, are to serve the king in his wars: but in both it is appointed, they shall have wages from the time they shall come from their houses, until they return.

2 & 3 Edw. 6, cap. 2. It is narrated, That no captain receiving soldiers serving by sea or land, shall receive any wages for more soldiers, or more time than they shall serve; and shall enter the days of their entering into wages, upon pain, &c.

All which records and statutes do prove, that the soldiers should be at the king's wages; therefore the command for soldiers wages for twenty-six weeks, when they go from Portsmouth, is illegal, and expressly against these statutes: and so the assessment being entire, as well for the wages, as the other charges, I hold it to be clearly illegal, and not to be demanded.

4. That the command of this writ to the sheriff, to assess men at his own discretion, is not legal, nor warranted by the precedents: for the precedents are commonly, that assessments for contribution, for making or setting out of ships, have been by commissioners, which by presumption had knowledge of such matters, as commonly sheriffs have not. Also, this leaveth to the sheriff too great a power to value men's estates, as to inhance whom he will, and to favour whom he will.

5. That the power to the sheriff and mayors of towns, &c. to imprison, especially as it is used, is illegal, and expressly against divers statutes, for it is provided by Mag' Char' cap. 29, 'Quod nullus capiatur vel imprisonetur, nec 'super eum mittimus, nisi per judicium parium 'suorum, vel per legem terræ.'

Also, 5 Edw. 3, cap. 9, That no man shall be attached, or his goods seized, contrary to the form of Mag' Chart'.—Also, by the statute made 37 Edw. 3, cap. 18, it is recited, That by that Great Charter, none should be taken or imprisoned, but by due process of law; yet by colour of this writ, the sheriff may imprison any person, yea, any peer of the realm: for although peers are not to be arrested upon ordinary process between party and party, as it is resolved in the countess of Rutland's Case, in Coke lib. 6, fol. 32, yet upon contempt, and upon process of contempt, which is always for the king, any peer may be imprisoned, as it is resolved by all the lords, and all the judges, in the Star-Chamber, in the earl of Lincoln's case: and so the sheriff, by colour of this writ, may arrest any peer, as for a contempt in not paying. But by the book-case, 2 Edw. 3, fol. 2, it is resolved, That a writ to imprison one upon sugges-

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tion, before he be indicted, or without due process of law, was illegal. So for this clause, I hold this writ to be illegal.

6. The last clause of this writ is, That by colour of this writ, no more should be gathered than will be sufficient for the necessary expence of the premises, and that none who shall levy any money towards these contributions, shall detain the same with them, or employ the same to other uses; and if more than did suffice were collected, it should be repaid amongst those that paid, after a rateable proportion. But as the course is taken, it is not to be performed: for no ship, nor tackling, nor ammunition, nor men, nor wages, nor victuals being provided, it is not to be known, whether more be gathered, or less than would suffice: and there being money gathered, it is of necessity either detained with the collector, or the sheriff, or employed to other uses than are appointed by the writ; so the writ is not performed: and the money assessed and collected, is not duly paid nor collected; and the money assessed and unpaid, cannot be duly demanded.

7. Admitting the writs were legal, and the commands therein legal, yet the assessment, as is certified, is not sufficient to charge the defendant; for it is not certified, that any ships with ammunition, and men, were prepared: and this is a year after the time it should have been prepared and sent to Portsmouth. And if it were not prepared, there is no cause to charge the defendant; and that not appearing to be done, it shall be conceived not to be done.—For if one be charged, in consideration of a thing to be done, before a certain time to pay a sum of money, if the thing be not performed according to the time, none can be charged for not payment of the money after the time is past: for it is in nature of a condition precedent, to have a duty or sum of money to be paid after the condition performed; and there, he that will have the duty, must shew that the condition is performed.—This appeareth in the case of 15 Hen. 7, and Coke, lib. 7, fol. 9, Ughtred's case. And therefore, if the ships be not prepared according to the writ, nor money employed for preparing a ship for and in the name of the county: then every one that paid any money, either voluntarily as in obedience to the writ, or compulsorily upon distress, may demand their money again of the sheriff, or of them that received it: for as they paid their money, so it must be disposed of, and cannot be disposed of otherwise by any command whatsoever, although it be under the great-seal: for the command being under the great-seal, to prepare and furnish a ship to such a purpose as in the writ is mentioned, and they paying it to that purpose, it cannot be otherwise disposed, although it be more for their advantage; for private men having interest therein, that cannot be taken from them, nor dispensed withal. Therefore, in Coke, lib. 7, fol. 37, in the Case of Penal Laws, it is resolved, That if the penalty appointed to be forfeited upon a penal statute, be given to the poor of the parish where the offence is committed, the king cannot dispense with the penalty for that offence, because the poor have an interest therein; but if the penalty be given part to the king, and part to the poor, the king may dispense with his own part, but not with the part of the poor.

Object.—And where it hath been said, That it is by way of accommodation, because the country cannot well know how to provide to content, and perhaps with more charge,

Respons.—To this it is answered, They must do it at their peril, if the writ be legal; and then if it be done, they shall have the benefit thereof. For as my brothers Weston and Berkley have both agreed, if the ship were made when the service was done, the county for which it was made shall have the benefit of the ship, ammunition, and victuals, and of the service of the men, being made more expert against another time; and the ship may with some easy charge serve again, and nothing lost, but the expence of the victuals; and the kingdom shall be so much the more strengthened by having so many ships made or prepared; and they may have account of their money how it was bestowed; and if any surplusage be gathered, to have it restored. And that the law is so, that if the money be received of the county, and not employed accordingly, the party so receiving it, and detaining it, or misemploying it, is to pay a fine to the king for the same, and is accountable for the money, appears by two records.

The one in Hill. 16 Edw. 3, rot. 23, B. R. where two soldiers were indicted, for that they taking 3*l.* a-piece towards their arms, and the bringing of them to the place where they were appointed to serve the king in England in his wars, they went not, but tarried still in their houses, and retained the armour and the money which they had received for that purpose. They thereupon being convented, pleaded Not Guilty; and the one was found to go in the service according to the appointment, so he was discharged: and the other was found, that he received the money, and went not to do the service, nor restored the arms nor money; and thereupon he was committed to the prison, and paid to the king a fine, and found sureties to pay the money to the hundred from whom he had received it.—The other was Hill. 20 Ed. 3, rot. 37, B. R. There two high-constables were indicted, for that they, 5 Edw. 3, had received 6 marks of the towns in their hundreds, to set forth soldiers, and had not set them forth, but detained the money; which they denying, it was found that they had received the money for that purpose, and had disbursed 10*s.* 6*d.* thereof towards the setting forth of soldiers, but had retained 38*s.* 6*d.* and not disbursed it: thereupon they were fined and imprisoned, and afterwards enlarged upon sureties to pay the money they had retained undisbursed, at the next time the king commanded soldiers from those parts. By both which records, being for offences done so long before, it appeareth, that

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those that have received money of the country to prepare ships, and not employed it accordingly, are answerable to the king and his successors, to pay a fine for mis-employment of it, and are chargeable to those of the county of whom they received it for payment thereof.

8. For the last point, I conceive, that this Certiorari directed to the two that were late sheriffs at the time of the assessment, and not to the sheriff that was at the time of the Certiorari awarded, who is the only immediate officer to return the writs, is not legal; for it is the first that hath been seen of that kind: for all writs are directed to some immediate sheriff, requiring him to demand of the former sheriffs, what they did upon the former writ; and they are to return to him what hath been done, and he to return the same to the court, whereunto he is an immediate officer; and the former are not any officers. So the Sci' Fa' thereupon grounded, I conceive is not good: Also the Sci' Fa' to warn Mr. Hampden 'ad ostendendum 'si quid pro se habeat, et quare de prædict' vi-'gint' solid' onerar' non debet,' not shewing to whom, is uncertain, and is insufficient. Thereupon I conclude upon the whole matter, that no Judgment can be given to charge the Defendant.*

The ARGUMENT of Sir WILLIAM JONES, knight, one of the Justices of his Majesty's Court of King's-Bench at Westminster, in the Exchequer-Chamber, in the great Case of SHIP-MONEY.

In Easter Term there issued forth a Sci' Fac' and this doth rehearse divers sums of money assessed upon divers persons in the county of Bucks, for providing a ship of 450 tons, with men, ammunition, &c. to attend the king's navy for defence of the kingdom. And afterwards upon a Certiorari out of Chancery, directed to the sheriff, to certify those assessments, and the names of those that made default of payment, Mr. Hampden was returned to be assessed at 20*s.* and hath made default. Upon this return the king by Mittimus out of the Chancery sent the writ, the Certiorari, and the return, to the barons of the Exchequer, to do as the court shall think fit. Thereupon a Sci' Fa' went forth to the sheriff to summon Mr. Hampden to shew cause why he should not pay the 20*s.* assessed upon him: He was returned warned, and appears and demands Oyer of the several writs and their returns, and of the Sci' Fa': and upon all this he demurreth in law, and Mr. Attorney hath joined in demurrer with him. And my Lord Chief Baron and the rest of the barons have adjourned this hither, to desire the advice of all their brothers of the law; and indeed it requires advice, for it is as great a case as ever came to be advised on before judges.

I say it is a great case; it concerns the king in his royal prerogative, and the subject in his interest, in his land and goods, and liberty of his person. They that have spoken already, and they that shall speak after me, shall hardly escape the censure of the people, of some that have some understanding, of some peradventure that have less, and of some that have none at all, but speak according to their opinions, affections, or wills. 'Fælices essent artifices, si 'per solos artifices judicarenter:' we should be happy to be judged by them that are learned; but when it is by them that understand not, then it is turned into calumny and reproach.

Some have taxed them that have gone, or will go with the king, as though they were fearful, and went about to captivate the liberty of the people, and take away their goods. Some are taxed on the other side, if on the contrary, that they are given to popularity: so as I may say as the Psalmist, 'Domine, me posuisti in 'lubrico loco;' for it is impossible to escape their tongues, and between those two decks of censure I am like to fall. And however I may fall with my sentence, with God's grace I shall make no shipwreck of my conscience.

I am trusted by the king to display his justice equally to all, and sworn to dispense his just prerogative, as well as the subject's liberty; and if we do otherwise than as judges, we do as false men. If any man offend contrary to his oath, he doth forfeit his lands, goods and tenements. I shall not therefore for any respect do against my own conscience; but descend to give judgment, not regarding the watry mouths of others.

The king's counsel, and the counsel at the bar, have spoken so largely to this business, and it is spoken to by my brothers so fully, that I can hardly say any thing but what hath been said before; so I will select some few things, to satisfy my own conscience, though I cannot satisfy any man's else; which I will do as plainly as I can, and as I ought to do. And if there had not been a variety of contestation, I should have spoken very little; but now necessity requireth that I must enlarge myself a little more.

1. I will state the question, and in it put many things objected out of doors. The question is, whether the king of England, when he perceiveth danger to be imminent to the kingdom, and a necessity of defence, may not by his writ send to all counties as well inland as maritime, to require them, at the charge of the county, for a convenient time to provide shipping, with men and ammunition, &c. but no money to come to his purse, but the ships to go to defend the kingdom. The question stands not, whether the king may draw it to be a perpetual charge upon the subject, which under favour he cannot; for this goeth upon a fear of danger, which continueth but for a time, and therefore this cannot be perpetual; for when the occasion ceaseth, the taxes must likewise cease. There is a case to this purpose, 39 Hen. 6, fol. 39, Protection. Brooke. A pro-

* An abridgment of these Judgments of Croke, in the handwriting of Archbishop Sancroft, is among Tanner's MSS. in the Bodleian Library.

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tection granted to one for three years, and the question was, whether a good protection: the rule is, the king may grant a protection for one year, and at the year's end, renew it for another year if the occasion require it, and so for a third year; yet he cannot at the beginning give a protection for three years together. So in this case, though the king may, upon an emergent occasion, command ships, yet by reason of that occasion he cannot make it perpetual, for the occasion may cease.

2. In this case, I will not exempt the king's majesty himself, to bear a part of the burden; the head and body must go together, he must join with his subjects in the defence of the kingdom.

3. The question is not, whether for a foreign war he may command this charge; it must be only in defence of the kingdom in case of imminent danger.

4. It is not whether the king may lay this to draw a sum of money into his own purse, for the king sends to have no money; but to provide a ship: and if the sheriff accordingly provides a ship, there is an end of the business; all this is out of the case.

As Catlyn chief-justice compared a fine to Janus Bifrons having two faces, the one looking backwards, the other forwards; so may I of my argument: I shall first look backwards, and tell you *quid fecimus*, what we have done; and then forwards, and tell you *quid faciemus*, what we shall do.—The *quid fecimus* rests in the advice we have given to his majesty in the case, and the opinion of the judges subscribed with their hands delivered over to his majesty, (which was read at large by him.) The advice we gave consists of four assertions.

1. That when the kingdom is in danger, all the kingdom is to join in the charge of defence. —2. What shall be adjudged a danger, and what not, his majesty is the sole judge thereof, and of the means how to prevent and avoid it. —3. That in case of danger he hath power to send to inland counties, as well as to maritime, to assist to defend against invasion. 4. That the king hath a power of compulsion, to punish those who refuse to contribute to this charge.

This opinion being jointly and severally delivered by us, declared by my lord keeper in the Star-Chamber, in the presence of us the judges, before the lords of the council, with an intimation as if it were the full consent of all the lords of the council before hand, and there commanded to be inrolled in all the courts at Westminster; yet we so delivered our opinions, that if better reason was shown to alter them, we might recede from them; for we had better *recurrere*, than *male currere*.

Now to the second point, *quid faciemus*, whether to stand to this opinion or not, and then whether this book or record will warrant it, and how far it differeth from what we have done, I shall speak my conscience. I am an old man and ready for my grave, my tongue and my heart shall go together. I am of the same opinion I was then; and conceive what we then delivered was according to law; with all modesty submitting to those that have been or shall be of a contrary opinion, for the grounds of law and nature support it.

1. 'Salus populi est suprema lex. Qui sentit 'commodum, sentire debet et onus. Quod 'omnes tangit, ab omnibus debet supportari.' What do these rules intimate else, but that when a danger is imminent, the charge must lie upon the whole kingdom, and the burden must be borne by all? And that is not denied by them that were of counsel on the other side. It must not be every kind of fear and rumour that must draw this kind of burden upon the subjects; but such a danger as the king in his understanding perceiveth doth require a speedy defence.

2. That the king is sole judge of this danger, and how to prevent and avoid it, is not to be literally understood, for we are his judges deputed, but our judgment flows from him. Judgment is settled in the king, he is the fountain of justice, from whence all other proceeds. Bracton saith 'Rex vicarius Dei est in terra 'sua.' We are judges cumulative, not primitive; so he is the supreme judge. In the parliament the king is the sole judge, the rest are but advisers. 22 Ed. 3, fol. 3. Here it is that the old fashion of penning of statutes was 'Rex statuit.' 7 Hen. 7. Afterwards it came to be with the advice of the lords and commons. Trin. 6 Hen. 6, rot. 41, Banc. Reg. There was a prior brought a writ of annuity against one in Ireland, there was judgment in the Common-Pleas; then at length a writ of error in parliament; the judgment affirmed; afterwards a writ of error in the King's-Bench here, and both judgments reversed. And in the entry of the judgment the record saith, 'Nos cum assensu et ad requisition' commu- 'nitat' do reverse the judgment. Where note, the king is the man that is the sole judge thereof. (By the way observe, out of this record, the power of the king's-Bench in England; for upon this record it appears a writ of error was brought in the King's-bench in England to reverse a writ of error in parliament in Ireland.) This sheweth the king in parliament is the sole judge, the rest but advisers. So, as I said before, he is the only supreme judge of the danger himself, and of the way of prevention, whether by his council or by his parliament.

The third assertion is, that the king without parliament, in case of imminent danger, hath power to send to inland and maritime counties to provide ships. And I think he may do so by the fundamental laws, common laws, and statute laws, and by the precedents.

First of all, for the common laws, (here I leave the divines to talk of the king's power, who under favour take more liberty than is fitting to say in a pulpit; for he that will have the statute De Tallagio non Concedendo, if it be a statute, to bind the king, such a man is not Cæsar's friend, but speaks without his book) Bracton saith, that by the general law of monarchy, the subject's goods are at the king's plea-

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sure: but a king ruling by politic advice, is to rule according to his fundamental laws, which yet in England take not away, but preserve those 'jura supremæ majestatis,' as to pardon all offences, to stamp money, and infinite others more declared in parliament, 1 Jac. which court is that 'tres hault court,' of which none ought to think dishonourably. I leave divines to talk their pleasure: We are to judge according to the fundamental laws and customs of the realm. There is a book which Mr. Attorney remembered well, that the king of England hath more power than any other king. If the king must by the law defend the kingdom, he must lay a charge to provide for the same. The common law owns the king as sovereign and head of the kingdom, that should defend and protect it. 1 Sam. 8, 19, 20. They would have a king to be adjudged by, as other nations had, and to go in and out before them; that was the fashion of kings before, to judge their people by laws, and to defend them with arms. It is an incident quality inherent in the king. It standeth with nature and reason, that the king should have the charge of the defence. If this inherent quality should be taken away, how can he defend his people? If he be no more than a common person, he cannot be a king, unless he take the defence and protection of his people upon him. Mr. Attorney shewed learnedly, the king is a monarch and sovereign, the people his subjects: he is the head of the body, and therefore may command it. Fitz. Herb. Na. Br. and Stamford Prerogative, that the king protects the bodies and lands of his subjects: he is Vicarius Dei, appointed to protect the kingdom; so there is a tie of allegiance that binds every man. Stamford, cap. 2, of Prerogative, the king by law is the protector of the body, lands, and goods of his subjects: so he hath a liberty and prerogative for this end, (not for his own profit) in the bodies, lands, and goods of his subjects, in time of danger. 11 Hen. 7. Every man in his own person is bound to serve the king for the defence of the realm; and gives a reason, and that is the reason of protections, because they are bound to it; therefore they should have no harm done unto them. The king himself cannot free any man from his allegiance, without act of parliament; neither can the subject free himself, as in Dr. Storie's case. So you see the king's majesty hath interest *pro bono publico*, in the person.

He hath also an interest in our estates, if it be *pro bono publico*; as in the case of L. it was adjudged he has power to come over mens lands. Now what prerogative hath the king concerning that? and yet, according to Popham, the two chief justices and chief baron agreed, that where a man hath an inheritance in lands and woods, the king cannot cut his woods for his private use, unless it be *pro bono publico*; nor dig gravel in another man's lands: but yet in case where it is *pro bono publico*, he may do it, and make bulwarks on their grounds for defence of the kingdom.—So for pontage and murage, the king cannot compel the subject to make the walls of his own house, or a bridge for his own private use; but where it is commanded to be done, where the subject hath a benefit, there it is good: so here is the difference of the case, where the king commands for his private use, or *pro bono publico*.

My brother Crooke saith, the king may press ships for his service, in the defence of the kingdom, but not command inland counties to furnish ships: yet there is a precedent in Oxford to the contrary.—By the fundamental laws of the kingdom, he is the defender of his subjects; of their bodies, lands, and goods; and where it is *pro bono publico*, they are to pay towards it. If there had not been objections that dazzled me, I should have done before this.—The case of the abbot of Robertsbridge is an allowance of this charge, a double charge of lands there in two several places. I remember in a parliament, where I learned a great deal of good, 1 Jac. the king, without consent in parliament, laid an imposition on merchandize, but was in case of necessity, *pro bono publico*.

Now to answer objections, and those were many, my brother Crooke did double and redouble them. Brother, we sit one next another, antient judges, though different in opinion. I speak out of my conscience, as you have spoke out of yours; so, though there be variety of opinions, yet conscience is the same.

First, saith he, the fundamental laws of the kingdom have settled a property in the goods in the subject, that, without their consents, this cannot be taken from them.—This doth not trench upon the property of the subject, if you take the case right: If this be a lawful prerogative in the king to lay this charge, then how can it be said, that the subject's property is invaded? For if the property *ab initio* be in the king, then the law annexed this to the lands and goods of the subject in the beginning, and made them liable to it by a secret tacit condition. If a man do enter for a condition broken, this is no divesting of the property out of the subject. If goods be given to one till such a thing happen, or upon such a condition, there is a property in the donee, yet it is clogged with a limitation and condition; and when the one or the other happens, the property may be reduced or transferred, as in all assessments and rates, goods are liable to the payment thereof: so for the payment of those things necessary for the defence of the kingdom without their consent; for if legal, what needs this condition? I would wish no man to clamour, that this is to divest the subject of the property in his goods; for it is nothing but what is for the defence of the kingdom.

The next authorities objected by my brother Crooke, are the laws of William the Conqueror, and Charter of king John, then the statutes, then Fortescue; and therefrom he saith very much, that the king of England cannot lay taxes upon his subjects, without their consent in parliament. And where he speaks of taxes and charges that cannot be imposed without consent, some other places of the author do shew, that it is where the king imposeth it for

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his own private use, and not in case of public defence.

The next is 13 Hen. 4, the charges of 1*d.* upon a cloth for measuring, adjudged void. I conceive it was not adjudged void upon that point. True, in parliament it was complained of as a grievance to the subject; but every petition in parliament doth not argue a right: it may be it was *ad damnum*, yet *absque injuria;* that case differs much from this, for there was a charge to a private benefit, and no regard to the public, which perhaps the law will not allow, but where there is a *quid pro quo;* nor of the case of dice, cards, monopolies, those cases nothing like this: so a commission of sewers may lay a charge for the repair of a bank; when the lands are overflown, and the owners be not able, the neighbourhood must be taxed; so in case of a bridge.

Then the statute of 2 Rich. 2, was objected; nothing must come to the king's purse, nor to the king's coffer, but it must be for the defence of the kingdom.—This was no lawful charge, because the intention was to fill the king's coffers, which were empty, and that could not be done but by parliament; so it is not in our case, no money is to come to the king's private use.—That of Hen. 4, for repealing of commissions that were awarded to provide barringers, the record saith only that the king's answer to the complaint was, 'Le roy se avisera avec 'ses signores.'

Then he cometh to the statute of tonnage and poundage only for ordinary defence of the kingdom.—Why there should be any difference between an inland county and a maritime I know not, since to the common defence all are equally engaged as one intire body; and the inland counties have the benefit by sending their wools by sea, and yet they must not help to the defence of the sea. As in the natural body one member helps another, so when the maritime counties are not sufficient to make defence (as in case of extraordinary defence they cannot be) the inland county must contribute. Besides, the king may unite an inland county to a maritime, and make them but one county; is not he lord of the land as well as of the sea? What was the law before the division of counties? Surely it was equal in charging the whole kingdom; for I see no reason but an inland county should be chargeable by law, as well as a maritime. In antient times, things done upon the sea, were tried upon the land in the King's-Bench, as by many records appeareth. One is of a Norman robber upon the sea.

Object.—But if this be so, the law suffereth a greater inconveniency, viz. that the king may by his writ charge what and when he pleaseth.

Respons.—This the law trusteth the king's goodness with, that he will not require it of his subjects but when there is occasion; and he may do it, so long as he continues it no longer than there is occasion.

Object.—But were not Dr. Cowel and Dr. Manwaring sentenced in parliament for such tenets?

Respons.—They were sentenced, and deservedly, but different from our case: I was a member in the parliament, and was in the lower house when Cowel was sentenced. I will tell you what Dr. Cowel did: he wrote a book, and under the words Prerogative, Subsidies, and Kings, he inferred as if the king might make laws without consent in parliament; and wrote against the common law, which the king is sworn to maintain: thereupon he was sentenced, and his sentence was just, and I gave my voice for it. The other was Dr. Manwaring, he preached two Sermons that the king was not bound to observe his laws, that the right and liberty of the subject are at the king's will and pleasure without parliament, and that this doth bind the conscience of the subjects, and that they are bound to pay Loan-Money upon pain of eternal damnation; and that they that did refuse to pay the Loan-Money, did offend against the laws of God, and were guilty of disloyalty and disobedience; and that the authority of parliaments was not necessary to the granting of any subsidy. For this he was sentenced, and made his submission. That was for raising of money for his own use, but this is to require his subjects to provide ships for the defence of the kingdom.

Object.—The next objection was Coinage, that by that tenure great profits arise to the king for defence.

Respons.—Shall the defence of the kingdom be laid only upon those who have their maintenance out of the public revenue? What will the king have left to maintain himself, his queen, his children, intelligences abroad? Will you strip him of all? It is true, I hold that the king, with the subjects, must join together in the defence of the kingdom. If the king be rich, you should have pleaded that the king had sufficient in his purse.

Object.—Then it is objected, that there is no apparent danger, and that this charge is not allowable neither by the common law, statute law, or custom.

I say, it is due by the common law; but will you have danger so apparent, as Hannibal *ad portas?* Will you suffer an enemy to come in before you prepare to resist? If once he gets in, you will hardly get him out. Is not that as much to be commended, that doth prevent a danger before it cometh, as when it comes? Is not the care to prevent fire from a house before the fire takes hold of it, as great as when it is on fire to quench it? Therefore the king, like a good physician, seeing a disease growing, before it gets too much strength prevents it.

Object.—In six weeks time, a parliament may be called.

Respons.—Though it may be, yet after they meet, a long time they spend in consultation before they can do any thing: which would be too mischievous in a sudden invasion: and therefore king Ed. 3, in his 10th, 11th, and 12th years, whilst the parliament was sitting, sent forth his writs for aid.

Object.—It was alledged by Mr. Holborne,

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that the law of nature teacheth every man to defend himself.

Respons.—What, I pray you, will you then have done, on a sudden invasion, when forces must be raised in Cornwall, some in other parts of the kingdom as remote, and all must meet together? If the king must expect such an actual invasion, before such time as he sends forth his writs to have them all in readiness, how poorly would the kingdom be defended at that time? Our forces would be scattered, and cannot be brought together, which thus divided cannot withstand a foreign power.

Object.—The last objection was, that the king, at his pleasure, may draw when he pleaseth this charge upon the subjects, if he say he is of opinion that there is danger.

Why may not the law allow this, and trust the king's judgment here as well as in the case of a *Ne exeat regno*, in which if the king commands his subjects to stay at home, for such and such a cause, the case is not traversable? Fitz-Her. Na. B. 165, 85, 7 Hen. 7, saith, if the king doth rectify an act of parliament, you cannot speak against the king's certificate under the great seal; 'Null tiel record' is no plea.—Again, God Almighty bless the king; it is against presumption of law, that the king, whose heart is in the hand of the Lord, should tell a lye. God gives wisdom to govern aright. Lying lips do not become a prince. Truth to God Almighty he owes. The law says, the king may *nescire verum*, but not *dicere falsum*. The king may not know a truth, but cannot speak falsely. Next *juramento strictus*, he is bound to administer justice, and not to grieve his subjects. Is he so unwise to charge them and himself without cause, with providing of ships? What benefit comes to him by it? Surely to tell a lye will be no advantage to him; he were a king of wickedness to lay a charge on the subject to no purpose; thus he shall charge himself and his subjects about nothing. Does any man think he will put a burden upon his subjects without cause? We have a good king, and our imaginations ought to be good of him.

The fourth assertion is, that the king hath power to compel them to the contributing to this charge. This power of the king is a special prerogative, and if good at common law, it taketh away the statute, when it is *pro bono publico*, to defend the kingdom.

The general words of a statute shall never be construed to extend to it: the charter of king John shall never take away the king's prerogative, neither the statute De Tallagio non Concedendo, which I agree to be a statute, and so my lord Coke allows it to be. Now this power of the king, of which I argue, is a special prerogative in point of government; it is a *proprium* to a sceptre *quarto modo*, therefore the general words of a statute shall never be construed to extend unto it; as if the king hath a special interest in land by the prerogative, it doth not pass away without precise words, as the books are infinite in it. If the king grants away land by his letters patents, parcel of a forest, without special words, this shall remain subject to the forest-laws still: so many cases may be put, when general words of a statute extend not to a particular prerogative. If general words of the statute should take away these aids, why do they not take away the aids of 'pur faire fitz chevalier, et pur file marier,' since that general words may include them as well as this? But you all grant that these aids are not taken away, and by the same reason I conceive this remains.

My brother Crawley held that special words in an act of parliament could not take away his prerogative, because it would have been an act against reason. I will tell you what I have heard adjudged in this case. In the parliament held 1 Jac. there were two things expressly moved: One, That there might be no wardship or tenure of the king: The other, that the king might not allow surveyors. To these questions, after long disputes, it was answered by the whole parliament, that such an act of parliament to top the prerogative of tenures would be void, because it is inherent in the crown, for every man holds immediately or mediately of the king. And 2 Hen. 7, an act of parliament to restrain the king's *non obstante* to dispense with penal laws, as not to pardon murder, is void; his person and royal prerogative cannot be restrained by parliament. Thus I have done with the former and larger part of my argument.

Now I come to see if the record will maintain that which we have here, and I think it will bear it both for matter and form. First, let us see whether there be substance enough, to shew that there is danger sufficient for this prerogative to require aid and assistance; and I think there is sufficient, the French king, the Spaniard, the Low Countries, all up in arms; who knows what danger this kingdom may be in? and if the king say it is in danger, it is not traversable; if the king had said no more but this, *pro defensione regni*, without any more saying, it had been sufficient. It also recites that there were *prædones, piratæ*, that took away both men and ships; and that foreign provision was making to take away the dominion of the sea; and that all this was 'ad gravandum regnum nostrum:' and therefore commands a ship to be provided 'ad defensionem regni.' Here the danger is general, and therefore the defence must be general.—An indifferent and equal assessment is first to be made, and then the overplus of the provision to be restored according to the writ; for until the money be had, how can the provision be made; Though it has been said, let the ships be first built, and then make the assessment; that cannot be, for with what shall the provision be made? The money must do it.

For matter of precedents, as Danegelt, &c. I do not much stand upon, because I had not time to peruse them, but conclude on my former reasons.

My Lord Chief Justice asked him what his advice was; he answered,

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My advice is upon the whole matter, that the barons finding the other process of court and Sci' Fa' to be according to the Exchequer, (for that I leave to them) Judgment shall be given that Mr. Hampden shall be charged with the 20*s.* with this limitation and condition, that none of it comes to the king's purse, for if it do, my opinion is against it.

The Argument of Sir RICHARD HUTTON, knt. one of the Justices of his Majesty's court of Common-Pleas at Westminster, in the Exchequer-Chamber, in the great Case of Ship-Money.

The king by his Writ 4 Aug. informs us that there were gathered 'piratæ ac maris grassatores,' and that they were gathered together in hostile manner to hinder our merchants from bringing their goods into our ports; and reciteth, that there are wars abroad, and that considering these perils and dangers, and that the defence of the kingdom consists in the defence of the sea, which at all times belonged to this kingdom, and that the charge of defence is to be borne by all; and the king is loth that in his time such an honour as the dominion of the sea should fall away or be diminished, and not be defended, hath therefore sent a Writ to the sheriff of Bucks (as to other counties) to provide a Ship of such a burden against the 1st of March, and to come to Portsmouth, and there to remain for 26 weeks, and to do as shall be directed them for the defence of this kingdom. And the Writ directed, that all that are inhabitants shall be assessed for the providing of this ship with men and ammunition.—By force of this writ, Mr. Hampden being assessed at 20*s.* there went forth a Certiorari a year and a half after, directed to the sheriff of the county of Bucks, to certify what sums they had assessed by virtue of the said Writ 4 Aug. and there are two several certificates returned into Chancery; one, that Mr. Hampden was assessed at 20*s.* the other, that he hath not paid it. 5 Maii 13 Car. the king, by mittimus out of Chancery, recites that when he awarded the Writ 4 Aug. 'Salus regni periclitabatur,' and that it was for the defence of the kingdom and security of his subjects; and doth send this Writ 4 Aug. the Certiorari, and Mittimus, to the barons of the exchequer, and commands the barons to do that which appertains to justice to be done. Whereupon a Sci' Fa' is awarded; whereunto Mr. Hampden hath appeared, and demanded Oyer of the Sci' Fa' Mittimus, Certiorari, and the Writ 4 Aug. and hath demurred generally; and Mr. Attorney hath joined in demurrer: and how this Sci' Fa' lieth, is the question.

And I am of opinion that this Sci' Fa' doth not lie, and that Judgment in this case ought to be given against the king. For the better understanding of the court, I shall observe in the method of my proceedings,

1. Whether a charge of this nature may, by the king, be imposed, by original writ only under the great seal, without a parliament. Wherein I hold it cannot be proved by any authority or reason, unless in time of actual war and invasion. 2. I will answer those objections only made formerly by them that have argued, that these statutes do not extend to this kind of prerogative, and that this prerogative is not taken away by any of these statutes. 3. I will answer the precedents, both by precedents of equal nature, and by some reasons, whereupon I will conclude, that this prerogative and power, which is monarchical, is included and taken from the king, and that must be done by parliament. 4. I will answer some objections that now have been raised, and were before made by Mr. Solicitor. 5. I will just open the writ, that it neither containeth matter sufficient in the writ itself, nor is there matter to warrant any such levy as is pretended; neither is the same lawful, nor can it be mended by Mittimus, nor can be commanded by those sheriffs that are no sheriffs in this case upon the matter.

Now, as my brother Jones hath taken a great deal of pains and time, I will not be drawn from my own order by what he hath said; but answer him in his argument.

1. I say, that this power of assessing of money, being a great charge, cannot by the law at this day, unless in time of actual war, be imposed upon the people by act of parliament.—The acts of parliament that have been mentioned, the first was Mag' Char', which is an antient and great statute; it cometh unto us with an *inspeximus* from Ed. 1, confirmed thirty times; the words are, 'Dedimus et concedimus has libertates subscriptas in perpetuum. 'Nullus liber homo capiatur vel imprisonetur, 'aut dissesietur de libero tenemento suo vel 'libertatibus, &c. aut aliquo modo distringatur, 'aut in carcerem mittatur, nisi per legale judicium parium suorum, vel per legem terræ.' King William the Conqueror made these laws, and swore men to those laws. And then king Edward, in the last chapter, commands them to be kept, and he will keep them so long as concerned him and all his people for ever. And for this they granted him a fifteenth part of all their goods, and it is a statute here to this day, Stamford, fol. 172, to be tried *per pares*, as the barons at this day have for their trial the privilege of this statute.

The next statute is 25 Ed. 3, chap. 5, reciting, 'And forasmuch as divers persons, &c. we 'have granted for us and our heirs, that we shall 'not draw such aid and pride into custom for 'any thing done heretofore, by any other rule 'or precedent that may be found.' So there is now not only for taxes for war, but for any other business whatsoever, 'forsque de com-'mune consent de touts la realm,' saving the antient aid and prizes due and accustomed. And this saving is nothing, for this statute extends to no particular; for if any extend to aid by tenure, all England is not bound to this, but some few. The statutes extend to such aids as the whole kingdom is subject unto; none

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will say that all the kingdom holds of the king 'pur fils marier, &c.'

The statute of 34 Ed. 1, concerning certain liberties granted by the king to his commons, this is printed anno 1534, 25 Hen. 8. No taillage to be taken or levied to us, our heirs or successors, without the good-will and assent of the archbishops, bishops, barons, and other burgesses and freemen of the realm. This statute hath been quarrelled withal, but the words are very effectual.

The statute of 14 Ed. 2, agreed to be perpetual by my brother Jones, for my part, I can see no reason why it should be so. The statute reciteth, that whereas the barons and commons of the realm have granted of their good free-will the king an aid towards his wars as well on this side the sea as beyond, of the ninth sheep, the ninth sheaf, &c. and the ninth part of all their goods, we will and grant for us and our heirs, that the same so charged shall not be brought into example to make any aids, he doth not say *such* aids, but by consent in parliament. No man can say against these words, they are so full and absolute. The statute 25 Ed. 3, enacts, that none shall be compelled to find hobbellers; 'Si il ne soit per commune 'consent in parliament.' The reason given in the parliament-roll, is very observable; 'Car 'ceo est incounter le droyt del royalme.' These words are in the roll, yet left out in the printed statutes, but the reason I know not. This statute of 25 Ed. 3, is confirmed by the statute 4 Hen. 4.

The statute 1 Rich. 2, a very good statute, though in a young king's time, enacted and done by the lords and commons: There have been many inventions to charge the subject. Now Hen. 4, invented many benevolences, and that is recited, that whereas divers inventions, &c. (all the world I think is full of inventions) it is enacted from henceforth, that the subject shall no ways be charged with any such like charge. They gave it the name of benevolence, but indeed they were impositions, and great charges were collected with that name.

I conclude with that statute of this king, the Petition of Right, which reciteth the statute De Tallagio. Very many particular things are mentioned there, men are not to be compelled to lend money without common assent in parliament; which is a confirmation of these statutes. I have done with the statutes.

For the authority of the year-books; I will confirm those two authorities cited by my brother Crooke, though my brother Jones slight the authority, 13 Hen. 4, the principal case being then a grant of an office of measuring of cloth and put in practice, and being granted out of parliament condemned to be void; for the king cannot grant any common charge on his people but in parliament. And though my brother Jones said, that perhaps such a charge was *damnum*, yet not *injuria*; surely had not there been more in it, it had not been damned as illegal.

The other authority is that of Fortescue; though my brother Jones, in that book, doth omit that which is material; for that man he was sworn chief justice of England, and afterwards made chancellor, who saith expressly in his 9th chapter, that the king of England cannot alter any law; That he governeth his people, not only by royal, but by politic power, and can lay no charge upon them but by parliament, The king can change no law, nor make land gavel-kind which is not, nor make land divisible which is not; which he might do if it were to be done by power royal. And Fortescue concludeth with this excellent saying, fol. 26. 6. 'Rejoice therefore, sovereign prince, and 'be glad; for the law of your realm admi-'nistereth to you and to your people no small 'comfort and security, &c. Prerogative 'strengtheneth the subjects liberty, and their 'liberty strengtheneth the king's prerogative.' Cap. 38, is full and strong against the king, which my brother Jones was pleased to omit. The king may by his officers take necessaries for his house, nevertheless he is bound to pay for them; for by the law he ought not to take away any of the subjects goods without making satisfaction for the same; neither can he lay any taillage, subsidy or other burthen, or make new laws, or alter old, without express agreement of his people in parliament.

I have done with the positive part of my argument. I will not trouble you long; I will answer some objections now made, and heretofore made against these statutes.

First, For the statute De Tallagio non Concedendo. True, it is very probable that it was no statute, but an extract out of the statutes of 25 Ed. 1, which is upon record, the other not being to be found upon the roll. It was averred *una voce*, it was a statute, though not without probability it was no statute, as it was learnedly observed by Mr. Solicitor, in respect of the king's absence beyond the seas. Only I collect this out of his argument that he thought that that statute did reach very far against the king, which he could answer no way, but to take it away; therefore he thought it a statute of some force.—Next, my brother Berkley would have the statute of 14 Ed. 3, to be but a temporary statute, and but during the continuance of the wars. The first part of the statute is absolute, but the latter part is but a temporary statute, and but during the continuance of those wars. But it must (the former part thereof) needs be perpetual, for it is granted for the king and his heirs.

The next objection is by my brother Jones and my brother Crawley, That this power royal is part of the prerogative appertaining to his person, and inherent to the crown, a *proprium quarto modo*, so inseparable, that an act of parliament cannot take it away.

I confess there are some inseparable prerogatives belonging to the crown, such as the parliament cannot sever from it. And I will prove to you out of books, cases and statutes, that the king cannot release his tenure *in capite*. It was endeavoured that a law should be

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made that the court of wards should be shut up, it was resolved it had been a void law; such is the care for the defence of the kingdom, which belongeth inseparably to the crown, as head and supreme protector of the kingdom: So that if an act of parliament should enact that he should not defend the kingdom, or that the king should have no aid from his subjects to defend the kingdom, these acts would not bind, because they would be against natural reason. But in our case here, there is no such thing; for there is no act that restrains the king to lay any charge at all, but only ties him to one means, by which he would come by it, to wit, by parliament. If before the statute a man alien land held of the king without licence, the king shall seize the land, and have it forfeited to him and his heirs for ever. Now by that statute the prerogative is restored to a reasonable fine only; this was as inherent in his person as any thing could be, and yet it is restrained by parliament.

Before Mag. Char. the king might take any man's goods for his provision, and cut any man's woods down, to build or repair his castles: yet since that statute it is enacted, 'Nullus vicecomes nec ballivus noster capiet equos, &c. nisi reddat liberationem. Nec capiemus boscum alien' ad castra vel ad alia agenda nostra, nisi per voluntatem illius cujus boscus ille fuerit.' And to this day this statute is of force, that the king cannot take these things, nor use his prerogative.—The prerogative of 'Nullum tempus occurrit regi,' is a great one; yet in some case of lapse of churches, this prerogative is taken away by the statute of 25 Ed. 3, cap. 1, where the king granteth for him and his heirs, not to present but in his own time: and this being pleaded 11 Hen. 4, fol. 7, is adjudged against the king, notwithstanding the rule of 'Nullum tempus occurrit regi.'

The statute of 7 Hen. 8, c. 3, concerning restraint of informations, and that of 21 Jac. whereby the king excludeth himself to make a title to any land, whereof he had not been in possession within 60 years before this time, he was tied to no time, but unlimited; yet this great prerogative is thus bound. 30 Ed. 3, cap. 10, parliaments to be holden every year one, or oftner if need be, because of divers mischances that may happen. It is to be acknowledged as a gracious favour from his majesty to his subjects, that he would admit of this case to be argued in any ordinary court of justice, and not refer it to the parliament, to which place all such weighty causes are most fit to be referred. I am satisfied in my conscience he would do nothing in this case, if he were justly informed, or may be informed he ought not to do it by law.

The laws of England *mutari non poterunt*, without consent of counsel gathered together: 'Si inusitatum emerserit,' saith Fortescue (as the case of ours is) it is referred to the next parliament; 'si aliquid inconsuetum,' then it is to be put to the parliament.

2 Ed. 3, fol. 7. There ariseth a new question concerning the statute of Winchester, about recovery by actions against the county where robberies were committed; there the case in respect of the difficulty was referred to the parliament, and there the sheriff was warned to have his money.—You shall see a notable case in the Register fol. 224, among the writs, of two that were at York, and served by a clerk in the Chancery there to appear at Rome; and because of this contempt they were committed to prison, and a writ came to bail them, returnable *coram nobis in parliamento*: so matters of difficulty were adjourned into parliament.

Westminster 2 cap. 28. 'In nova causa fiat novum remedium in parliamento.' To resolve cases of difficulty, statutes have enacted that there should be two parliaments every year, viz. 4 Ed. 3, c. 4, which was a great confirmation of the liberties of this realm. Littleton 110, 180, parliaments ought to be frequent. I know not how it comes about, that this kingdom which hath thus long flourished by parliaments, should now forget her frequent kind of government by parliament, whether by reason of something past, or some disaster now fallen out, that this which is the antient way (I do not say that parliaments is the government, but kings have governed by them) is so much out of use now-a-days.—I do not prescribe power to the parliament to govern the realm, but the public have been governed by the parliament. There was seen too much of the ambitious humour of some in the last parliament, that stirred up nothing but confusion and discontentment, as we now feel it to our great prejudice.

Now I come to precedents. First, that of Danegelt hath been objected; of which there were two kinds, as sir Henry Spelman in his Glossary observes; the one *ad pacandum*, the other *ad coercendum Danos*; great sums of money they had to go home again, from 12,000*l.* to 48,000*l.* per annum; and it was raised in three years: it was continued until king Stephen's time; at which time it is said it was released. For my part, I see not but that it might now be put in use as formerly, had it not been for those statutes of Ed. 1, and Ed. 3, before-mentioned: for it was not laid down when the danger ceased, but was continued and taken up by princes when they had a mind to it, as by William the Conqueror, and William Rufus; but since these statutes it was never taken (and here he read the words of the statutes.) So if these statutes took that away, why do they not bind in our case? Which is a full answer, in my opinion, to that and all other precedents before these statutes: there have been shewed 200 on each side; but I say, it had been better they had never made use of them. So to all the precedents made before the statute De Tallagio non Concedendo, I give this general answer, to be of no force.

For the precedents in Hen. 3's time, which were many; yet in those commissions for preparing of galleys, after they were made they were at the king's cost: This may be done at

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this time.—And with the statute of 14 Ed 3, I answer those precedents of the 10, 11, 12 Ed. 3, and by the way observe the times that were then, that statutes were forced to be made to remedy those evils; and surely those were the burdens and unreasonable taxes which the king, in the 13th year of his reign, confessed he had oppressed his subjects with, and desired they might be forgotten, because he was urged to it by his necessities, and not for any ill end of his own, (and so he caused the record itself to be read openly before all the judges.)

2 Hen. 4, 2 Rich 2. A general assembly called and resolved, That money could not be raised but by parliament. Since this time, all the precedents that have been vouched were for arraying men, and putting them in readiness.

28 Hen. 8. There were some forced upon their own charges to go to suppress some rebels in Lincolnshire, but afterwards were recompensed for their charges; saith the Record, Our pleasure is to send a messenger, and on a bill of charges he shall satisfy them. I do agree, and there are many statutes that men should be arrayed, as the statute of Winchester, which are only preparations to make men ready.

Now for that which hath been urged by Mr. Attorney excellently well, that the king by the law of the land, hath a prerogative in the lands and goods of his subjects; so that in some cases, the sheriff may for him break open a man's house, and the like, because otherwise he cannot execute justice.—True, the king hath such a prerogative, and fit it should be used; for otherwise justice could not be administered, as it is in many cases, the sheriff, though a verdict by default, hath power by prerogative of the king to break into the house, and give possession; for otherwise justice could not be administered, if all laws were contemned: for which contempt the king may use his power.—Again, the king of his own charge maintains his courts of justice, and is bound so to do, 39 Hen. 6, 34 Hen. 6. And in lieu of these charges the law gives him those fines and other duties; so there is upon the matter a *quid pro quo*: but where there is an interest in a subject, he cannot take it away without his consent, as he may do it in murage and pontage, and the like; for there is a particular benefit to the subject. So I think I am almost at an end of answering the first and second part of the precedents; the antient time was one way, and the modern time another way.

In Ed. 4, Ric. 3, Hen. 7's times, they are all for wages of the mariners, certain allowances they had; what a week, what a day is set down.—But you say, here in this case appears no money to be paid by the subject, but only for a ship to be provided by the sheriff, and not any money to come into the king's purse.—I must conclude this part with what is agreed by all, that if this writ had been to levy money, it had been void.—As I do take it, the writ is to prepare a ship of such a burden; so the ship is the matter: then give me leave to say this, and I say, as it appears plainly by the record, there was no ship prepared at all; then if no ship, no writ can be had against him for disobedience. It is known to all the world, it is not ships, but Ship-Money: Ship-Money is in every man's mouth. It hath a name of preparing ships, but the end of it is to prepare money, as in Yorkshire 12,000*l*.—If the provision of a ship had been expressly alledged, it might have been traversed, and therefore Mr. Hampden's counsel could do nothing but demur; and by demurring, they confessed nothing but what is materially and sufficiently alledged, so that it might have been denyed by a traverse.—But you will object, that I did subscribe to a contrary opinion, and set my hand unto it.—To this, for my own part, I must say, and I can truly say it, 1. My private opinion was ever against it. I did subscribe, but it was but for conformity; for it is known to all, when a great number meet together, the judgment is that which the greater number saith: besides these words to which we subscribed are no wise pursued.

2. Our opinions were very suddenly required; for the king's letter bears date Feb. 2, and our opinions upon it bear date Feb. 7, following; and it was in a case wherein we never heard any argument: and we usually do, and God forbid but we may dissent from our private opinions upon a better reason heard. But I am of the same opinion now that I was then.—But it will be said, we might have done it more advisedly. No man of us but sometimes delivers his opinion, and yet after we have heard an argument, have changed our opinions, and gone contrary to our former judgment.

3. If after any arguments heard I had been of the same opinion that was delivered, yet this writ doth not pursue the direction thereof; for though we agreed, that the king might charge in case of a general danger, yet this was, and is intended, not a danger of pirates, but an imminent necessity, and apparent danger, which could not be avoided. For I do agree in the time of war, when there is an enemy in the field, the king may take goods from the subject; such a danger, and such a necessity, ought to be in this case, as in case of a fire like to consume all without speedy help, such a danger as tends to the overthrow of the kingdom. Give me leave to say, that kings of England have exercised great power in taking this to themselves. 17 Hen. 8, in the Cardinal's time, it was counted lawful to send forth commissions throughout England, to take a sixth part of the subjects goods; whereupon many upon refusal were sent to prison; the lord Cobham among the rest sent to prison from Huntingdon to London: at length Norfolk and Suffolk grew to such a heat for taking away their goods in that undue manner, that the king was forced to call a great council, who suppressed those kind of writs; and the king laid the fault upon the cardinal; and the cardinal said it was the advice of the king's council, and

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they denied it; so he bore the shame.—So in the time of queen Elizabeth, who was a gracious and a glorious queen, yet in the end of her reign, whether through covetousness, or by reason of the wars that came upon her, I know not by what counsel, she desired benevolence; the statute of 2 Ric. 2, was pressed, yet it went so far, that by commission and direction money was gathered in every inn of court: and I myself, for my part, paid 20s. But when the queen was informed by her judges, that this kind of proceeding was against law, she gave directions to pay all such sums as were collected, back; and so I (as all the rest of our house, and as I think of other houses too) had my 20s. repaid me again: and privy counsellors were sent down to all parts, to tell them that it was for the defence of the realm, and it should be repaid them again.

Now for the exceptions to the writ itself, I must answer my brother Berkley, that no allegation afterwards (if the writ be not good) will help it. The writ is said to contain matter sufficient, 'Quia datum est nobis intelligi quod 'quidam piratæ naves et bona subditor' nostror' '&c.' and lead our men into miserable captivity, and provide ships, mariners, &c. 'ad gra-'vandum regnum nostrum.' Now here is nothing for the defence of the realm, no 'cognos-'cimus hostium adventus;' as the writs did antiently run. Again, pirates are to be withstood with ordinary defence, which appertaineth to the king himself; but for extraordinary defence against invasion, when the kingdom is like to be overthrown, there indeed the whole kingdom is to contribute to the defence. And our resolution was, when such a danger was apparent, the whole kingdom in danger, then the defence to be extraordinary.

But you object, that though there be no danger set forth in the writ, yet in the mittimus it is certified, 'Quod salus regni periclitabatur.' —The writ issued 4 Aug. 11 Car. the mittimus came not out till near two years after: now the counsel perceiving the first writ was not sufficient, they politicly add to the mittimus this clause of 'salus regni periclitabatur:' so this coming so long after, cannot make that which was not legal *ab initio*, to become good by matter *ex post factum*; this could not be helped by any subsequent matter, as in case of a fine, &c.—This was much stood upon by my brother Berkley; but I shall answer him with two cases not to be denyed: the first, Vernon's Case in the 4th Report. A man conveys land to the use of himself for life, the remainder to I. S. for life, the remainder to his wife for her jointure, though in this case I. S. die before her husband, so that now it falls out to be as advantageous to the wife, as if it had been limited her immediately after the death of the husband: yet it is resolved, because it is not so limited in the beginning, no good jointure to bar her of her claim to her dower. —Also in Chenie's Case, 5 Report. A will uncertain (and so not good) shall not be holpen by an after-averment subsequent to alter the estate: so it is in our case. if the writ were not legal when it first issued, no subsequent matter shall make it good.

The writ commands the sheriff 'et quos 'rebelles invenerit' to imprison, and to distrain all such as refuse to pay. This is directly against the statute of Mag' Char' none ought to be distrained or imprisoned, but by the lawful judgment of his peers, and according to the laws of the land; it was never contained in any writ before, nor can any such writ be maintained.—Besides, the words of the writ are to rate every man 'secundum statum et 'facultates,' shall the sheriff be a judge and party? If the assessment be done according to the writ, he must be judge and party: never such a writ before. All sheriffs must pay nothing themselves, or every sheriff must assess himself, 8 Hen. 6, Dyer 320. So, for the reasons aforesaid, I hold the writ to be against law.

Again, no ship was prepared: if it had been prepared, it had been their own goods; if not, it might have been pleaded that there was never a ship; and then the sheriffs might have been punished for not obeying the king's commands.—It hath been said, he hath confessed all matters contained in the writ; whereas in a demurrer he confesseth no matter of fact, but what is sufficiently set down, 30 Eliz. Coke 23, resolves the same.

But to the writ of Sci' Fa' I conceive it not legal; no such writ can go forth to two sheriffs of one county, they being neither of them sheriff at this time; for it went out after they were out of their sheriff-wick: therefore some return should have been made by inquisition. I never did see or hear of any writ that went to two sheriffs of one county, as it was to Bucks; and so two sheriffs made two several returns. Again, this money cannot be levied by Sci' Fa', because the writ directs other means, either to distrain or to imprison; therefore not by Sci' Fa', for it is contrary to the words of the writ. And seeing the sheriff hath not followed that direction, he must answer the contempt.

But here to answer my brother Trevor; I do agree in some cases of a certificate, or presentment, that a bridge was out of repair, or a high-way stopt, there shall go a Sci' Fa' upon that; but that tells to whom the money shall be paid. But here the writ doth not demand the money to be paid to the king for not preparing a ship; that must be by office or inquisition on record, if a legal certificate, as it is 2 Ed. 3, fol. 2. The king commands the sheriff of Leicester to summon I. S. &c. to come and meet him with aid, to go into Scotland; he spent the money to a great value: there went a writ out of the exchequer to attach this man: yet after long debates it was held fit, the king must be informed by matter of record.

I agree, that the king, as he is lord of the sea, may lay impositions; but then he ought to defend the merchants goods from pirates. That

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famous Case of Mich' 4 Jac. in which case I was of counsel, of an Imposition of 5*s.* a tun on currants, one Bates stood out, and would not pay it; adjudged that that Imposition was lawful, for the king may lay an Imposition; for he hath the rule of the sea, and hath power to hinder merchants to traffic; and if they traffic, he secures their goods.—To conclude with that which my brother Berkley said, that the subjects of England are free men not slaves, free men not villains. Here is no apparent necessity of any invasion; therefore by law, they cannot be thus compelled to part with their interest in their goods. If there were any apparent necessity, they were without limit or stint. Thus have I, with as much perspicuity as those imperfections which attend my age, would give me leave, set you forth my reasons; and without any farther protestation I conclude, both for matter and form, that you are Not to give Judgment for the King.

The OPINION of Sir JOHN DENHAM, knt. one of the Barons of his Majesty's Court of Exchequer, in the great Case of SHIP-MONEY, presented in Writing.

May it please your Lordship; I had provided myself to have made a short argument, and to have delivered my opinion, with my reasons: but by reason of want of rest the last night, (my old disease being upon me) my sickness and weakness are greatly increased, insomuch that I cannot attend the business, as I desired. And if my Opinion be required, it is for the Plaintiff.

Serjeant's-inn, Fleet-street, May 26, 1638.

Sir JOHN DENHAM's second CERTIFICATE, directed to the Lord Chief Justice Brampston, 28 Maii 1638.

My Lords; Understanding that some misconstruction was taken by some, of the declaration of my opinion, which I desired your lordship upon the last Saturday to deliver in my name; for further satisfaction therein I have sent again, although I was most desirous to have passed my vote in silence in this work of weight, by reason I heard not the four last arguments: yet I delivered my opinion for the plaintiff, which I took to be Mr. Hampden, by reason it appeareth by the Record that he coming in upon process, 'Queritur de colore 'præmissorum graviter vexatum et hoc minus 'juste;' which satisfied me that he was plaintiff; and therefore I now declare my Opinion for Mr. Hampden who did demur.

I shall only deliver these two reasons for the maintaining of my opinion. The 1st is, that the king's majesty is 'sola et suprema justitia 'regni,' and the rule of the law is and hath always been, that his majesty can do no wrong; and thereupon ariseth another rule of our law, which I gave for my second reason.

The king's majesty being of a corporate capacity, can neither take any lands or goods from any of his subjects, but by and upon a judgment on record, (according to our daily experience in the exchequer) there must precede some judgment in that or some other court of record, whereby his majesty may be intitled either to the lands or goods of a subject, as namely where seizure of goods is made for his majesty either upon outlawries, attainders, or matters of the like nature; as in cases of seizures in the court of Exchequer, where seizures are given by statutes; yet without a judgment in that court upon a trial for the king, the goods are not to be recovered to the use of the king as forfeited.

Upon consideration whereof, and comparing the same with his majesty's royal writ, I find no judgment thereupon had nor given; which were the chiefest reasons of my Opinion for Mr. Hampden.

The ARGUMENT of Sir HUMPHRY DAVENPORT, knt. Lord Chief Baron of the Exchequer, in the great Case of SHIP-MONEY in the Exchequer-Chamber.

My Lords; There have appeared unto us upon this Record many several arguments, and excellently made; it comes now to my course, to express my own opinion. It appeareth upon this record, that Pasch. 13 Car. a Sci' Fa' issued out of the Exchequer to the sheriff of Bucks, reciting, Whereas several sums of money mentioned in a schedule to that writ annexed, by virtue of the Writ 4 Aug. assessed upon several persons for providing of a ship, were not paid, whereby he was commanded, 'quod scire 'faceret,' to those several persons in the schedule annexed named, to appear in the Exchequer, Octab' Trin' 13 Car. to shew cause why they should not pay those sums of money assessed upon them. Thereupon a Certiorari 9 Mar. 13 Car. was directed to the sheriffs of Bucks, to certify the sums, and the several persons upon whom they were assessed, and of the warning given unto them to pay the same: The Certiorari being returned, and in court in April 13 Car. Then on 5 May there came a writ of Mittimus out of the Chancery, by which the said former writs were sent to the barons of the Exchequer; which Mittimus recites the Writ 4 Aug. and not the Record itself: and the barons are commanded, that they should thereupon proceed, as by the Mittimus is required. Upon these Records, thus certified, there issued out of the court of Exchequer a Sci' Fa' that is now in debate, which was awarded against the parties mentioned in the schedule; and Mr. Hampden being returned, hath appeared, and demandeth Oyer of the Writ 4 Aug. 11 Car. of the Certiorari 9 Mar. 13 Car. and of the Mittimus 5 Maii 13 Car. Upon Oyer of these, and reading them unto him, as was demanded, Mr. Hampden hath demurred in law, alledging, That the writs, and every of them, and the returns of them, and the matters therein contained are not sufficient to charge him with the sum of 20*s.* on him charged: and thereupon demandeth judg-

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ment, if the king will be pleased any further to proceed upon this writ. To this demurrer, thus tendered by Mr. Hampden, Mr. Attorney hath joined, alledging, That the writs mentioned, and all of them, and the matters therein contained, are good and sufficient in law to charge the defendant with the sum of 20*s.* and demandeth judgment thereupon for the king; and that the defendant Hampden should be charged with the sum of 20*s.* and thereupon make satisfaction; but to whom is not expressed upon the record. This demurrer being thus warily joined on both sides, there have been several arguments thereupon at the bar and bench, excellently, no doubt, argued, and very fully. There hath been introduced and pressed to the court (whereof there have been several notes delivered) a number of records appertaining to the question; so far forth, that in one of the arguments at the bar, there were excellently well remembered, at the least above 300 records, and great authorities.

Upon this record, the demurrer being thus joined, my purpose is, after my meanness, (not being able to give an account of every particular) to make a summary collection of what I shall say, and with that shortness and brevity that appertains to be (the weight of the cause not deserted) upon the duty of my place, and upon my oath, which I have learned and hold to be 'ligamentum fidei inter Deum et animam,' to declare unto this court what I do conceive to be just upon the question arising upon the records, wherein my meaning is to retain myself unto the parts of the record. Judgment is not here to be given, but a judicial advice; and according to the number of voices here, judgment must be given in the exchequer, without respect to any of our particular opinions who sit in this court. I shall do my best endeavour to open unto you such questions, as do appear to me upon the record to be aptly and fitly debated before us.

The state of the question out of the record will appear to be this, That 4 Aug. 11 Car. there issued out of chancery a Writ, not returnable unto the sheriff of Bucks: This Writ was 'inter breva irretornabilia,' according to the stile in that court, and in the court of exchequer. By this Writ 4 Aug. which I do conceive to be the original main ground of this record, it appears what was the occasion and ground that writ was awarded. It was touching and in respect of certain grievous incursions by the pirates upon the seas, who commit depredations, and take the goods and merchandize, both of the king's subjects and others that traffic here, and carry them into captivity; and this is said to be to the great damage of the kingdom.—That the times were dangerous, and hostile times, 'tempora hostilia;' and therefore, it was fit there should be a convenient remedy provided by the kingdom for defence thereof; and thereupon, in that writ, two several mandates or commands are imposed.

The first was a command and direction to the sheriff of the county of Bucks, and to the mayor of Buckingham, and to the bailiffs and burgesses of Chipping-Wiccombe, and parishes of the county of Bucks, 'et pro omnib' hominib'' of those towns, and all others dwelling in that county; these are the persons who are charged. And by that writ, 4 Aug. they were charged with this particular, that they should before the 1st of March then following at their own costs, prepare and provide a ship of war of 450 tons, furnished and fitted with men, ammunition, and victuals, to be brought to Portsmouth at their charge, at or before the said 1st day of March; and from thence, to be maintained at their own proper costs and charges, for the space of 26 weeks then next following, to attend such noble persons, to whom the king should be pleased to commit the custody of the sea, and to pursue their directions.

The Second sort of those two mandates descends from the persons to whom the writ was directed unto some few, and that is upon the matter to the sheriff of Bucks, and to the mayor of Buckingham, and the bailiffs and burgesses of Chipping-Wiccombe: to these is given and limited a power by the writ, distributively, as therein is appointed, respectively to tax and assess the whole county, 'secundum statum et facultates.' And those that they should find to be rebels, they should distrain them, or by any due means commit them to prison, there to remain until his majesty sets forth an order for their deliverance. This I do conceive to be the end of those two mandates mentioned and comprised in the Writ 4 Aug. 11 Car.

After this Writ 4 Aug. 11 Car. almost a year and an half, then cometh the Certiorari out of chancery, dated 9 Mar. 12 Car. directed to the sheriff of Bucks, who, with the other referees, should certify unto the king the names of such persons as were assessed, and what they were assessed, and who have performed the assessment, and who not. That writ was returnable 26 April then next following. And therein Mr. Hampden appears as a defendant to the Sci' Fa'; therein was he certified to have been taxed to the sum of 20*s.* for his lands in the town of Stoke Mandeville, and that he did refuse to pay it, and did not pay it unto him, nor any of the collectors that were appointed.—This being returned into chancery, and no order there made, or any rule, that the sum imposed on Mr. Hampden should be paid, 5 Maii then following, in the same term cometh a Mittimus, reciting the effect of those writs, which is directed to the lord treasurer and barons of the Exchequer; herein the tenor of the writ (and not the writ itself) is certified into the Exchequer: and withal it certifieth the rest of the record, together with the schedules annexed to those writs; and by that it is commended to the court that they should proceed to do for the further receipt and collection of the sums behind, as by the law and custom of the kingdom of England should be required.—And upon this certificate here cometh a writ

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of Sci' Fa' directed to the sheriff of Bucks, to give notice to the persons that were defaulters, that they should appear and shew cause, if they could say any thing, why they should not be charged therewith according to the laws and customs of the realm; and the writ is so returned: and upon that return Mr. Hampden appears upon the day in person, and after Oyer of the proceeding, hath demurred.

Upon this record, this being the case, and the demurrer thereupon joined, we are to see what is the law and custom of England upon the matter extant in the record; for I intend not to expatiate beyond the record, but to stick close to it, as it is in the case now depending in court, upon this record: and therein I shall confine myself to some few general heads, I shall not be long in any thing.

The first thing is, Whether these two powers and mandates mentioned in the Writ 4 Aug. 11 Car. (the original ground of this suit) the one for preparation of a ship and furniture, and of the residue therein mentioned; and the other, for taxation at the pleasure of the sheriffs, and other persons to whom it is referred, and that expressed upon the motives of the Writ 4 Aug. whether, I say, that these same mandates were and are good in law, according to the law and custom of the kingdom of England, upon the matter of this record; that is the first question: if that do fail, then the Sci' Fa' is at an end. If there be no legal charge imposed upon the country, then he ought to be discharged.

The second question is upon the principal head; admitting these were legal in themselves, according to the tenor of the writ, to see then how it is reduced by the record. Therein I shall offer to consideration, whether on this certificate on the Writ 9 Mar. out of Chancery, after the time so past for execution of the first writ which is irreturnable, that upon that it be so legal, and according to the course of law conveyed over by the record to be a sufficient ground and warrant of the Sci' Fa' here brought, is the second question.

The third question: this writ of Sci' Fa' being issued out, and the defendant having appeared, and demurred in law, whether hereupon there be such matter therein, that they may charge the defendant with the sum imposed upon him, so that the king may have a judgment and execution upon it: that I conceive to be the last question.

This case is a case of very great weight, and doth nearly concern every one of us to have an especial eye unto it. It is an usual question in our books; whereof we have much view.—However it be in the record, to which we are now tied, it concerns the prerogative of the king, and the estate of the subject. In my conscience I think, for the act that was done was a gracious, honourable, and royal act, and proceeding upon just cause, that there should be a present remedy for avoiding the inconvenience that did appear, no doubt for our good. Herein, though it be known to every one that knoweth me, but especially to myself, if I partake of the rule that every man is bound unto, *nosce teipsum*, I know withal, that no man is more bound, nor oweth a more tender care to preserve the king's prerogative, and to do that which may advance the same, as we are all bound to do by the great oath that we have taken upon our promotion: and in that particular, I profess none more bound than myself.—Upon this I have been told, and I have truly looked into the records, so far forth as my meanness will give leave; and according to what I understand of the law and the custom of the kingdom of England, to be upon this record, I must needs say, though I do confess for my own particular unwillingly, that upon this record Judgment ought to be given for the Defendant, 'Quod Johannes Hampden sit 'quietus, &c.' however with submission to the greater vote of my brothers.

For first, I do conceive, that this charge, thus commanded, and thus taxed, is not warranted by the laws and customs of the kingdom of England: and shall therefore offer to the consideration of the court, the several discussions upon the writ.

First, For the Writ 4 Aug. 11 Car. directed to the sheriff of Bucks, to the mayor and burgesses of Buckingham, and bailiffs and burgesses of Chipping-Wiccombe, 'et probis homi-'nibus com' Bucks;' hereby are they charged upon their allegiance, that they should, before March 1st following, prepare at their own costs and charges, 'per probos homines,' throughout all the county, a ship of war well furnished, and that the same ship of war they shall maintain at their own costs and charges, for the space of 26 weeks, to attend the king's navy, for the custody of the sea, as the king shall appoint and direct.

This first point I take is not warrantable by the law and custom of England; in respect, being a matter of so great a charge, and by them, being an inland county, impossible to be performed to prepare a ship before that time, being no maritime county, but an inland county: this I do take in itself, that this is not a charge to be imposed upon a county, by the name of 'probos homines,' or of the particular men there named, except it were by their own consent and approbation. And with their consent I agree, a charge upon 'probos homines,' so they receive nothing to their own uses, is good enough; whereof I find one excellent record, 24 Ed. 1. A writ that issued out of the Exchequer, and whereof there is the record remaining to this day inrolled and certified to be a true copy: there it is directed in case of necessity, when the king is absent beyond the sea, upon information of the discovery of a present and instant invasion of the enemies in Flanders and France, under colour of coming as fishermen to surprize the town of Yarmouth, and all the parts of the coasts thereabouts; the lord treasurer that then was (the king being beyond the sea) the under-treasurer who had the custody of the sea, and the barons of the

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Exchequer, caused a writ to be directed to the bailiffs 'probis hominibus' of that town: and no doubt of it, in the judgment of our predecessor himself, was good law, and the writ legally executed upon the instant necessity appearing. But Fortescue speaks not so much of the necessity, as hath been observed: therefore it is not good to conclude upon some general words in him, that in no case of necessity the charge can be laid; for the scope of the whole book, considered well, will not warrant it: the intent of it is not against cases of extremity. You see not in the case, but that therein the regal course must be observed, according to the law and custom of the kingdom of England.—But when I do consider of the first charge of preparing a ship at their own charges, and of the consideration of the next charge in the same writ for taxation, I do not see, nor I cannot perceive, how the same do agree, but that the one is repugnant unto the other; for that the former part commands the charge to be generally by all; and by this last power it is limited to be done by a particular person, and that to be done at his will, and as he shall think fit; whereby the sheriff, mayor, and bailiff, thus employed, are excluded from the charge; for they can do no act upon themselves. It should have been done 'per sacramentum proborum 'hominum,' considering these two different powers. I hold the law so to be clear in this point. It appears not upon this record that they were assenting unto it, or agreed upon any ordinance herein.

Now the power of the preparation, upon the whole it is on the sheriff himself, mayor, bailiffs, 'probos homines' and all; but when you come to the latter *ipso facto*, by the laws and customs of the realm, a great part of the former charge is removed directly from those that were chargeable: power of taxation is appointed, to whom? to the sheriff, and how can he tax himself? he and all his estate within the county of Bucks under the first charge, and all discharged by the power of taxation limited in the second clause: and therein I take it, that this same is not legal according to the customs and laws of England, the one doth not agree with the other. If you ask me the reason of it, my brother Hutton hath given it. The charge is upon the sheriff, and 'tis not possible for the sheriff to tax himself, he cannot find himself *inter rebelles*, he cannot commit himself to prison, there to remain till such time as the king's majesty shall deliver him; that he cannot do. So for the other referees of Buckingham and Chipping Wiccombe, exempted likewise; if they can do this, then clearly the former charge, imposed by the first and said to be done by them all, is out of doors.

Now it cannot be done, according to the law of England, upon the sheriff or upon his land. The point I think is very evident in our books. 18 Hen. 8. If a defendant that is sheriff be to be summoned, and he return that he cannot do it, justice H—— said that return was not good, for that he might summon himself. 8 Ed. 3. But if it come to a further question that if there be any execution to be done where another may be prejudiced, he cannot do it, as to impannel a jury upon a writ, where he is a party, which may prove a prejudice to another; for if he do, it is not lawfully done, as it is in Dyer, fol. 8, 9. Of the sheriff in a common recovery. So upon these authorities, for the first question, I hold it manifest, that this act which the sheriff is charged to do, is afterwards by this second power discharged: these two powers do not cohere, and therefore are not warranted by the laws and customs of the realm of England.

Concerning the first question my opinion is clear, that there is a material and legal exception appearing on the self-same writ. My reason is, the sheriff is the great officer of the county; but when he must do it, I take it legally, he ought to do it according to the duty of his place by the law of England; that I do not take to be at his will and pleasure to lay one thing upon one, and another thing upon another; for my part, I conceive this must be done 'per sacra-'mentum;' he is not to be judge in case of uncertainties, when a division of charge and taxes is to be made; where things are put in certainty in any of the king's courts, there he may execute, as take a man's goods, imprison, &c. but in case of uncertainty, the law hath annexed to his office a way and means how to reduce the thing to a certainty, and that is, 'per sacrament' pro-'borum hominum:' as in the case of parceners, if they have a mind to make partition of their inheritance, they may do it by agreement between them if they will, or by making of lots by a third person, and the elder shall chuse; but if she herself make the partition, she shall not both divide and chuse; that alters the case for execution, when it is *in propria persona*. But admit they cannot agree, the judgment of the law is, that the sheriff shall go in his proper person into the ground; shall he at his discretion make the partition as he pleaseth? No: The Judgment is, the sheriff shall go in person unto the land, and that there 'per sacramentum, per inquisitionem,' to be taken by chosen jurors, they must consider of it; upon such a thing so done 'per sacramen-'tum,' then indeed it is in the sheriff's power, he may now chuse whether he will prefer the elder or the younger. But for our case, that this should be done by a sheriff, by his discretion, whilst the interest of several persons is concerned, is as it were to make a rape. I do not find that in any book of law, I must confess. In that act, which is done by the law, there can be no error or partiality; so in Fitz. Na' Br' in his writ De Onerando pro rata Portione, see what there is to be done: it goeth to the sheriff, he is trusted with the doing of this, but he is trusted by legal means; what shall he there do? where 20 acres of land held of the king in chief, they are sold to several hands, there must be a writ De Oneranda pro Rata for discharging of the rent; but this must be done 'per sa-'cramentum,' not by the sole power of the she-

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riff. Hereof I find a notable precedent; it is true, it is not in our books of law, but in an historian; yet he doth set it down in that manner, that a man may trust him so far. Matth. Par. he saith, and sheweth us that 17 Hen. 3, eight years after the making of Mag' Char' authorized by parliament, that the king himself in his parliament was pleased (according to the institutions of parliament) to require 'concilium et 'auxilium,' for the king's wars; where, by the way, let me observe, that 'auxilia' from the subject granted the king in parliament are not merely voluntary, but duties, to give monies for supply of necessities of state; and in that I agree with the opinion of my predecessor, Ho. Chief Baron, 19 Hen. 6. The king is bound to defend the kingdom. The same law that binds him to the defence of the whole realm, gives the king a right of inheritance to claim subsidies for the defence thereof. But to return to Mat. Paris: It appeareth there that the king in parliament did demand aid of his subjects, 'concilium et auxilium,' their counsel as they were bound, their help as they were able. It is said, that they made choice of the earl of Chester to give their answer, who at first held it not fit to do it, alledging their estates were but weak, that by the laws of the kingdom they that had been there in person, they for their escuage might not be troubled. The prelates they were more courteous in their answer, they desired time to assemble themselves together, many being far distant: thereupon was a time assigned, till Mens' Pasch'. In the mean time they all considered, the lords on the one side, and the lords spiritual on the other side; and being demanded a fifteenth of their goods, they answered, so as they might have their ancient laws established to them, for which they had been so much troubled, they would willingly assent unto it. The king consented unto it, and thereupon Magna Char' was there confirmed upon grant of a fifteenth to his majesty. But when they came afterwards, they did all agree, that for necesaity, and for the king's charges in his wars which did require a speedy supply, they were contented to yield to him a fourth part of their goods, to be levied in this manner, that is, (for so it is mentioned expressly in Matth. Paris, and the form is there set down *de verbo in verbum.*) I have it here to read it: that every sheriff within his county should return a juror in every town: that to four gentlemen of good value, and accounted principal men in every town, power is given, that they shall do (as a jury, to set forth upon their oaths) assessments reasonable according to their estate and power; and because it appeared then there, (the very exception now taken) that the assessors could not tax themselves, though they had power to tax the residue, therefore a power was given to two others of every town, and they should be sworn, and upon their oaths tax the four former assessors. This tells unto me, what the antient and usual manner was of taxes and assesses by the custom of England. The manner was not at the voluntary pleasure of the great officer of the county; but they that did tax others, should be taxed by others. And this opinion is directly in Matth. Paris, that the laws of England were so. And therefore for my own part, for the sheriff to tax at his discretion, I know no law for it.

Stat. 1 Ed. 3. By the true record, according to the manuscript of the Exchequer Book here, in French it is chap. 7, and so it appeareth in the Tower there inrolled: it is expressly there upon a complaint made, that they held themselves aggrieved with an assessment; their grief was, that whereas aid was granted to the crown, more than formerly was used, &c. and taxes not rightly laid upon them by the sheriff and commissioners: this grievance thus complained of in parliament, and the manner of their taxing disliked, the king saith that from thenceforth, the taxations and assessments should be made as in ancient manner, and not otherwise. Here is an express negative, no taxes to be done but by jury; which excludes in my opinion this same tax thus done, that is, by his own power and discretion is not warrantable by the law of the land. And herein give me leave, as I think in my conscience, and as I think the truth is, if this inconveniency had not tended to a grievance in very many particulars, we should never have heard of this question; but by this means it cometh in question, both the one and the other: for the act itself, it is a gracious and a royal act. It is requisite and necessary, as the state and condition, if it so appears upon this record, of the kingdom may be in, that there be a supply according to the necessity: for the king is lord of the sea; as it was argued at bar, in a cause brought before us the barons of the Exchequer, where we did unanimously agree, and adjudge that the king was, and is in my conscience, rightly true lord of the very propriety and ownership of the seas. The occasion upon which this grew a question was as I conceive, upon the writing of two books: the one called Mare Liberum, that no ownership of the sea should belong to the king; whereas it is the sea of our sovereign, and defence by sea, under Almighty God, that is our protection; and if we should suffer any else to have an interest in it, it would hazard the whole kingdom. But in answer to this book, Mr. Selden hath wrote very learnedly a notable book called Mare Clausum, approved of by his majesty, and inrolled in the Exchequer by command from his majesty, there to remain. But since there is another book written, which I had at my argument, by one Pontanus, directed to the great chancellor of the king of Denmark; and he undertaketh therein to make an answer to every particular chapter in Mr. Selden's book; and truly, as I think in my opinion though weak, Mr. Selden hath a judgment in law against him upon a *nihil dicit.*

Of how great consequence the dominion of the sea is to this kingdom, who knows not? So that without question, the tax was very fit to be done, if the power given to the sheriff had

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been as warrantable. But this same second power, to free himself and lay it upon the residue, is not good, nor warrantable by the law. Thus much for the first question concerning the powers contained in the writ 4 Aug. which doth not resort to the rule and custom of the kingdom of England.

In the next place, let us see whether the writ mentions causes sufficient for the issuing of it. For the incursions of pirates I conceive it no just cause: but the expressions in the writ, as 'quia datum est nobis intelligi, ut informa-'tur, vulgaris opinio est et rumor est, &c.' If the king undertake it upon this, he is not to shew how he discovereth it. I am satisfied in my opinion, upon view of the precedents, it is sufficient if the king do alledge, 'quia datum 'est nobis intelligi,' or 'quia intelleximus, &c.' it is enough, for it is so in these precedents, 'quod vulgaris opinio, &c.' All these, or any of these containing such a matter that the kingdom is in danger, I agree the same doth conclude the party, and that the king is the sole judge of it. The case is not traversable, the writ must be obeyed, agreeing with the laws and customs of England.—That this may be done by the king's writ, excellent and strong arguments have been made. That this imperial power belongeth to the crown, I heartily acknowledge it; his power declareth it so; reason it should be so: not voluntary at his pleasure, but it is according to his *politic capacity*, not excluding his natural imperiality. 'Quia 'rex,' he doth it not; but 'Quia rex Angliæ' he doth it: so I find it in Fortescue.

The grounds premised in this writ, that the kingdom was in present danger; truth in my conscience it was so, and if that had not been done so, England had heard of it before this day. Therefore there must be an expression of the kingdom to be then instantly in danger, or such a preparation in such a convenient time, or else it will be in a great danger; but that must be expressed, for I hold the law to be so. Doctor and Student saith, it is the old custom of the land, the king shall defend the sea: it is true, against whom? Against pirates and petty robbers, but not against a sudden invasion at his own charge. These 'prædones' who were spoken of in the laws of king Edward, when Danegelt was given, they were of that condition that they endangered the whole kingdom. They did occasion the tax of Danegelt, to raise from twelve to forty-eight thousand pounds; and William Rufus raised it to 4*s.* a hide, imposed upon a just ground to repel the Danes, being common enemies: and this was continued until Hen. 2's time, but since taken away by several statutes, as 25 Edw. 1, &c. That same Danegelt which was heretofore imposed on the kingdom by the terror of the Danes, continued still, though the name be altered; it is mentioned in the Red Book in the Exchequer to be used in Hen. 1's time; but after the time of Hen. 2, I hold that it is taken away by the statutes beforementioned of Edw. 1, &c. and therefore if for private danger this assessment be imposed, it is not according to the laws and customs of this realm.

I am over-troublesome, and I fear shall hardly hold out; give me leave to proceed to the second consideration. And admitting those charges in the first writ to be legal, the next consideration to be had is, whether the Certiorari and the Mittimus do legally revive the first writ, it being a writ irreturnable, and not executed according to the tenure of it within the time limited and prefixed to be done.—This Certiorari issued long after the first writ, dated a year and half after. And in my opinion this cannot be; for the nature of a writ not returnable, is to command a positive thing to be done within such a time; if it be not done accordingly, there is an end of the force of that writ: so that here in our case, the power given to the sheriff being not executed in due time by him, but done out of time, cannot be renewed now; for otherwise you will make a man an offender by a relation, which being a fiction in law, cannot so operate, nor be made penal to him for non-performance: and though afterwards by the Mittimus these words 'salus regni pericli-'tabatur' come in, yet will they not revive or make good the commands of the first writ. If the first writ had been returnable, and a return made, and a default according to the return, the writ had been still continued, and must have been referred by another court, and the party presented by a jury upon default; and upon presentation and indictment, the king shall have his remedy: but not being so, it is but a suggestion, upon which a Sci' Fa' cannot issue, as in Butler and Baker's case, report 3, and being not returnable, is but dead in law; and being certified upon the second writ, it is not good, it cannot be to relate to make him a wrong doer; to that purpose is the case cited, 26 Ed. 3, Leicestershire Case, reciting; whereas one sir John de Lamston, that he had delivered certain monies to Robert de, &c. and that he had wasted such a manor, and taken away goods to the value of 2,000*l.* and thereupon it was commanded he should be attached by his body, he appeared at this day, and because, &c. he was discharged of it; and according to that I find it, 7 Edw. 3, there it was suggested to be made in one king's time; and whereas it was not, and there abated, then the question, whether the king may do it or no? He giveth the answer, that where it concerneth the king in his own right, there he may do it; but when the title came to the king from another party, there it was otherwise.

Upon this I do conceive this Brev' irretorn' falleth short of making him punishable, as if it had been a writ returnable; let the writ 4 Aug. be never so good, the writ thereupon is not legally issued.

The next thing is upon the Sci' Fa'; the question upon this record is, Whether this doth appertain to the king? and I conceive, it doth not appertain to the king: My reason is this, because in the very writ 4 Aug. it is expressly provided, that it shall be employed to

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no other use, but the preparation of the ship therein mentioned, and by no means to any other purpose. It doth not now appear, who were collectors therein appointed to receive the money, whereby to become chargeable over to the king. It doth not appear upon this record, that any ship was provided, or that any fault was in them that were employed, or of surplusage in the collectors hands: though it was a worthy and gracious act in his majesty, yet this is not so legally executed, as the king may have a writ of Sci' Fa'. If judgment be for the king, it must be with this limitation, that it must not go to the proper coffer of the king, as my brother Jones observed. And in my conscience, if it were paid to him, he would be a loser by it. You see what the writ is, you should be charged upon 'onerare et satisfacere' one ship; *non constat* there was any ship, or any collector, or any act concerning it: This money was pre-ordained only to prepare a ship, and to be employed merely upon that, and for no other purpose; and this appeareth not at all, whether any ship was made, yea or no: now how shall we give judgment? The Sci' Fa' is, That Mr. Hampden should shew cause why he should not satisfy the sum imposed upon him; but whom he should satisfy, or to whom the money should be paid, *non constat*, as was well opened upon the demurrer; for it is not 'Si dominus rex valet aut debeat onerare' the defendant, but that the defendant 'onere-'tur et inde satisfac':' Nothing is put into the record to bring this to the king: therefore 'quod oneretur' cannot be executed at all; and according to the books of 39 Edw. 3, and 49 Edw. 3, if judgment be to be given, and it cannot be executed, there it shall not be given at all: So the judgment required on this demurrer, is upon the matter 'oneretur,' and shall by no colour come to the king. God knows it belongs to him, and that deservedly; but in a legal course *non constat*; therefore to give judgment, 'quod oneretur,' and not know to whom (for to the king it cannot) would be wrong; for this reason I cannot see how judgment can be given, 'quod oneretur.'

But hereupon another thing troubleth me very much, and which, in my opinion, makes it clear, that execution cannot be made upon this Sci Fa'; and that is the Mittimus to us in the Exchequer, which by *recordum ipsum* is not certified, but only the tenor of the record. I do conceive the law to be so upon this difference, as it is taken in a case excellently well argued, 33 Hen. 6, where it is said, if the record be in any other court, whence execution may be awarded, and the tenor of that record is by Mittimus sent into another court, where execution may be likewise awarded; in such a case a Sci' Fa' cannot issue upon such a record; for this is but an extract of a record. So if a man should sue out execution upon a judgment given before the justices of assize, what will you do with this? And if he have no goods within the precinct, you must remove this. How do you remove it? Not by certifying the tenor of the record, but *ipsum recordum*: But if the record itself be certified into the Chancery, and sent by Mittimus into the Common Pleas, that is good, and we are judges of the record: No other court can give judgment upon the record, but we.

Here is sent unto us the tenor of the writ, and not the record itself that I can find; and so two executions may be upon one judgment. 37 Hen. 6. A transcript or tenor of a recognizance came out of the Chancery into the Common-Pleas, to have executed, *et non allocatur*: and so it is Dyer 4, & 5, & 22, of the queen, there was a transcript there of a recognizance, to the intent that they might have a Sci' Fa' upon it, and held clearly by the court, that upon the tenor of a record no Sci' Fa' could lie. So all this appearing upon the very first branch of the record, that this was merely a tenor of the record, and not *recordum ipsum*, I do not know how upon this record there can be execution. Thus have I done with the several discussions of the writ and record, which upon my reasons before alledged, I conceive it not sufficient in law to charge Mr. Hampden.

I come now to the great question concerning the danger of the kingdom, and our certificate to his majesty. Give me leave, according to our former resolution made in answer to his majesty's question proposed, to speak of what we did certify: and in my conscience truly, and I hold it real, that when any part of the kingdom is in danger, actually in danger, or in expectancy of danger, and the same expressed by his writ; I agree, the king may charge the subjects without parliament, towards the defence thereof; for 'necessitas est lex temporis,' in vain to call for help when the enemy is landed. Clearly I hold the king to be the sole judge of the danger: And the danger being certified by his majesty, I hold it not traversable; and in such a case he may charge the subject without parliament, so that the very cause be effectually expressed upon the records, that the kingdom was in danger. But if a parliamentary advice may be called, and the danger not so imminent, then regularly no such charge can be laid out of parliament: legally and rightly, I hold, things done by the advice of parliament it were the best way: But if it be so, the necessity will not admit the delay of a parliament, when the enemy is in view, and expectant; that is such a danger as we did certify to the king in our opinion to be the time when he might so charge the subject. In Edw. 3's time writs issued, sitting the parliament. To say, that there cannot be incursions, but that they may be known within seven months time, wherein a parliament might be had, is a great hazard to the kingdom. It is possible the danger may be discovered before it comes; but it is possible it may come unexpected. In 1588, when that great invasion was, at which time if the queen should not have used her royal power, without calling a parliament, perhaps the kingdom might have been lost by delays; and yet then great expectation was of a parliament. So William 1, (not Wil-

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liam the Conqueror, for he did not conquer the kingdom, he conquered the king of the kingdom) his coming was sudden, he landed at Hastings; and was not the king advised of this at York? Did he not then make all haste by post, raised a sudden army, and had him battle? And William the Conqueror had the victory, not of the kingdom, but against the king. Lambert saith, That he came not in *per conquestum*, but *per acquisitionem*. After he was crowned, and received by the Londoners, he sent forth commissions to all the counties of England, to enquire, *per sacramentum*, what the antient laws of England were, and of the state of the kingdom; and certificates being made thereof, that of Danegelt was certified to be a tribute inforced. I say in times of necessity, the king may command this aid by his writ under the great seal, when the danger is instant; nay, the expectation of it is not traversable.

Object.—Then upon every certificate that the king makes, that he is of opinion that the danger is instant or expectant, this charge may come to be annual.

Solut.—No: we need not fear, that the king will require it but upon just occasion, the law presumes it; and legally it cannot be laid upon the subject, but in such cases of necessity, as aforesaid. By the charters of William 1, king John, Henry 3, no charge without parliament: by the statute of 10 Edw. 3, none is forced to go out of his county, except it be in case of necessity. 14 Edw. 3, I hold to be a general statute, and it doth bind, but doth not bind in case of necessity; for they are not to be understood to be binding in all cases. The charter of king John, as it is inrolled, not as it is printed, according to Mag' Char', saving two clauses that are not now in Mag' Char', hath this exemption in it to the subject of these, and these immunities; no tax nor taillage, but by parliament; but he excepts three cases; 1 Nisi ad redimendum corpus nostrum. 2. Pur faire fiz chevalier. 3. Pur fille marier. These prerogatives of the king are not bound up by the parliaments; the very commons themselves did agree to these three cases. As for the statute De Tallagio non Concedendo, I hold it to be a good statute, and much for the liberty of the subject. But if you come to a case of necessity, they will not stand in force. There is one omission in the printed statute, 25 Edw. 3, which is in the records at the Tower, as it was observed by my brother Hutton, 'Car ceo est 'encounter le droit del royalme:' How this comes to pass, I know not. I caused it to be searched, and I find these words only in the articles upon the roll, where they do complain for the finding of hobbellers, and are aggrieved for it, and give this as a reason, 'Car ceo est 'encounter le droit del royalme: And the answer which the king gave unto it, was a royal answer to the thing proposed; but those words are left out of it. But if it were the right of the subject, 'le droit del royalme,' as Littleton saith, that cannot die.

And certainly, in case of necessity there is a right belonging to the king to prevent danger; for legally, when the safety of the kingdom is in danger, in danger apparent, in that case the king hath a power of prerogative to compel aid. And if an act of parliament should be made to restrain such a charge on the subjects in case of necessity, it would be Felo de se, and so void; for it would destroy that *regale jus*. So this great question of imposing this charge, I am of opinion it may be done without parliament, as it was in 1588, so long as the present and apparent danger continueth. And I am of opinion, (as I was when we gave in our certificates to his majesty) that the king is the sole judge of the danger, and how to provide against it.

But however, I do conceive upon this record, upon which I am to give judgment, that the mandates in the writ 4 Aug. are not good in law, nor according to the laws and customs of the kingdom of England, nor well grounded upon the certificate; and that the information afterwards in the Mittimus cannot make a former writ good, which was first defective: And the sheriffs who were, their return is not effectual, upon which judgment may be given.

I cannot see how judgment can be given *quod oneretur*, and not tell to whom, and nothing visible to whom we may find it: And therefore, in my Opinion, judgment is to be given for Mr. Hampden.

The ARGUMENT of Sir JOHN FINCH, Kt. Lord Chief-Justice of the Court of Common-Pleas, in the Exchequer-Chamber, in the great Case of SHIP-MONEY. *

A writ under the great seal of England, dated 4 Aug. 11 Car. when to the sheriff of Bucks (sir Peter Temple) commanding a ship of 450 tons and 180 men to be ready furnished with all ammunition and tackling at Portsmouth for 26 weeks, to go with other of his majesty's ships, and of the subjects, to defend the dominion of the sea, the realm being in danger; and to charge and assess all his majesty's subjects, and all the inhabitants within the said county, and all occupiers, tenants, and terr-tenants there that have not part in the ship, nor serve in the same, to contribute for, and towards the preparation and setting forth of the ship according to their abilities.

The record of Certiorari saith, that Stoke-Mandevile is within the said county, and was

* Lord Clarendon says, "Undoubtedly my lord Finch's Speech in the exchequer-chamber, made Ship-Money much more abhorred, and formidable, than all the commitments by the council-table, and all the distresses taken by the sheriffs in England: the major part of men (besides the common unconcernedness in other mens sufferings) looking upon those proceedings with a kind of applause to themselves, to see other men punished, for not doing as they had done; which delight was quickly determined, when they found their own interest, by the unnecessary logic of that Argument, no less concluded than Mr. Hampden's."

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assessed at a reasonable rate; and that the sum of 20*s.* was assessed upon the lands of John Hampden, esq.; as by a schedule of 9 Mar. 12 Car. annexed to the Certiorari, may appear.

Whereupon a Mittimus 5 Maii 13 Car. with this Certiorari and Schedule, was directed to the barons of the Exchequer, to do there for the sum unpaid, 'prout de jure et per legem 'et consuetudinem regni nostri Angliæ fuer' 'faciend'.

A Sci' Fa' upon this went forth of the exchequer, to warn Mr. Hampden to shew cause why he should not pay the 20*s.* Upon the return of which Mr. Hampden appeared, and demanded Oyer of the writ, Certiorari, Schedule, Mittimus, and Sci' Fa'; and upon hearing of them read, he demurred, and Mr. Attorney joined in the demurrer; then my lord chief-baron, and the court of exchequer, adjourned it to the court of Exchequer-Chamber, desiring the advice of all his majesty's judges: and look what advice we or the greatest number of us give, that court ought and must give judgment accordingly.

In the debating of this case, there hath been great variety of opinions among the judges, a thing usual and frequent in all great cases and consultations; which shews commonly the difficulty of the thing, and argueth a candor and clearness in the judges, between whom combination and conspiracy would be most odious. All that have gone before me, have in one thing agreed, that it is the greatest case that ever came in any of our memories, or the memory of any man.

As the sun arising in the horizon shews not the figure so clear, as when it is beholden in the meridian; so by mixing many impertinences with the case in judgment, it hath been apprehended to be of a far tenderer consequence than indeed it is: yet tender and weighty it is. If equally weighed, in the one balance we may put the regal power, or rather the regality itself; in the other the privileges and liberties of the subject, in his person and estate.

To look upon either of these, or both, through the multiplying glass of affection, is to behold neither of them truly; neither can they be so truly discerned, much less to multiply by the glass of fancy: and therefore justice needs to hold the beam straight.

I cannot fear myself, when vulgar censure hath exercised itself upon every one that hath delivered himself upon this matter: yet I will not say, 'Domine, posuisti me in lubrico loco;' for we that do sit here, do move in a sphere, and should be like the *primum mobile*, according to whom all others are to steer their course; and judges themselves must move steadily upon their right poles, as I hope this court will. What judge soever he be that is elevated by popular applause, or animated by the contrary, to accumulate honour, is fitter to live 'in fæce 'Romuli quam in politia Angliæ.' Nor will I lose time in remembering the first oath of a judge, who should expel all by-respects, and speak his conscience. I hope none of us forget the duty we owe to God, to the king, and to the commonwealth, and to ourselves. I shall endeavour to satisfy my conscience in all that I can say: And they forget their duty to the first, and humanity towards us, that say or think the contrary of any one of us. Some of us have fortunes and posterities, and therein have given hostages to the commonwealth, and have as much interest in this case as Mr. Hampden. Those that want those blessings, want those temptations that make them dream of, or hunt for honour or riches, to perpetuate their names and families; to them nothing can be more precious than the balm of integrity, which will preserve their names and memories. It cannot be presumed, but we will speak our consciences; since we well know shortly, as the Psalmist says, 'Corruption shall say, I 'am thy father, and the worm, I am thy mo-'ther.'

In handling this case, no man can think I shall do other than right: and herein I am rather troubled for a method than for matter, rather how to dispose of what I find, than to find what to dispose. I shall endeavour shortly and clearly (considering the time I have to spend, and the weightiness of the matters I am to speak of) to deliver my opinion with the reasons of it; and my endeavour shall be rather to contract than omit.—I have, with the best care I could, taken notes of all that hath been said for or against Mr. Hampden; and have according to the measure of my understanding, weighed and pondered all that hath been spoken, both at the bar, and by my brothers, and bestowed many hours in meditation about them, which the time of rest and repose might have challenged.

Before I enter into the case, I shall speak of the steps and degrees by which this cause has come to judgment; whereby it will clearly appear, with what clemency, wisdom, justice and goodness, his majesty hath proceeded in this business.

The first writ went out to the port-towns and maritime parts of the land, 20 Oct. 10 regis, upon advice taken between his majesty and his council. Before then, of these writs I can say nothing; for I was commanded at that time to attend another service, about another employment, the forest of Deane: But it is well known, the resolution taken by his majesty therein, was grounded, and relied upon the judgment and learning of Mr. Noy, Attorney General, a man of great learning, and one that had great insight into records, by whom the matter was first prepared, collected and digested, and afterwards imparted to some of his majesty's learned counsel, and afterwards to some other eminent persons of the commonwealth, of no less judgment and knowledge in the laws of this realm. And upon consultation with my Lord Chief-Baron, and his majesty's barons of the Exchequer, his majesty commanded those writs to be sent forth: against the legality of which, nothing hath been truly alledged. It is true they are not in judgment properly before

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us: and if method did not press it, I should not have mentioned them.

Primo Octob. anno 10, of his majesty's reign, his majesty was pleased to command me to serve in the place that now I do; and those records, writs, commissions, and other precedents, were brought to me, as they had been formerly to my Lord Chief Justice, and my Lord Chief Baron; and we three did confer together, and did deliver our opinions in writing, under our hands, upon view and diligent perusal of a multitude of antient records, writs, and other precedents of Ed. 1, Ed. 2, Ed 3, their times, and other records of other king's reigns; which opinions were in these words, 'That the 'dominion of the sea belongeth to the king; 'and that he is sole lord and proprietor of the 'same. In which respect his excellent majesty 'these regalities and royal powers is to defend 'against all hostile actions, intrusions, and in-'vasions, as well for the good of his subjects, 'as strangers, importing and exporting their 'commodities, and for the defence of the king-'dom: And for the better performing whereof, 'the Cinque-Ports have been required to pre-'pare such a number of ships of divers burdens, 'and men of arms, and at such times, at their 'own charges, from time to time, as the same 'writs and the present occasion required. And 'for the time, and place, and residence of 'their attendance, his majesty was the sole ap-'pointer and only judge; and this was the con-'stant use in the reigns of those kings; and this 'was agreeable to the common law of the king-'dom.'

And 15 Nov. 1634, before the next summer, his majesty finding the danger to grow general, and conceiving, that there was little reason these maritime parts should bear the whole charge, for that the whole realm was interested therein; afterwards he required our opinions, viz. my Lord Chief Justice, my Lord Chief Baron, and myself, June 1635: After conference together, we delivered our opinions. And we upon consultation conceiving the reason of the precedents before, and the rule of the law, and reason requiring, that when the whole kingdom was in danger that the defence that concerned the whole kingdom should be borne by all the subjects of the kingdom; this was first verbally delivered to his majesty, and afterwards we put in writing under our hands, in these words: 'Whereas the charge of defending the sea had 'been imposed upon the Cinque-Ports; so 'where the whole kingdom is in danger, the 'whole charge ought to be maintained by all 'the subjects of the realm.' And amongst other writs, those to the sheriff of Bucks went forth at the time aforesaid. After which, his majesty finding some question made of the legality of it, he called all his judges, not singly, nor any one in a corner, but because he would have every one of them truly informed, required them to advise together, and every one of them by themselves to give his opinion; according to which, we severally, and every man by himself, and all of us together, delivered our opinions under our hands, in this manner, viz.—'That 'when the good and safety of the kingdom in 'general is concerned, and the whole kingdom 'in danger, of which your majesty is the sole 'judge, your majesty may, by writ under the 'great seal of England, command all the sub-'jects of this your kingdom, at their own 'charge, to provide such a number of ships, 'with men, ammunition, and victuals, and for 'such a time as your majesty shall think fit, for 'the defence and safeguard of the kingdom, 'from such danger and peril: And that, by 'the law your majesty may compel the doing 'thereof in case of refusal.' In which this clause 'his majesty is the sole judge,' was only put in by ten of us; my brother Hutton having not seen nor weighed the precedents, took time to advise, and gave no opinion, till conference between us: And my brother Crooke had the same reason, being not acquainted with those writs, but yet subscribed his opinion singly by himself, Dec. 1635, viz. 'That where the good 'and safety of the kingdom is in danger, of 'which his majesty is the sole judge, his ma-'jesty may command all his subjects at their 'charge, to provide and furnish such ships to 'sea, with men and ammunition, as shall be 'necessary for the defence thereof.' And this I hold to be agreeable to law and reason; and though I perceived nothing of this his opinion in his argument, yet he still holdeth it.

Wherein I observe, 1. That the king is sole judge of the danger, and whether it be imminent. 2. Not only that the king may in such danger command his subjects to defend the kingdom in case of necessity, but that the charge of the defence ought to be borne by all the realm in general. Which opinion was more independent than the rest, for that our opinion before it had relation to the precedent of maritime parts: but this was, that the subject might be charged absolutely; and this was delivered by him readily, chearfully, and without hesitation; he will not deny it.—I speak not of this as of a thing whereby he ought to have been concluded, but that all the world should know, that his majesty's regal and legal power go hand in hand together, and that his princely love and affection to his subjects are such, that he is willing to prevent all mistakes: And I speak it also to this end, that when judges singly deliver their opinions to the king, not examining the reasons that moved them to it; we ought to see very good and pregnant reasons to vary from that opinion, though it be not binding.

This his majesty required for his own private satisfaction; and this I dare boldly say was so delivered by us, that no one judge knew the opinion of the rest. When his majesty found slackness in some of his subjects in contributing to this charge, and thinking that it proceeded rather from misunderstanding of the law, than for want of duty, as desirous, out of his princely love, to avoid all mistakes, he did upon 2 Feb. 1636, send a letter to all his majesty's judges and barons of the Exchequer, thereby requiring our several opinions: about which we all con-

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ferred, and the particulars, wherein our opinions were required, had been considered of before, or else we were much to blame; for we had time enough to think upon it. And though our answers were returned the 7th of the same month, yet we had it in our consideration from June 1635, which was 15 months before the answer returned; so there was no surprize. I will spare to name our opinion then delivered; for it hath been repeated before. When we came to the debate and voting of this, we brake the writ into several parts.

1. When the good and safety of the kingdom in general is concerned, and the whole kingdom is in danger, Whether it ought not to be defended at the charge of the whole kingdom? And agreed it was, *una voce, nullo contradicente*, that it ought. 2. Whether the charge of the defence might not be commanded by the king? Which was also agreed, that it might. 3. Whether the king was not the sole judge, both of the danger, and when and how it was to be prevented? Wherein my brothers Hutton and Crooke did agree it likewise, that he was sole judge of the danger. What their opinions are now, and wherein they differ, with their good leave I shall examine, and their reasons and differences; (though indeed of the king's being the sole judge, in their arguments, my brother Crooke spake nothing of his opinion therein, nor my brother Hutton nothing against it.) But we delivered not our opinion upon the bye; nor was it so required of his majesty.

It was then also declared by all of us, that we did not deliver our opinions as binding, nor were they so required by his majesty; of all which I dare boldly say, his majesty was truly informed. And this was also soon after published by his command, and seconded by my Lord Keeper and Lord Privy-Seal, the first of them using many arguments and sound collections, delivered it in charge to his majesty's judges, to deliver it in their circuits, which might have satisfied any that did not respect their own private benefit. And Mr. Hampden, I think, of all hath the least cause to complain, being assessed but 20*s.* a contemptible sum, in respect of his annual revenues, to bring this case to judgment: yet his majesty's clemency appears to be great herein, in that he would not debar any to question the lawfulness of it, though he hath permitted *arcana imperii*, nay, *imperium ipsum*, (I would to God I could not say even too licentiously) to be debated at this bar; yet I speak it not by way of reprehension, but admonition to the counsel, who are to be commended, in that they have done their duty faithfully for their client: yet I may say, such a ravelling and diving into the king's revenue, and secret estate of princes, and what succeeding kings may be, or may do, it doth not well become these present times: it would not have been endured in the best preceding times. It was not well done to doubt succeeding posterity, that promise as much as any of their predecessors have done for the good of the commonwealth. It is not well to clog the case with so many precedents, impossible to be thoroughly observed; but our example, I hope, shall be a bar hereafter, and our care shall be to prevent it, being a great hindrance of justice, and cause of great expence to the subjects long attendance about their causes here; which may prove a greater charge than in providing ships for the realm.

I come to the case now, as it stands in judgment before us; wherein my method shall be,

I. To examine what the case is.—II. I will give my opinion of the case, with the reasons thereof.—III. I will answer the objections made against it.—IV. I will speak to the legality and form of the writ 4 Aug. the Certiorari, the Mittimus, and Sci' Fa' out of the Exchequer. And to all these, with what brevity I can, I will speak according to the weight of the case, where variety of opinions gives just cause to balance them: the case must arise out of the Record, and must stand or fall upon that.

I. For the case itself; and therein, 1. I will shew what danger there is, that is the ground of the charge. 2. What things there are to maintain it: as for other things, they tend to the destruction of the case.

1. I am of opinion, that the danger of the whole kingdom ought to be expressed clearly; for else the ground-work faileth; for if no danger, no reason of the charge. And I am of opinion, that in the writ 4 Aug. it ought to be expressed; and not in the Mittimus; though as my brother Jones observed, the Mittimus comes time enough to Mr. Hampden to give him notice, yet he was not liable to the charge, but by the writ 4 Aug. (1.) It is objected, the danger is not clearly expressed; for it is not upon words of certainty, but by way of uncertainty, 'Quod datum est nobis intelligi.' (2.) For the causes of the writ, that it hath not relation to the danger of the kingdom, but to defend the sea-coasts against pirates, &c. And they are not worthy of a royal navy, as brother Crooke also observed.—But I hold first, that the danger is sufficiently expressed, 'Certum est sicut res habet; datum nobis est intelligi:' A thing very ordinary with us; and in all former writs Ex relatione, &c. 'Quod vulgaris opinio est, &c.' Although my lord chief baron paralleled this to the Case of Patents, 'ex certa scientia, &c.' which is nothing alike: for there before the king pass away land, he may be informed if he may do it: but I hold, as this case is, the danger will not permit it to be examined, whether there be just cause of fears; for then it might receive delay, which is dangerous, and the kingdom be lost whilst we are disputing. And then for the phrase itself, 'Datum est nobis intelligi.' It is sufficient that the king knows there is a danger; add therefore, if it had been only 'intelligimus,' none can deny but it had been sufficient. And what difference is there between 'intelligimus' and 'datum est nobis intelligi?' That sets forth the knowledge of the danger,

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and this shews the means whereby he doth know it: 'Ut datum est nobis intelligi.' This goes farther than 'ex auditu, rumor est, &c.' Therefore unless the king should go out of the kingdom to see the danger, can it be otherwise expressed?

(3.) I hold, that the danger itself, with the motives in the writ, are sufficient.—The motives are, great depredations of the subjects goods, and lives: but it is not upon this I rest, for this hath relation to pirates leading many Christians into captivity. These are good motives, and (as one of my brothers said well) though these have relation to pirates, yet *bellum piraticum* points at as much terror as *Hannibal ad portas*. —I shall not rely much upon that, that the enemies of Christendom and of this nation did prepare 'ad mercatores nostros ulterius molestand',' nor 'ad regnum gravand' nisi citius 'remedium apponatur, &c.' But this 'Consideratis periculis quæ undique his guerrinis 'temporibus imminentibus ita quod nobis et 'subditis nostris defensionem maris et regni 'nostri omni festinatione qua poterimus con'venit, &c.' shews otherwise than for the pirate, this defence was requisite. Therefore the next clause is 'Nos volentes defensionem 'regni, tuitionem maris, securitatem subdito'rum nostrorum, &c.' And therefore that 'salva conductione navium et merchandizarum 'quæ ad regnum nostrum Angliæ venerint, et 'de eodem regno ad partes exteras transeunt, '&c.' takes not away the former works, nor limits them.—As for the clause in the Mittimus, I stand not upon it, nor that 'Salus 'regni et populi nostri Angliæ periclitabatur, '&c.'

(4.) Admit there had been no preamble nor expressment of danger, I hold the command itself is sufficient for setting forth the danger, which is, that the ship be with other his majesty's ships, and the ships of other his majesty's subjects at Portsmouth the 1st day of March next following; the words of the record be, 'Exinde cum navibus nostris et navibus alio'rum fidelium subditorum nostrorum pro tui'tione maris et defensione nostrorum et ves'trorum, &c.' And particularly to express the danger is not necessary; for the king, the sole arbiter both of peace and war, best knows it; and it was the practice in former times: and so no wisdom for the king to express the danger in particular, when arms usually go before heralds; nor is it the use of princes to compliment, to tell the enemy they will, or intend to invade their lands. And therefore I hold, though it might be more clear, yet *satis est quod sufficit*: I in my own conscience am satisfied that the danger is certain enough expressed in the writ. And so I have done with the first particular, the danger, which was the ground of this writ.

(2.) As to the second particular, what is alledged to be for the preventing of that danger; my brother Hutton, and my brother Crook, would have it to be raising of money, by reason of that clause in the writ, for the distribution of the surplusage. But the record is, 'ad as'sidendum omnes homines et ad contribuen'dum navem vel partem navis non habentes, '&c.' which shews it cannot be for money, neither is there any colour of money; for it is to find a ship: and if they have not of their own, they must build, or buy one with their money. But there is a great deal of difference between payment of money and finding of a ship. As if my brother Crooke be required to find a light horse and arms, he must buy one, or hire with his money, if he hath none: but yet the charge is not for money, but that he finds a light horse.—But my brother Crooke's objection is, if any surplusage remain, it shall be divided; and so the sheriff is to detain no part of it, but employ it for the public good, and not convert it to his own proper benefit. To this I answer, that this shews the equality of the charges which is fittest to be by payment of money.—My brother Crooke hath farther objected, that an inland county cannot build a ship: a great trouble for the county of Bucks, so far from the sea, to build a ship. To this I answer, that those of Buckinghamshire may hire a ship, if they cannot build one; and the words are but *parare*, not for the building but preparing a ship; and it is not meant that they should build it there, but that they should contribute to the building of a ship in a most fit and convenient place.

II. I shall now give my opinion of the case, with the reasons thereof. The king knowing and declaring the whole kingdom to be in danger, and necessarily requiring his subjects to defend and provide for this danger at sea, he may thereupon command all his subjects to prepare ships to join with his navy royal against the enemies of the whole realm, to defend the whole realm: and it is clear in the case, and it was the meaning of us all, that the king must join in the charge, it being far from us to excuse the king from his ratable part.

My reasons that the king may thus charge his subjects to join with him in the defence of the kingdom, are these.—1. The defence of the kingdom must be at the charge of the whole kingdom in general. 2. The power of laying this charge is, by the policy and fundamental laws of this kingdom, solely invested in the king. 3. The law that hath given this power to the king to do these things, hath given him means to put these things in execution.

And as to all these I shall ground myself upon authorities in law, and precedents in all ages.

1. That the defence of the kingdom must be at the charge of the kingdom, I shall prove, (1.) From the law of nature, which is, that every thing in nature ought to defend itself. (2.) From the rule of reason: for 'Quod 'omnes tangit, ab omnibus supportari debet.' (3.) From the true use of all that we enjoy, which must be abused, if not employed to and for the good also of those that come after us;

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and necessary it is for our posterity to have all sure and safe. A good patient will spare some blood to preserve his own health; and a good husband will spare some of his best ground for ditches and fences to preserve the rest; and he is an ill husband that finds not safety in that he doth. (4.) From the law of property: as every one hath a particular property in his own goods, so every one hath a property in general in another man's goods, for the common good. For the commonwealth hath a property in every man's goods, not only in time of war, but also in time of necessity in time of peace. Therefore if any man take away my goods without my consent, I have my action, and recover damage. Doctor and Student saith, Both a trespass of lands and goods is punishable by indictment, and trespass, at the king's suit as well as at the subject's: and this is by reason of the public interest the king hath in every subject's goods for the common good.—Now the rule and maxim before so clearly and fully put and agreed by all, is, that in case of necessity that is apparent, the subject ought to defend the kingdom. And my brother Croake agrees in case of danger, so it be eminent, all men are bound in their persons and estates to defend the kingdom? and he says then they must *exponere se et sua*: I think he means a man that takes a journey may carry his money with him, *se et sua*: or else he means the king cannot command their money without their consent: of which I will speak in its proper place.

2. I come now to the second part of my general head, which is the power of laying this charge. By the fundamental laws and policy of this kingdom, the sole interest and property of the sea, &c. is in the king. I will not speak of this monarchy, this is rather fit for civilians, historians, or the pen of a divine, than a judge at Westminster-hall: nor will I speak of the division of monarchies: the poets say that Saturn was the first founder of kingdoms. Only this I will say, that for the excellency of the government of this kingdom, through God's blessing, none are more happy than we. Look and see in other nations, and tell me if you can find out any place where they can and do enjoy those mercies of peace and plenty which we do; so as we may justly say, 'O fortunatos 'nimium bona si sua norunt Britannos!' Nor will I perplex myself with the original of the nation and monarchy; some stories are fabulous, others doubtful, not any so clear as to set it forth certainly, though they speak truly what is sufficient for us to know; nor is he the poorest, 'Qui non potest numerare pecus,' nor he one of the worst gentlemen that cannot shew the original of his pedigree. The excellency of this monarchy is, that it is sufficient it is a monarchy; and that it is most true what Fortescue saith of our laws. I agree that Fortescue was a lord chief justice in Hen. 6's time, but not chancellor of England. Sea and land make but one kingdom, and the king is *sponsus regni*; Magdalen College Case, sir Joh. Davies' Reports, stat. 24 Hen. 8, 1 Eliz. and 1 Jac. The soil of the sea belongs to the king, who is lord and sole proprietor of them; and good reason why he should, as is well maintained by Mr. Selden, that worthy and learned author of Mare Clausum; and I hope shall be by his majesty maintained, with the sovereignty of the sea: and without a navy this authority can do but little good.—The king holds this diadem of God only, all others hold their lands of him, and he of none but of God: but this is but to light a candle for others. From hence only I will observe, that none other can share with him in his absolute power.

A parliament is an honourable court; and I confess it an excellent means of charging the subject, and defending the kingdom; but yet it is not the only means. An honour the last parliament was pleased to bestow on me, which never any shall with more respect remember than myself, when they were pleased to chuse me for their Speaker. And as my brother Hutton said, I conceive it a fit way to charge the subject; and I wish that some, for their private humour, had not sowed the tares of discontent in that field of the commonwealth, then might we have expected and found good fruit. But now the best way to redeem this lost privilege (for which we may give those thanks only) is to give all opportune appearance of obedience and dutifulness to his majesty's command. The two houses of parliament without the king cannot make a law, nor without his royal assent declare it: he is not bound to call it but when he pleaseth, nor to continue it but at his pleasure. Certainly there was a king before a parliament, for how else could there be an assembly of king, lords and commons? And then what sovereignty was there in the kingdom but this? His power then was limited by the positive law; then it cannot be denied but originally the king had the sovereignty of the whole kingdom both by sea and land, who hath a power of charging the whole kingdom.

3. The law that hath given that power, hath given means to the king by this authority to put it in execution. It is a very true rule, the law commands nothing to be done, but it permits the ways and means how it may be done; else the law should be imperfect, lame and unjust: therefore the law that hath given the interest and sovereignty of defending and governing the kingdom to the king, doth also give the king power to charge his subjects for the necessary defence and good thereof. And as the king is bound to defend, so the subjects are bound to obey, and to come out of their own country, if occasion be, and to provide horse and arms in foreign war; and such are compellable now to find guns instead of bows and arrows, so ammunition, as powder, shot, &c. Then if sea and land be but one entire kingdom, and the king lord of both, the subject is bound as well to the defence of the sea as of the land; and then all are bound to provide ships, men, ammunition, victuals, and neces-

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saries for that defence. And for us islanders, it is most necessary for us to defend ourselves at sea: therefore it was the great argument in 1588, whether it was best to fight with the royal and invincible navy or Armada of Spain at sea, or suffer them to land; and it was resolved clearly, that it was better to fight with them at sea, though we lost the battle and our ships, than to suffer them to land.—But then there was Hannibal *ad portas*. To this I shall answer afterwards. But here the maritime towns shall not help the inland, nor the inland the maritime, but each of them bear their own charge, and defend themselves. But of this I shall likewise speak hereafter; yet undoubtedly it is reasonable that both should join to defend the kingdom in case of necessity.

Now I shall endeavour to prove this clearly by authority in law, and precedents in all ages. And, (1.) It is a great authority in law, that there is no express authority against it: though there have been some books cited by my brother Hutton and my brother Crooke, (which I shall answer in their due place, amongst other objections) yet there is not one authority or opinion, much less resolution or judgment, in necessary time of danger, that says, the king may not charge the subjects for defence of the kingdom. (2.) All these authorities that prove the king is trusted with the defence of the kingdom, and in divers cases give him aid, taxes, subsidies, &c. prove that the subject is bound in case of danger and necessity, to pay them to the king for defence of the kingdom. (3.) All the authorities of murage, pontage, salt-petre, &c. shew that for the good of the public the king is interested in the estates of the subject, and may charge them much more, if for the well-being, than where the being itself of the commonwealth is at stake and in danger. (4.) The authority of commanding the persons of the subjects to come out of their own countries proves it. The power of commanding the person of the subject into foreign parts is in the king; much more the state of men should be at his command, in case of necessary defence of the kingdom. (5.) All the commissions of arraying men in Ed. 1, Ed. 2, Ed. 3, Ed. 4, Hen. 7, and Hen. 8's times, &c. are grounded upon the same reason, and went out for the necessary defence of the kingdom. These writs are not to command the person, but a ship only, 'juxta facultates suas;' which are answerable in reason to the antient precedents.

From authorities I come to precedents; though they be not judgments, yet they shew the practice of the law: and what better book have we in the law than the book of precedents, or what is there of more authority than that, for we have not the twelve tables for our common laws? The common law is but the common usage of the land; and therefore the precedents alledged by the king's counsel are of good authority to prove the laws in this case: wherein I shall not name the particulars, they have been well remembered by Mr. Attorney and Mr. Solicitor: but I will mention the substance of them.

The first sort of precedents were before the Conquest, in the times of Edgar, Alfred, Etheldred, &c. the use was to defend the kingdom at the charge of the whole kingdom, by the edict of the king. A strong inference from the precedent of the grant to the clergy and church of divers privileges, with these exceptions of Pontium, &c. in the times of Edgar, Alfred, and Etheldred, &c.

The council of Enoch in Edgar's time, about 606, mentioned by the learned antiquary sir Henry Spelman, fo. 510. And after those follows 'hæ sunt constitutiones, &c.' fo. 523, in which are excellent things, good for church and common-wealth, cap. 23. Navales Expeditiones, if it be no act of parliament, yet nothing is more like an act of parliament: take the phrase of those times, and certainly it was either an act of parliament, or a proof of the king's power, that without parliament, he might charge the subject for the defence of the kingdom in case of danger. And the word expedition is used for war, and sometimes for an army, as Cassiodorus giving the reason of the name says. In the third place, it shews the practice of the kings of England to charge their subjects for the defence of the kingdom in case of danger.—Now if this charge of Danegelt be not taken away by any of the acts of parliament, it remains still, saith my brother Hutton. And so I think it doth, or something in lieu of it; for it is not taken away by any act of parliament.

In these precedents, observe, (1.) That they are all upon the same common reason that this is. (2.) These writs are not limited for their number or time; so they prove the power was in the king to charge his subjects. (3.) In these precedents, some were to inland counties, as Bucks, Huntingdon, Bedford, Leicester, Oxford, Berks, &c. And though they went not generally to all counties at one time, yet they went to them as occasion was. And if the danger had required it, the king might, if he pleased, have sent to all as well as to some.

But because there was never any time, when all the ammunition in the kingdom was drawn at one time to one place, may it not therefore be done? the commanding sometimes of one, sometimes of another, is an argument they may be all commanded as occasion requires. I do not build my opinion upon confused notions, but on matters digested, on precedents of weight, the chiefest in respect of time: and after the making of Magna Charta, 9 Hen. 3, 13 H. 3, m. 28, 18 Hen. 3, m. 7, 13 Ed. 3, m. 77, 23 Ed. 3, m. 4, 28 Ed. 1, m. 23, and many others in Ed. 1's time, there is proving contribution towards the maintenance of the sea-coasts from inland towns, as 25 Ed. 1, m. 13, the abbot of Robertsbridge's case is a full precedent, notwithstanding all that hath been said against it. So 9 Ed. 2, pars 1, 20 Ed. 2, m. 7, 2 Ed. 3, Scot. Roll. 7 Ed. 3, m. 9, 10 Ed. 3, m. 16, 17, 11 Ed. 3, 12 Ed. 3, 14, 15, 16, 18 Ed. 3, 46 Ed.

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3, m. 34, 25 Ed. 3, Rot. Franc. m. 9, 25 Ed. 3, 1 Rd. 2, 1 Hen. 4. Yet Hen. 4 had as much reason to please the people as any king of England. So in Hen. 5's time, though busied in the glorious conquests of France, or rather recovery of France; God forbid we should see such times. So in the times of Ed. 4, Hen. 6, Hen. 7, and Hen. 8, by way of offensive war, writs and commissions to their subjects to contribute toward it. So in queen Eliz.'s time, commissions towards the maintenance of the kingdom. 11 Eliz. 41 Eliz. a commission to the earl of Nottingham. In 1588, letters from the lords of the council, which letters had the queen's writs in them.

But my brother Crooke answered all these with this rule of law, 'Judicandum est legibus 'non exemplis.' To this I answer, that examples and precedents are good law; they are authorities out of the law, and what of more certainty? Digest of writs, these are *inter oracula legis*, precedents drawn up by clerks; though they pass sometimes *sub silentio*, yet are they good authorities in the law. The abbot of Robertsbridge's case is a precedent of great authority. But it is alledged, no precedent goes to inland counties. I answer, in truth the precedents are quite otherwise; for ordinary defence they go to maritime counties only, but when the danger is general, to inland counties also, and after another manner. For this I refer you to my brother Weston's argument: These could not be so frequent; for first, such danger was but seldom: Secondly, We had then double hostility, one from France by sea, another from Scotland by land. Examiné the precedents therefore.

Another observation that my brother Crooke made, is this, that we are compellable by our persons and arms, but not with any sum of money. I answer with my brother Jones, that *bona corporis* areabove *bona fortunæ;* but this power of liberty to command the persons of his subjects, he agrees is in the king; then I say, more reason that their estates should be in his power in this case of defence. Besides, the precedents warrant the quite contrary, and wages have been paid the soldiers by the subject in this case.

III. The third thing I shall do in this case, is the answering of all the objections which have been made against it, which were three.

1. That this writ was against the common law. 2. That it was against the statute law. 3. That many inconveniences will grow thereby.

1. It is against the common law, because it is without precedent: this is the first of this kind since the Conquest; and where there is no precedent, the law will not bear it; Littleton, fol. 32. Lord Coke's comment upon it: and they put divers cases to the same purpose. I answer, that there are precedents for it, and the law is so, that the king may charge his subjects towards the defence of the kingdom in this case.

2. The second objection is, that it is against the freedom of the subject, who hath a true property in his goods, which cannot be taken away without his actual or implied consent. Lambert, fol. 294. Mag. Char. 17 king John, Mat. Paris, fol. 212. Fortescue, fol. 9, cap. 13, &c. 13 Hen. 4, the Chamberlain of London's case, Reg' fol. 127, Fitz-herb. Na. Br. &c. I answer, that the authority of Lambert rehearsing the laws of the Conqueror, is, 'Volumus et 'concedimus ut omnes liberi homines totius 'monarchiæ regni nostri habeant et teneant 'terras suas et possessiones suas bene et in 'pace, liberas ab omni exactione injusta, et ab 'omni tallagio, ita quod nihil exigatur vel capi-'atur nisi per commune concilium,' &c. It cannot be construed that they should not be charged, but that they should be free from all unjust taxes. The king is not concluded by the subsequent words 'omne tallagium;' this cannot be so general, but the king may impose just charges towards the necessary defence of the whole kingdom. For this is meant, as by the word taillage plainly appeareth. 'Tallagium' is derived from a French word, and is indeed a cutting word, and therefore 'injusta exactio;' which shews that for the most part it is taken in the worst sense, and as my brother Crooke said it, the manner of expounding it must be from the law. But my brother Crooke quite left out these words following that declare and expound the former, viz. 'Statuimus et firmiter præcipi-'mus ut omnes liberi homines totius regni præd' 'sint fratres conjurati ad monarchiam nostram 'pro viribus suis et facultatibus contra inimicos 'pro posse suo defendend' et viriliter servand',' &c. whereby it is apparent, (1.) That the kingdom is to be defended by the whole kingdom 'pro facultatibus' with their goods, as well as 'viribus' with their persons. (2.) It comes after the chapter of tenure and services, by which they are bound to defend, 'terras et honores 'suos,' &c. which shews that he meant not to discharge any from the general charge of defending the kingdom in case of necessity.

The next objection is the charter of king John, 'Nullum tallagium imponatur nisi per com-'mune concilium.'

I answer, the words are concerning the defence of his own person, and not the kingdom; and therefore it is excepted, 'nisi ad redimen-'dum corpus nostrum;' and in the original act these words are left out. Scutage, murage, and other aids there mentioned, shews that only those were meant, that were of private benefit. They were not to be imposed by the king upon any subject, without parliament, but not to bar himself from laying such as were for the public good.

The next authority that was objected, was Fortescue, which was most pressed and insisted on by my brother Crooke. Before I come to the words themselves, note (1.) The time when he wrote that book, it was after all the acts of parliament that took away the royal power; yet it did not mention them, so as must needs relate to the common law. It was writ when the civil wars were between the two houses of York and Lancaster, and he himself was in

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exile; no time then to displease the people. (2.) It shews the difference between kingdoms, when a monarch rules, that challengeth all power over his subjects, and a monarch that governs according to the positive laws. The words that seemed to be against this charge are, fol. 9, cap. 26, 'Rex Angliæ politice imperans 'genti suæ nec legem ipse sine subditorum as- 'sensu mutare poterit, nec subjectum populum 'renitentem onerare impositionibus peregrinis.' cap. 13, fol. 32, 'Rex caput corporis politici 'mutare non potest leges corporis illius nec 'ejusd' populi substantias proprias subtrahere 'reclamantibus eis aut invitis.' And cap. 36, fol. 84, which my brother Crooke says is the express authority *in hoc individuo;* the words are, 'Rex regni Angliæ ibidem per se aut ministros 'tallagia subsidia aut quovis onera alia imponit 'legibus suis aut leges eorum mutat vel novas 'condit sine concessione vel assensu totius reg- 'ni sui in parliamento suo expresso,' &c.

From them all, I take the true meaning of him to be; and I hold, (1.) That the kingdom ought to be governed by the positive laws of the land; and that the king cannot change or make new laws without a parliament. (2.) That the subject hath an absolute property in his goods and estate, and that the king cannot take them to his own use. (3.) That for his own use he cannot lay any burden upon his subjects, without the subject's consent in parliament. (4.) That for the benefit of trade, the king may lay fitting impositions, and may command that which is for the necessary defence of the kingdom; which is no command of charge, but command of employing. (5.) I answer therefore to the great objection, that the liberty of the subject is lost, and the property is drowned which they have in their estates.

First, I say, all private property must give way to the public; and therefore a trespass to private men may be punished by indictment, because it is an offence of the public weal: and though every man hath a property in his goods, yet he must not use them in detriment of the commonwealth. A man may give his grass or corn away in the field, or when it is in his barn: but if he will cut it unusually, or burn or destroy his corn, or if he throw his goods into the sea, that they may perish, these are crimes punishable by the common law: so is transporting of goods, commodities, against the public good: therefore the directions of the statutes, for the restraint hereof, are from the common law. And the reason of this is, because the public property must take place: and if in petty business it may be, then much more in time of public, and great necessity and danger. And it is rather an averment of the subjects property, that in case of necessity only they may be taken away, than contrary to it.—My brother Hutton and my brother Crooke agree, that all are bound in case of necessity *exponere se et sua*, to defend the kingdom; and may not the king command a part, with more reason than all?

In the next place, I shall remove a scandal that hath been put upon the king, how that his majesty hath meant to make a private personal profit of it.—What he hath done is well known; and I dare confidently say, all hath been spent, without any account to himself, and that his majesty hath been at great charge besides towards the same: and I heard it from his own royal mouth, he spake it to me, and my lord Brampston can testify as much, that he said, it never entered into his thoughts to make such use of it; and therefore said, he was bound in conscience to convert it to the use it was received for,' and none other; and that he would sooner eat the money, than convert it to his use. Therefore, he that thinks the king made a revenue of it, doth highly slander his majesty. But let kings be as David was, men after God's own heart, yet they will not want a Shimei to rail on them.

But though (blessed be God) his majesty is so gracious and loving to his subjects, and so just, that we need not fear he will charge them but upon urgent necessity; yet we know not what succeeding ages will do.—It is not well to blast succeeding ages; and if they should hereafter charge unreasonably without cause, yet this judgment warrants no such thing. Again, it is no argument to condemn the true use of a thing, because it may be abused. And again, the law reposes as great trust in the king as this. The king may pardon all offences; but if he should, then none should be safe. The king may make peace and war at his pleasure: but yet should he make peace, when peace would ruin us; or war, when war would undo us; it would be worse than this. Therefore it cannot be suspected, that the king will do any thing against law and the public good of the kingdom: therefore the law says, the king can do no wrong; for he is *sponsus regni*, as in Magdalen College case.

Then they object Clark's, and the chamberlain of London's case. These cases are nothing against this, but rather for it.—The record of 14 Ric. 2, rot. 60, B. R. Lever's case, in an action of trespass, for taking away his goods, without his consent, had judgment to recover in Durham.—But the case was this: one Lever of Durham brought his action against another for entering into his house, and taking away his goods and 60*l.* in money; the defendant pleaded Not Guilty, and the jury upon a special verdict found that the defendant took away his money, but upon this occasion: the Scots had invaded the realm, and were in Durham, and could not be gone without a certain sum of money: whereupon the inhabitants assembled, and amongst the rest, the plaintiff was one; and they made an order to abide the ordinance of the greater part, which was to give the Scots the money desired; and because the money was to be paid presently, ready down, therefore they made another order, to search in all men's houses, and take away what money they found; and according to which the defendant searched the plaintiff's house, and took away 60*l.* and because it was without consent the plaintiff had judgment in Durham: but upon

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the special verdict it was reversed in the King's-Bench, because it was with his consent. Indeed the reasons were, 1st, because he had sufficient remedy against the commonalty of Durham, and 2dly, because he did it as a servant.

But I answer, 1st, Though the ordinance was good by consent, yet it followed not that it was void without consent; the question is there only, whether good by consent. 2dly, It follows not but that all men without consent are bound to contribute towards a general charge for necessary defence.

Another objection made by my brother Crooke was 2 Ric. 2, pars 1, where all the lords and sages met together after parliament, and it was agreed by them, that they could not charge the commons without parliament; that this was a declaration of the law in parliament, and almost equivalent to an act of parliament. I answer, (1.) that this was no act, but a declaration in parliament of the law, and indeed no declaration, but a relation by the chancellor. (2) If it had been a declaration, yet it had not been binding without the king. (3.) It is no precedent of a good look, it was when the king was young, and the parliament had the regency: counsellors, treasurers, and all his officers about his person, were chosen by the parliament; and therefore, no wonder if they endeavoured to please the parliament. (4.) It is a precedent that they, i. e. the lords, could not charge the commons by themselves.—Again, the case was not for the defence of the realm, but for wars in France, Scotland, and Ireland; these were the many wars. Though subjects may be charged for necessary defence of the kingdom, yet if foreign wars be together with them, it is otherwise. And therefore in the parliament before, they said such charge belong not to them; and therefore they hold, they ought not to bear it; and so that rule of Gascoigne; 24 Hen. 4, fol. 4. That no man shall be charged without parliament, where bulwarks were built, &c. it proves not, though it implies, that if it had concerned the kingdom, it had been otherwise.

3. The next general objection was the great inconveniency that would hereupon ensue; if such a charge might be, then none knows what his charge will be, for the king may command it as often as he pleases, an example hereof they put in Danegelt, that in eleven years they grew from twelve to forty-eight thousand pounds: therefore the law hath provided against that uncertainty, and limited it to a parliament.

I answer to this, (1.) That if danger increase, so must the charge; again, the king may command all persons when there is necessity, and as often as he pleases he may do it. Is not this as great an inconveniency as in this case, and yet that abates not the writ? My brother Crooke shewed how subsidies increased, and yet no inconveniency in that he conceived; and indeed this shews the provision of charge must be according to the danger. Besides, no abuse of any thing must take away the true and lawful use thereof. But we cannot suspect that there will be such abuse. 'Ubi confidit Deus et 'lex, et nos etiam confidemus.' God and the law hath trusted his majesty, and we should not distrust him. In time of imminent danger, *tempore belli*, any thing, and by any man may be done, murder cannot be punished: yet, says my brother Crooke, the king cannot charge his subjects in any case without parliament; no, not when the kingdom is actually invaded by the enemy. But truly I think, as he was the first, so he will be the last of that opinion, especially having delivered his opinion, that the king is sole judge of the danger before, as indeed he is; and that the king is sole judge of the danger, not any have denied it, and therefore else it should be no danger, but when every one shall say, you shall judge that the kingdom is in danger.

(2.) There hath been, and may be, as great danger when the enemy is not discerned, as when in arms and on the land. In the time of war when the course of law is stopped, when judges have no power or place, when the courts of justice can send out no process, in this case the king may charge his subjects, you grant. Mark what you grant; when there is such a confusion as no law, then the king may do it. 'Dato uno absurdo, infinita sequuntur.' Then there may be a time of war in one part of the kingdom, and the courts of justice may sit; as in 14 Hen. 3, Rich. 2, and Hen. 7's time, wars were in some parts of the land, yet the judges sat in Westminster-Hall.

(1.) Now, whether a danger be to all the kingdom, or to a part, they are alike perilous, and all ought to be charged. (2.) The king may charge the subjects for the defence of the land. Now the land and the sea make but one intire kingdom, and there is but one lord of both, and the king is bound to defend both. (3.) Expectancy of danger, I hold, is sufficient ground for the king to charge his subjects; for if we stay till the danger comes, it will be then too late, it may be. And (4.) His averment of the danger is not traversable, it must be binding when he perceives and says there is a danger; as in 1588, the enemy had been upon us, if it had not been foreseen, and provided for, before it came.

But I will not determine the danger now. Do not we see our potent neighbours, and our great enemies heretofore, were they not prepared for war; and was there not another navy floated upon the sea? and was not the dominion of the sea threatened to be taken away? As long as this danger remains, I shall bless God for such a king as will provide for the defence of the kingdom timely, and rejoice to see such a navy as other nations must veil to; and we are not in case of safety without it, and should lose our glory besides.

The next objection of my brother Crooke was, that there is a means provided by parliament, which will not with-hold aid for the defence of the kingdom, and it were a sin to deny it in case of necessity. And in Ed. 1's time,

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Ed. 2's time, and 4 Ed. 3's, a parliament was to be held every year for the defence of the kingdom, 'et propter ardua regni.'

I answer, that might well be, but then, in the time of Ed. 1, Ed. 2, Ed. 3, there were pleas in parliament, but those are now laid aside; and that the subjects ought to give the king subsidies; I will not say that, inferring they will not do it, nor am I apt to believe it; but I hold parliaments are the excellent means to raise aid for the defence of the kingdom, and yet they are not the only means, for then the parliament, and not the king, should be the only judge, and have the defence of the realm; or else it should give the king a charge of defence, without power or means.—The objection of the king's revenues, tenures and prerogative, they have been unfitly remembered, and they have been fully answered.

The statute of tonnage and poundage given to the king, for and towards the defence of the sea, and the other acts of parliament, that restrain the king's power, so that he cannot now charge the subject without his consent in parliament, I shall answer in the next place; and before I come to the particular acts, I will shew what in my opinion, they may do.

1. Acts of parliament may take away flowers and ornaments of the crown, but not the crown itself; they cannot bar a succession, nor can they be attainted by them, and acts that bar them of possession are void. 2. No act of parliament can bar a king of his regality, as that no lands should hold of him; or bar him of the allegiance of his subjects; or the relative on his part, as trust and power to defend his people: therefore acts of parliament to take away his royal power in the defence of his kingdom, are void (as my Lord Chief Baron said;) they are void acts of parliament, to bind the king not to command the subjects, their persons and goods, and I say their money too: for no acts of parliament make any difference. Now to the particular statute objected.

(1.) 25 Ed. 1, Chap. 5. Confirmatio Chartarum, the words are these, 'aids or taxes, 'granted to the king, shall not be taken for a 'custom or precedent:' and cap. 6. 'Moreover, we have granted for us and our heirs, 'that for no business from henceforth, we shall 'take such manner of aids, taxes, nor prizes, 'due and accustomed.' And cap. 7, a release of toll upon every sack of wool: 'And grant, 'that we will not take such things without their 'common assent and good liking, saving to us 'and our heirs, the customs granted by the 'commons aforesaid.'

As to the other statute, De Tallagio non Concedendo, cap. 1. 'Nullum tallagium imponetur nisi per commune concilium regni 'nostri.' cap. 2, 3, 4, 5, &c.—First, These words must have relation to the aids before, and there be divers aids; as some by taillage, some by way of prize upon goods, and ransom of his majesty's person, &c. the king thereupon makes this grant, which hath relation to such aids as were granted voluntarily. Secondly, antient aids are there reserved, as redeeming the king's body, 'pur faire fitz chevalier, et pur marier son file eigne:' and so all other ancient aids, which are to be understood with an 'ad redimendum corpus, &c.'

And to the statute De Tallagio non Concedendo, in some books it is not in print, but mentioned in Mag' Char' Rastal, and the Petition of Right 3 Car. 1628, to be in 24 or 25 Edw. 1. And therefore I answer, It is not in the parliament-roll, and there is variance about it; and therefore it is but an abstract, and no substantial statute.—But since it hath passed for a statute, and possibly may be one, I agree with all the rest of my brothers, that it is a statute: And then I answer, (1.) That 'nullum 'tallagium imponetur, &c.' that is, no unlawful taillage shall be imposed upon the subject without his consent; or else the aids 'pur faire fitz 'chevalier et pur file marier,' had not been excepted. (2.) No aids shall be imposed but by contribution of the king and people; and here the king is taxed as well as they. (3.) An act of parliament can by no means take it away, much less by those general words.

Obj.—In 14 Ed. 3, cap. 1. No man from henceforth shall be chargeable, but by common consent in parliament.

To this I answer, That though it be but temporary in some parts, yet it is binding only *secundum subjectam materiam*: And the words are general, as in the other statute De Tallagio, &c. besides, the practice in that king's time, and after, best interprets it.

Obj.—25 Ed. 3, cap. 8. No finding of men at arms, unless by consent, much less finding of ships.

Answ.—This takes not away any former law; and therefore the precedents following, 4 Hen. 4, shew that it does not reach to this case.

Obj.—2 Hen. 4, m. 2, which is absolute in the point, saith my brother Crooke, where a commission went forth for the defence of the sea, whereof complaint was made in parliament with desire that it might be repealed, and it was done.

Answ.—I am of the contrary opinion: for the petition was that it might be released; and the answer was but this, that it should, but the king would treat with the council about it; and it was but a repeal of his commission then only.

Obj.—1 Ric. 3, cap. 2, where the king grants, that he would not hereafter charge them by benevolence, or any such charge, but that they should be dampned by the law, by no such charge or imposition, *i. e.* by no such charge of money.

Answ.—That statute was only against benevolences, and made by a king that had reason, as we all know, to please the people for his own ends.

Obj. 2.—The statute of Tonnage and Poundage, granted for the defence of the sea, the words are, That no taillage or aid shall be without act of parliament. 2. That the king hath means to defend the kingdom, with a

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protestation not to draw it into example, 4 Hen. 4, 13 Hen. 4, Parl. roll, m. 10.

Answ. I will not argue whether Tonnage and Poundage was before this act of parliament, nor that time out of mind they were granted to the king: But my answer is, They are only for the ordinary defence of the sea. And the protestation of 4 Hen. 4, is a protestation of the commons only: and this charge is not taken away thereby, and Tonnage and Poundage is for and towards the defence of the sea: so all the acts are, and so I agree. But for extraordinaries, and but solely in case of danger of the whole kingdom, that they should not be granted cannot be collected out of these grants.

The last Objection is the Petition of Right 3 Car. That no charge shall be imposed upon the subject, but by parliament.

Answ.—I was then Speaker of the lower house, and I have reason to remember what then was made. And I say, 1. There is no mention of this case. 2. There was no new thing granted, but only the antient liberties confirmed, taking notice of the commons protestation, not to bind the king from his ancient rights. 3. Look upon the prayer, what is desired: and the main scope was, (1.) Generally against loans, and this could not be included in these words. (2.) Imprisonment without shewing cause. (3,) Billeting of soldiers. And (4.) mariners lying within the land.

IV. I have now done with my third general head, I come to the last, touching the form and legality of the writ.

First, For the legality of the writ, and the objections touching the necessity, I have answered before; the main objection is to the body of the writ.

It is said, [1.] The command to charge the sheriff to levy and assess money according to his discretion, is not legal; for that the sheriff should make it *per sacramentum*, by the oaths of a jury, as in the writs of partition, distribution *pro rata*, &c. This assessment is not warranted by the precedents, (say my Lord Chief Baron and my brother Crooke) they do it not upon their knowledge but presumption of mens estates; and from thence they speak against the too vast power given to the sheriff, to enhance it as he pleases. [2.] The inconvenience is great hereby; for by this means there is a great inequality in the assessment.

I answer, first, to the assessment *per sacramentum*. No reason why it should be here; for it is not done in the commissions to levy subsidies, much less should it be done here for a matter of great haste: And besides, the sheriff is trusted with more; for he hath the trust of the whole county, and takes an oath to execute his office justly, whereof this is one part.—As to what they say, that there is no precedent for it. (1.) I say, That there is no precedent that it hath been done by jury, but always by the sheriff, or such whom the king was pleased to trust; and since one must be trusted, none more fit than he. (2.) By example, we see, he speeds all, and is most ready for it. (3.) I say, the writ leads not the assessment, it commands the ship to be provided; so if that be done, there is no necessity of assessment: and if the towns and counties say they will provide a ship, and do it, then no assessment is requisite; but if they do it not, then the sheriff is to levy it, that the defence may be seasonable: so that the clause of the assessment shews the manner of it. When a multitude is to join, none more fit than he to do it; and no way better, than to write to him to do it according to mens abilities. (4.) The clause of the assessment is not only to the sheriff, but to the head officer of the town and borough; and though the discretion of the clause be to the sheriff, yet it appears not, that it is limited to him only.

And whereas it was said, That the sheriff cannot assess himself, and the precedents warrant not this assessment by the sheriff: I answer, all the precedents are not against it, but commonly it is not so; and yet there have been a multitude of precedents thus. As to the inequality of it, Mr. Hampden had the least cause of any man in England to complain, considering how he was rated.

Again, all that the writ commands, is but an assessment 'juxta facultates suas, ita quod 'omnes, &c.' and if the sheriff do otherwise, and wrong the subjects, he is answerable. By divers antient precedents it appears, where the sheriffs have been faulty this way, they have been punished; and sir Walter Norton's case, now depending in the Star-Chamber, concerns this, for an abuse in levying this charge, when high sheriff of Lincolnshire.

Truly, I think, as my lord chief baron said, if there had not been an inequality by the abuse of the assesses, the charge had not been complained of; yet the like inequalities is in subsidies: And this is no just cause of exception against it, but of accusation against the sheriff who is to answer it. And I can say truly, his majesty hath been very careful to prevent and remedy the abuses therein, and hath often sat daily in the Council-Chamber to give his advice herein himself; and upon his command reformation hath been in divers parts; and it hath been given in command to all his judges in their circuits, to endeavour the same in all parts: And I myself, by this command, have rectified rates in this kind, that have been unequal. And I doubt not, if the necessity of danger shall still require it, or again, hereafter it may be done with all equity.

The second objection is, That the sheriff cannot tax himself, for then he should be judge and party in one case; nor can he commit himself: and if he be omitted out of the assessment, then it cannot be equal, nor cannot be according to the writ, that commands all should be assessed according to their abilities rateably. I answer, This *prima facie* carries some shew with it; but examine causes of less consequence, and it is easily answered. The justices of peace, in levying subsidies, make rates for themselves. The commissioners of sewers tax

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their own lands; and so if by jurors it were done, it would be the like. There must be either new assessors appointed, or they themselves must do it: That would bring delay, and this requires haste and expedition; and therefore the sheriff is fittest for this business. Authorities in law there are divers herein, as the writs for the levying expences for knights of the shire, direction is to the sheriff to do it, who assesses himself, and yet he is to execute it: So in a writ of recovery 'de bonis habitantium,' the sheriff is chargeable with his part; yet he is to execute it. If a fine be laid upon the whole county, he levies it, yet is chargeable with his part towards it.

Obj.—The writ is directed 'probis hominibus,' and these cannot be charged in an inland county.

Answ.—What difference there is 'inter probos homines,' between inland counties and maritime counties, I know not. 24 Ed. 3, a writ whereby they were charged in case of necessity; as to Yarmouth it was 'probis hominibus, &c.' True, a grant by the king 'probis hominibus' generally is void. 1 Hen. 6, Dyer Phil & Mar. 7 Edw. 4, 14. But a commission or writ to assess them good enough. 'Probi homines,' that they know not, nor see not, it is not material, for that would make them sole judges of the danger, when as the king only is, and this not traverseable neither.

Obj.—The writ commands an inland county to find a ship and mariners, which is impossible; and 'lex non cogit ad impossibilia;' and for this my brother Crooke puts the common cases, that a general return, 49 Ed. 3, 6, and impossibilities are void; a covenant for impossible things is void, but a bond may be good.

I answer now to the point of impossibility. And possibly the ship may be built in an inland county, though to carry it to Portsmouth is impossible; but it is possible to provide a ship and mariners, as the writ commands, which may very well be done with money.

Obj.—But we have none but trained soldiers, no mariners; our country consists in tillage, and our men are trained up to the plough and husbandry.

I answer, We have the like occasion of ploughs and husbandry in Kent, and we have in many places no maritime towns; some lie 20 miles from the sea, and yet we are justly charged to find a ship. Precedents we have as well as you in Oxon and Bucks, or else none should be charged but port towns, and in particular no law or statute to exempt them. Until Alfred's time, there was no distinction of maritime or inland counties, for then all England was but one maritime county.

Then they objected, the payment of soldiers wages for 26 weeks, to be in the king's service, is against many precedents: as 16 Ed. 2, 10 Edw. 3, and entirely for wages to be paid by the county is against all the precedents: and tenants by knights service after 40 days, are to be paid by the king. And other precedents my brother Crooke cited, when divers refused to go out of their own county till paid, and order taken for their pay by the king. And whereas the county had given bond for payment of soldiers wages, they were cancelled, and order made in parliament, that soldiers should be at the king's pay, 2 Edw. 3, 16. 18 Edw. 3, cap. 7.

These are easily answered, for these precedents prove no more than payment of wages *de facto*, and so the king may pay it where it is not due; and for their refusal, I have nothing to do with that now: but 10 Edw. 3, m. 2, there is mention made of Berkshire men, commanded to carry their soldiers forth of their county at their own costs; and when the soldiers refused to go thence, no charge or payment; for soldiers used to be paid by their county, as in that case; and they were forced to go, and did go, and stay there three years: so 13 Edw. 3, m. 8.

Obj.—1 Ed. 3, m. 14. None compelled to go out of their county without wages paid. 18 Ed. 3, m. 6, 7, that none should go out of their counties: And not only those that had offices and patents to serve the king, but all with this proviso, that the king should pay them their wages.

Answ.—1 Ed. 3. It is clear, and hath in it the exception in case of necessity, and to be done as in times past.

18 Ed. 3. It is expressed in the act, when they go to the king's wars out of the kingdom: so 19 Hen. 7, &c. These are all but declarative to the common law, Corbet's case; the reason is, because the allegiance of the subject is not natural, but local. But that the king shall give wages within his kingdom, there is no act of parliament for it. Now it was resolved in the Exchequer, that the sea and land made but one entire kingdom, and so no going out of the kingdom here; and consequently the payment of the soldiers wages within the kingdom is not against law.

The last objection is, that the writ is illegal, because contrary to Mag' Char', 'nullus liber homo imprisonetur.'

Answ.—As touching the objection of the nobility, that they are privileged from imprisonment, it might well have been spared; and I know not wherefore it was spoken of, unless to make them think they were more interested than the rest of his majesty's subjects in this case.

Obj.—But yet, I say, noblemen may be imprisoned upon contempt, as my brother Crooke knows well; and it was resolved in the earl of Lincoln's case, in the Star-Chamber. It is true, that upon ordinary process, they are not to be brought to trial or imprisoned.

Now I answer, there is no imprisonment in question, but the assessment only, why he should not pay the money assessed, or shew cause to the contrary.

Secondly, Were the writ illegal for form and circumstance, yet this makes not the command itself illegal for substance.

The exceptions to the Certiorari are these:

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1. The direction of it to two sheriffs, one out of his office, when as the sheriff in being ought only to return it.

Answ.—Of this there is little doubt; nothing more frequent than for a Certiorari to issue out of the Chancery to two parties, as to the executors, or the judge that took the fine, and is removed. And so upon commission to take a fine by 'dedimus potestatem;' in this case the writ is 'inter brevia irretornabil':' and this must remain with the old sheriff, and are never delivered over by the jury to the new sheriff. In Hobart's case, in the King's-Bench, being convicted of heresy before sir Julius Cæsar judge of the Admiralty, certificate to him after Master of the Rolls, and directed to him: so in the case of my lord Paget.

Obj.—The writ is without return, saith my Lord Chief Baron; and the Certiorari, which is a year and a half after, cannot renew it.

I answer, That shall not be the determining of it only; for the time limited expiring, shall not deprive one of his just debt.

It is not sufficient, because it appears not, that Mr. Hampden was tenant or ter-tenant, or that Stoke Mandeville is within the county of Bucks.

2. It appears not that there was any ammunition or ship prepared.

I answer, It doth sufficiently appear, that Mr. Hampden was ter-tenant, for the Certiorari was to the sheriff, who certifies that he was tenant; for it was in pursuance of the writ: the words are, 'Virtute brevis domini regis huic 'schedul' annexat. certifico quod virtute et se- 'cundum exigentiam ipsius, &c.' 'Assessavi,' Anglicè 'have assessed,' 'super separales homi- 'nes et terræ tenentes com' Bucks præd' quo- 'rum nomina subscribuntur, &c.' It relates to the place there, tenants in the county of Bucks, and makes Mr. Hampden one. And thus the business of knighthood was done, and in no other manner.

Then it appears not that the ship was prepared. To this I answer, 1st, That the ship was done according to the command of the writ. 2dly. It was prepared. 3dly, If none had been prepared, the fault was in them, for that they paid not in their money. For the exceptions to this Mittimus I say nothing, because I told you the case rests not upon these words, 'Salus regni periclitabatur,' which is only to bring it to issue.

Then they except against the Sci' Fa', 1st, That the king is not intitled to bring the Sci' Fa'. So there is no *cui oneretur*, to whom he should pay the money, for whose good or benefit Mr. Hampden should satisfy the money assessed. I answer, the king is interested in all actions for public good, and shall recover accordingly, as in case of Highways, Pontage, Murage, &c. much more when it is for the general defence of the realm. In a *quare impedit* between two common persons; though the king be neither plaintiff nor defendant, the king shall recover therein. Many times in case of a common informer, the king recovers the one moiety, though no party; so it was in the case of knighthood, though suit was depending. Again, all writs in the kingdom are the king's writs, though no fine, much more here for the defence of the realm. And it is usual for the king's attorney to compel men to perform charitable uses; and the king may question any one for them, in the case of Aurum Reginæ, by process out of the Exchequer.

Again, where it is said, 'Quare ipse de præd' 'summa specificat' onerari et inde satisfac' de- 'beat, prout ulterius tibi præcept', &c. for though the writ be in the king's name, yet it is but for the performance of the work and charge; and though it appears not, who were collectors or assessors, yet it appears it was done. Upon public service, process goes forth in the king's name; but then it is not so fit it should be expressed in particular for the king, when it is for the general good only. Was not this objection made by my brother Denham? though none more chearfully did subscribe to his majesty's letter, neither was the Sci' Fa' without his advice, being the aptest course, and better than trespass: but the objection that he made was, That the king cannot do any wrong, nor take without record, as in seizure upon outlawry, attainder, or the like; and in this case there is no Record upon the writ 4 Aug. no judgment, &c.

I answer, This Sci' Fac' is not annexed to the writ, and is a new action, that Mr. Hampden *oneretur et inde satisfaciet*, and after that judgment upon the writ, and upon his saying nothing, why *revocetur*, there shall be a good Record whereupon he shall be charged. 3 Eliz. Dyer 156. *Ignoramus* is sufficient title for the king, and ground for a 'Melius inqui- 'rendum.'

No Sci' Fa' lies upon the tenor of a writ, say they: 39 Hen. 6, fol. 34, 21 Eliz. Dyer fol. 205. I answer, a Sci' Fa' upon a recognizance will not lie in Chancery, but upon the Record there; yet in debate, an action of debt lies upon the tenor of the Record. 39 Hen. 6, the doubt was because the party might be subject to a double execution, one upon the Record there, and the other upon the tenor of the Record in another court. 33 Edw. 3. Title Tenure by Transcript 8 Hen. 5, Fitz-Her' Error Sci' Fa' Reg' fol. 51. The Record was before the justices of the King's-Bench, the tenure was of the Treasury to the barons of the Exchequer; and it is the usual order, if a recognizance be forfeited, to certify the tenor of a recognizance; so of a fine of amerciament, &c. to certify the transcript thereof. So the transcript was sent from Ireland of an act of parliament; a Sci' Fa' thereupon went against a baron in England: so in debt, upon the transcript of a Record from Ireland, a Sci' Fa' here went forth.

Objected it was in the last place by my Lord Chief Baron, that judgment in this case would be fruitless, and none should take benefit thereby; upon this Record he put several cases, wherein judgment in such a case ought to pass.

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I answer my Lord Chief Baron with a judgment of his own, in case of knighthood, resolved here in this court; the case was this, The king by writ Jan. 1, of his reign, commanded the sheriff of Berkshire, that all that had 40*l.* should be in the Chancery 31 January following, to take upon them the order of knighthood. Sir John Dayxel, sheriff of Berkshire, made his return, (as the sheriff of Bucks here) all that are not knights under the name of Illorum, and sets down their names. A Mittimus thereupon went out of the Chancery, reciting the substance of the former writ, 'Vobis Mittimus 'præsentibus, &c.' with a clause to enquire after such as were not returned, and to fine them. And upon this a writ of *distringas* to the sheriff. My Lord Chief Baron and my brother Denham know what judgment was given; when I observed, 1st, Not the Record, but the tenor of the Record, was sent into the Exchequer, yet returnable in the Chancery. 2dly, For the returning of the names of the defaulters as here. 3dly, Upon the *distringas* thereupon was had execution, much more than here, upon the Sci' Fa'. 4thly, There was no more judgment of Record to warrant than here in this.

Now I come to conclude. I have been somewhat too bold, in taking more time than is usual, but I did it to satisfy my own heart, according to which I must give my judgment. What I have omitted I refer to the rest of my brothers that went before me, and to my lord chief justice that comes after me. The reasons I shewed whereupon I conceive by the common law, and the fundamental policy of the kingdom, that the king may charge his subjects for the defence of the kingdom, and that the king may charge his subjects towards the defence thereof when it is in danger; and I hold that the king is sole judge of the danger; and ought to direct the means of defence. And therefore this writ of Sci' Fa', and all the proceedings in this case, are well grounded according to law.

My Opinion therefore is, That Mr. Hampden shall be charged with 20*s.* assessed, and that my Lord Chief Baron ought to give Judgment accordingly.

The Argument of Sir JOHN BRAMPSTON, knt. Lord Chief Justice of his Majesty's Court of King's-Bench, in the great Case of Ship-Money.

Quarto Aug. 11 Car. a writ issued out of the Chancery, being directed to all counties of the realm of England, both inland and maritime; and among the rest it was directed to the sheriff of Bucks, for the making and building of a ship of 450 tons, and to provide a certain number of men with ammunition and victuals, to be brought to Portsmouth, and from thence to be employed in his majesty's service, for defence of the realm, and of the sea. Mr. Hampden, in the county of Bucks, was assessed at 20*s.* for his manor of Stoke Mandeville, who refused to pay the same; whereupon a Certiorari issued to the sheriff of Bucks, to return the defaulters; amongst whom Mr. Hampden was returned to make default of payment of the 20*s.* assessed upon him. Whereupon it was by Mittimus sent into the Exchequer, and a Sci' Fa' thereupon issued out of the Exchequer against Mr. Hampden, to shew cause why he made default of payment of the said 20*s.* Whereupon Mr. Hampden appeared in person, and demanded oyer of the writs, and returns thereof, and demurred in law, with whom Mr. Attorney joined in demurrer.

Now three points have been debated already at large in this matter, viz. 1. Whether the king may command this general charge of his subjects by law, or no, without their consent in parliament? 2. Whether this kind of assessment be warrantable by law, or no? and, 3. Whether the Sci' Fa' did well issue or not? In all these matters, so much hath been already spoken, that if I should not say what hath been already spoken, I should say little to purpose. I will not be long; for if I had intended it, my lord Finch hath prevented me in it; for he hath taken from me very much that I should have said, and insisted upon.

That which this case resteth upon, in my opinion, the vote of the court hath passed already by the greater number of voices, that mine will do nothing which way soever I go: yet being to deliver my opinion, I shall shew my reasons; and that I shall do without any other defence. Concerning the first point, Whether his majesty may impose that general charge upon his subjects by law or no? I am of opinion, that whensoever the whole kingdom is in danger, his majesty may command all his subjects to join with him in this case for the defence of the kingdom. My brother Finch hath insisted so fully upon this matter, that I shall need to say but little: but yet something I must say, as well as my brothers that have spoken before me, to discharge my conscience: and for that which I shall say, my intent is to insist upon some few of the principal statutes, which have been already recited.

For this point, in my opinion, will rest upon the several statutes and acts of parliament that concern this case; and I take these statutes to be merely declarations in affirmance of the common law. And I shall begin with the statute 1 Edw. 3, cap. 5, and I shall not go far from the intent of the statute; I shall scarce make use of any precedents, though many have been used, but only so far as they may seem to expound and declare the true meaning of those statutes.

And whereas it is objected from the statute 1 Edw. 3, That no man shall be compelled to go out of his county wherein he liveth, except in case of invasion, and necessity requireth, and then it shall be done as in times past: I answer, That this is merely declarative, and spoken in affirmance of the common law, and this use is declared by this statute to be the antient law of the realm. Now what that use was, will be a very great question in this case.

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Indeed it hath been much insisted upon, both by Mr. Hampden's counsel and my brother Crooke, that the subjects going forth of the shire shall be at the king's charge, which they have affirmed by divers statutes: but that which will go far in this case, as my brother Berkley well observed, is out of the precedents of Ed. 1, Ed. 2, and H. 3rd's times; and in them you shall find it to be for foreign wars, or else for ordinary defence, as for pillaging of boroughs or private towns by pirates, when the subjects have not given their aids in such cases. And there is no doubt but the king hath paid the charge in such a case, for the defence of the realm; but the subjects gave the king subsidies to do it withal.

But the question is, What the subject in this case, 'secundum legem Angliæ,' may be compelled to, in case of necessity, for defence of the kingdom? I answer, They may be compelled to this charge, 'sumptibus propriis,' for the soldiers wages; but to go out of the realm, or their shire, must be at the king's pay, according to the common law of England: but in times of sudden defence, there is no time to stand upon wages. It appears both in Fitz-Herb. Na. Br. fol. 28, and also in my lord Coke in Calvin's case, the king may command his subjects upon their allegiance, to go with him, as well in wars without the realm, as in his wars within, and with him, and without him, in the king's service. By the statute of 18 Ed. 3, and 11 Ed. 3, men of arms, as hobbellers, archers, &c. are to go in the king's service, as in England, so out of England, was the matter of these laws. And my lord Finch said, This was the very common law of England; so that it is clear, these two statutes are declaratory laws in affirmance of the common law. In 7 Hen. 4, title Tenure 44, there it is said, a man is not to go with the king in his wars, out of the realm, without wages. And so 7 Hen. 4, title Tenure 73, the subjects of England are not to go with the king beyond the seas, without their wages: but in the realm they are at his command, and there is no wages to be given. So it is in going out of England, when they are at the king's charges; but within, at their own. And if the going out of the county be at their own charges, I know not but that should put an end to the case, that the defence of the realm must be at the subjects' charge.

It is of dangerous consequence for judges, in their judgments, to rely too much upon precedents, that perhaps went forth through the necessity of the present times. But that is not our case here; we are here directed to know what was used in times past, in this case, before the making of this statute: So that in this case we take the usage not to declare or prove a law, but that use is declared by this statute to be a law. Now therefore, we must know what the use was: now that the use was, that the subjects of this realm ought to be charged in time of common danger, appears by a multitude of precedents applied rightly to the statute of Edw. 3, which do declare the law upon the statute. And to shew what the use was, I shall rely chiefly upon those precedents that are most judicial. First, that of 25 Edw. 1, Term' Mich' Rot. 72, Banc' Regis, in the abbot of Robertsbridge's case; compare that and this together, and I know not what more can be answered, than that this use for the subject to maintain their peace, was an usage, law, and custom of the realm. 10 Ed. 3, m. 2, fo. 18, the king by his writ sent a command to send to Portsmouth one hundred foot and twenty horsemen to guard the sea-coasts. They refused to do that service, and would not go without wages. The king sent answer in these very words, 'That no wages were due, for it was a 'public danger.' And so 25 Ed. 3, cap. 8, it is generally assented to by parliament.

But there we have a general law in the first statute 1 Ed. 3, which was grounded merely on the common law, and so was the statute 25 Ed. 3, and the rest to the same purpose, because it was against the right of the realm. And this statute of 25 Edw. 3, was merely grounded upon the petition of the commons; then certainly this finding of arms was intended by that statute to be against the right of the realm. Besides all this, to keep ourselves to that which is legal and authentical, so the parliament roll 13 Ed. 3, m. 9, and 11, it is there apparent, that it is not against the right of the land to charge the subject; then how comes it to be against the right of the realm 25 Edw. 3, for then there was no statute?

Now to bring it down to our times. In 26 Ed. 3, m. 44, every maritime town was charged to keep a petty watch, there being some imminent danger; therefore they pray, not to be discharged, but that it might be reduced to a lesser charge, being it was but petty watch to guard the sea-coast; much less then is there cause for the subject to seek to be discharged when the enemy is approaching. 5 Ed. 3, there was a commission issued out, to distrain every one 'secundum potestatem,' in matters of array; here is now the judgment of the whole house of parliament, that men according to their abilities are to be charged to join in charge with the king, to defend the realm 'sumptibus 'propriis.' Thus much for defence upon the land; now for defence upon the sea. In the statute 18 Ed. 3, cap. 7, that they who serve the king out of the kingdom, serve for wages; but in case of necessity, without the realm, in times past, by no precedents, saith my brother Crooke, can it be proved it was done before.—I answer, that the sea is within the kingdom; see 2 Ed. 3, cap. 10, protect. 46, Bract' lib. 2, fol. 365, there the sea is made part of the kingdom. Doctor and Student, cap. 51. It is the ancient custom of England, that the king is lord of the narrow seas. But that which I most rely upon is, from the statutes of 1 and 18 Ed. 3, for they both meet in one, which is according to the common law; for all the difference thereof is, the subject to go out of his own county whether to defend the land or the sea.

In the statute of 1 Ed. 3, it is objected, that

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there is no precedent for inland counties. But I answer, if not from inland counties, yet there is for maritime, as in 14 Ed. 3, Term. Mich. But I rely not upon precedents for either, but only upon those precedents that went out to the ports and maritime towns: for it was well observed by the king's counsel, that they were not grounded upon any precedents or charters, but only upon ancient customs. But if the precedents to the maritime towns were directed in case of necessity, then I see no reason but that it may be done now; which was indeed intended by the statute of 1 Ed. 3, as the precedents do plainly declare; and they were then more common than writs of this nature issuing for in this case, and the commons were then bound to land-service, and the mariners to sea-service; and they were compelled to it at their own charge, merely upon their allegiance, both in Bedford, Bucks, Lincoln, with many other counties. If then they may be compelled to go out of their own proper counties, to defend that part of the realm that they live near unto, why may they not also be compelled to go to defend the sea-coast? The sea-men were willing to bear some part of the charge for the defence of the sea, because the inland counties did bear their charge of the land-service and of the ports; And if they may be compelled in the inland counties to defend their inland counties, and the sea-men to defend the sea-coast; then I know no reason but that they may be compelled all in general to bear a public charge in case of necessity.

I am still upon the statute 1 Ed. 3, wherein I find Mr. Selden, in his Mare Clausum, says it was an ancient use to charge the inland and maritime counties in case of necessity; and therefore in my understanding, I hold it to be 'secundum legem Angliæ.' But here my brother Crooke objects, there is no statute or precedent to shew that any inland counties were charged. I answer, that statutes and precedents do not extend to our case, for this was in use many years before the making of any statute. See the statutes of 1 Ed. 1, and 1 Ed. 3. They cannot cross one another, for then could not the statute of Ed. 1, be confirmed by the statute of Ed. 3.

Again, concerning the statute of finding of men and arms, it is true, it is merely the common law of England, and that merely without common consent in parliament, as my brother Berkley saith, that the statute of 9 Hen. 3, and 25 Ed. 3, cap. 11, are the great charters rather than statutes; and in king John's time it was not taken for a statute, but only for a declaration. And so it was taken in the time of Hen. 4.

But now if concerning the charging of the county, the said statutes were nothing but according to the common law of England, I cannot see how they should cross another now; for there is no difference, but only in such things as are given as a benevolence to the king, as in 1 Ed. 3, cap. 5, 6.

As for the statute De Tallagio non Concedendo, we deny it not; but the difference is in the occasion of the statute of 14 Ed. 3. There was a pretty case put by Mr. Holborne about the office of alnage, where there was but a fee to be paid out of it, and held a taillage: but there is great difference between the taillage and this service, which every subject is bound to do by his allegiance to his sovereign lord, Fitz' Her'. Na. Br. 103. The king may impose this charge upon the subject in case of necessity, *pro bono publico;* and it is nothing but what every subject owes to the commonwealth in a time of common danger. And after king Edward the Confessor, it was ordered by several statutes, let every one have their own goods and lands free from taillage, and let nothing be taken from them. But in this case of necessity in common danger is another thing, the king may then compel his subjects to this charge; and I may add the reasons strongly insisted upon by the king's counsel. My lord Coke said, it could never be the meaning of the great charter of the liberty of the subjects by this statute to take away the power of the king's prerogative, and so to exempt themselves from this charge of defence: for there is a difference between a taillage upon the people, and a service in a case of necessity, which they may be compelled unto. My brother Jones cited a most excellent case 4 Jac. upon the opinion of Coke and Popham, that the taillage-statute taketh not away: and shall it take away this royal power of the king, so inherent in the crown, the protection and preservation of his kingdom?

From this statute 1 Ed. 3, Mr. St. John raised this objection. Here is seven months from the date of the writ, to the time the ship was to be brought to Portsmouth, in which time there might have been a parliament, and therefore it ought to have been done in a parliamentary way. But this will not admit the calling of a parliament; but if the danger is not sudden, you must have it in a parliamentary way.—My lord Finch gave a full answer to this: there must be a preparation before the enemy come, else the defence is too late; there is a necessity to prevent a necessity, and who shall give warning in such a case but the king? Saith Littleton, who gives warning? Not the tenant by castle-guard, but the lord; and so consequently in this case our sovereign lord the king: and therefore in such a case the subject is bound by his allegiance to the king, to assist in case of public danger. My lord Coke tells us the reason of the warning: he saith, there must in that case be a preparation before hand, lest your defence come too late: enemies are more easily kept out than overcome when they are got in.—By the statute of 8 Ed. 4, there bulwarks may be made in another man's ground; but this preparation cannot be without warning, and none can give the warning but the king, and the subjects are to be at his command, and none other; for there must be a preparation of the subjects in the realm, to meet the enemy before he enter the land. No

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subjects can take upon them to build bulwarks, &c. It is an assuming of the royal power, for it must be done 'juxta præceptum domini 'regis.'

Now I come to the second part, whether this assessment be warranted by law or not. The writ was dated 4 Aug. to prepare a ship against the 1st of March. Therefore we see it is not against the great laws concerning the subjects liberty, because it is no taillage but a service: for howsoever it must be granted, it must be a general danger that causeth a general defence; and there must be matter in the body of the record to satisfy therein; there must be, I say, a public danger, and then it is 'secundum legem et consuetudinem regni An-'gliæ,' as appears 20 Ed. 3, m. 21. And also in Doctor and Student, cited before, that when necessity doth require, the king may compel his subjects to this public service and charge. Though the king be the sole judge, and his certificate is not traversable and cannot be denied, yet there must be matter apparent within the record to satisfy the conscience of the court, or else we cannot be judges of the case at all. If the danger be general, then the defence must be general; but if ordinary danger as robbing of merchants by pirates, &c. it must be at the king's charge. And we do see by the petitions of the commons in many parliaments, that they never conceived themselves subject to the charge of ordinary defence.—Now upon all that which hath been observed by my brothers, there is enough in the record to satisfy them fully (as if the king were not sole judge) that it was a public danger, being 'pro defen-'sione regni et tuitione maris, &c.' It did issue to all the king's subjects, as a general charge, and not to the county of Bucks alone: therefore I may conclude, when the whole kingdom is in danger, the king may compel his subjects to assist in such public danger.

Then for the assessment; many exceptions have been taken to it, and to the record and Sci' Fa': I had provided myself to have given a full answer thereunto, but my lord Finch hath prevented me, and hath cited the very authorities, that I myself did rely upon. But for the assessment itself to the sheriff, I do not say that I do find he hath like power in any other case of law: commissions of sewers may be directed to the sheriff, but not to give power to assess men's goods. I answer, that this is in case of necessity: for the very main case is but a case of necessity, the ordinary and usual way is 'per sacramentum.' My lord Finch gave an excellent answer to that, and warranted it by law, that the sheriff hath no such unlimited power granted him; he is not made judge of the estates of men, but only to pursue the direction of the writ, to assess them as he is commanded, and not 'secundum discretio-'nem suam;' but as my lord Coke 5 Rep. 99, saith, he must do it 'secundum legem et se-'cundum arbitrium;' that is to say, according to law and reason. But it is impossible, in such a case of necessity, to put it into such an equality to make it without exception; but in as much as in him lieth, he ought to order it proportionably, his power is unlimited; for by his discretion he is to discern between right and wrong, between substance and shadow; and he must go within the bounds of law and right. In the chamberlain of Loudon's case, they might rate and assess *in bono publico*, as in making a high-way to a church, and the like, wherein the subject is brought to no distress or inconvenience, so as the greater part, in such a case as this, shall ever bind the lesser, it being *pro bono publico*. Yet this assessment cannot make a law a debt or a duty, but is only a means to bring this duty to a certainty, and so make it a duty, so that he be rated in an equal proportion. Hath the sheriff rated Mr. Hampden disproportionably, according to his estate and degree? If he hath, let him tell. If the sheriff hath followed his own will, and done corruptly, then he hath done contrary to the intent of the writ; it turneth upon the sheriff himself: and a great offence it is for a public minister of justice to abuse himself in such a place of justice. The sheriff returns, he hath assessed 20*s.* which is no great sum; and also confesseth upon the record, that it is an equal assessment. When Mr. Hampden appeared upon the Sci' Fa' he demanded Oyer of the writs, and so demurred in law: which upon the matter, being a general demurrer, is a confession.—And as for the Sci' Fa', my lord Finch hath handled it fully, and hath cited the same books and authorities that I intended to have cited; and so hath prevented me in that. And also in Bodmin's case in Cornwall, and upon the exception *super tenorem record'* in 9 Hen. 6, fol. 23. And the reason why he should not have execution *super tenorem record'* is, because otherwise the subject might be charged double. And divers cases were put upon suing forth execution upon the tenor of the record; and yet no execution can go out of the chancery at the first, because it is not returnable by the sheriff, but it is sent out of the chancery, by Mittimus into the Exchequer, 24 Hen. 6, 4 Hen. 6. But it is true, it doth concern every one to be satisfied in the truth of the case; for if the sheriff should not assess 'per sacramentum,' it might be made another way.—And as for the Certiorari, my lord Finch hath likewise cited the same books and authorities, which I also intended; therefore I forbear to insist upon that.

There is another exception to the record, 'quod onereturr,' and not know to whom it should be, no money demanded to the king by the first writ, no, nor by the second writ; therefore can give no judgment 'quod satisfa-'ceret domino regi:' then if judgment shall not be given for the king, then for whom? *non constat*, it doth not appear to whom it is due, for any thing I can see in this record.—Truly for my own part, of all the exceptions that I have heard, none sticketh with me but this exception: for I do not know any precedent, that a judgment was given, and not say to whom.

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This scruple, I confess, still remaineth with me. I must needs say, that in my opinion, I do rather incline, as far as I am well satisfied, that this is a good exception, according and upon those reasons which my Lord Chief Baron gave; and yet I am not so far satisfied, that it is law. —I must rather incline as my opinion inclines, than go against the inclination of my own opinion: as I have gone through all the rest with the warrant of my own conscience, I cannot go upon any string in a thing of the least weight, but I must deliver my opinion as it inclines; and therefore, upon those reasons that I have heard, and upon consideration taken with myself, I do rather incline to the opinion of my Lord Chief Baron, and upon his reasons, which I think was in that with the lesser number: but for my opinion in all other points, I agree with the general vote of the court.

Upon the 12th of June, 14 Car. Mr. Attorney moved the Court of Exchequer for Judgment against Mr. Hampden; and after he had opened the Record he said, "Your lordship and the court, in respect of the greatness of the cause, did adjourn it into the Exchequer Chamber, that your lordship and the court might receive advice of all the Judges; whose Advice and Opinions your lordship hath already received, and the plurality of their voices is, that Judgment should be given against Mr. Hampden, and accordingly I do pray Judgment."

To which my Lord Chief Baron answered: "It is very true, it was referred from hence to the Exchequer-Chamber, to receive the advice of all the judges of the land. We do not take them to assist only by way of advice, but for a judicial direction: for admitting we four were of one opinion, and the rest of the judges of another, (though the cause properly depend in this court) yet we must apply ourselves to their resolution, and our four voices are involved in theirs; and therefore accordingly, *secundum legem*, &c. *oneretur* Johannes Hampden."

The Copy of the Order, as it was drawn upon the Motion of Mr. Attorney-General, and now remains entered in the Exchequer.

Termin' Stæ' Trin' anno
Remem' Regis. 14 Car. 12 die Junii.

Bucks.—Whereas several sums of money by virtue of the king's majesty's writ under the Great Seal of England, bearing date the 4th day of August in the 11th year of his majesty's reign, were assessed and charged upon several persons, for and towards the provision of a Ship of War, together with the furniture and other things thereunto belonging, in the said writ particularly mentioned; which said several Sums of Money, so assessed and charged, and not being satisfied and paid, the names of the said several persons, together with the several sums charged upon them, were returned into the Chancery, whereby his majesty's writ of Certiorari, bearing date the 9th day of March, in the 12th year of his majesty's reign, certified into his court of Chancery, and by his majesty's writ of Mittimus, under the same seal, bearing date the 5th day of May in the 13th year of his majesty's reign, were sent into the court of Exchequer for further process to be had thereupon, as by the said several writs may appear: and whereas process of Sci' Fa' was, the 20th day of May, in the said 13th year of his majesty's reign, awarded to the sheriff of the county of Bucks, directing to garnish the several persons, in a schedule to the said Sci' Fa' annexed contained, to shew cause the octaves of the Holy Trinity then ensuing, why they should not be charged, and satisfy the said sums of money assessed upon them; in which schedule it was contained, amongst divers others, that John Hampden, esq. was assessed at 20*s.* as by the said Sci' Fa' and schedules thereunto annexed may also more fully appear: whereupon the said John Hampden, esq. being garnished by sir Anthony Chester, baronet, then sheriff of the said county of Bucks, appeared, and demanded Oyer of all the aforesaid writs; which being read unto him, he thereupon demurred in law. And thereupon sir John Banks, knight, his majesty's attorney-general, joined in the said demurrer: and the record thereof being made up, it pleased the barons of this court (the same matter being a matter of great consequence and weight) to adjourn the arguing of the same matter into the Exchequer-Chamber, and to desire the assistance and judgment of all the judges of England, touching the same. Now upon the motion of his majesty's attorney-general this day, informing this court, that seeing the said matter hath been so solemnly debated and argued, as well by the counsel of the said defendant, and by some of his majesty's learned counsel, and also by all the judges of England, and by the barons of the Exchequer, and that the major part of the said judges and barons have delivered their opinions and judgments that the said John Hampden ought to be charged with, and to satisfy the said sum of 20*s.* and therefore the said Mr. Attorney moved the court, that judgment might be entered accordingly: it is thereupon ordered by this court, that judgment shall be forthwith entered, that the aforesaid John Hampden ought to be charged with, and satisfy the aforesaid sum of 20*s.*

A Copy of the Judgment (in English), as it is entered upon record, in pursuance of the said motion, and according to the major votes.*

And because the barons here will advise themselves of and upon the premises, before they give Judgment thereupon, a day is given to the aforesaid John Hampden, in the same state as now here upon the octave of St. Michael, that the said barons in the mean while of

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* Cr. Car. 525, 601.

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the said premises may advise, and with the justices of both benches may thereupon deliberate: for the said barons here, not yet thereupon, &c. And upon this it is agreed between the Barons here, as well with consent of the said attorney-general of our said lord the king, as of the said attorney of the aforesaid J. Hampden, and the counsel learned in the law of the said J. Hampden, that some persons learned in the law as well of counsel, and on the behalf of our said lord the king, as of counsel and on the behalf of the said J. Hampden, of the aforesaid matter in law and the other premises, in the Chamber of this Exchequer, commonly called the Exchequer-Chamber, before the said barons, together sitting with the aforesaid justices of both benches, should in the mean time be heard publicly to argue: at which said octave of St. Michael, came the aforesaid J. Hampden here as before. And because the barons here further will advise themselves of and upon the premises, before they give Judgment thereupon, a day is further given to the aforesaid J. Hampden in the same state as now here, until the octave of St. Hilary, that some persons learned in the law, as well of counsel and on the behalf of our said lord the king, as of counsel and on the behalf of the said J. Hampden, of the aforesaid matter in law, and the other premises, in the Chamber of this Exchequer, commonly called the Exchequer-Chamber, before the said barons together sitting with the aforesaid justices of both benches, should in the mean time be heard publicly to argue, and the said barons with the said justices deliberate thereupon; so that no person learned in the law, either of the counsel of our said lord the king, or of the counsel of the said J. Hampden, is yet heard, and the barons here thereupon are not advised, &c. And afterwards in the time between the aforesaid octave of St. Michael, and the aforesaid octave of St. Hilary, as well the Attorney and Solicitor of our said lord the king, as two learned in the law of the counsel of the aforesaid J. Hampden in the premises, being on the part of the said J. Hampden, twelve several days in the aforesaid Exchequer-Chamber, before the barons of this Exchequer, sitting with them then there the aforesaid justices of both benches, were openly and singly heard to argue at large, and particularly of the said matter in law, and other the premises (the aforesaid record being recited) and what thereupon they could or would say. And the aforesaid attorney, and solicitor-general, divers and very many records, writs, commissions and precedents, as well of this Exchequer, as of the court of Chancery, the court of King's-bench and Common Pleas, the matter in law, and other premises in the several writs, returns, and schedules aforesaid contained, on the part of our said lord the king, to prove, confirm and maintain, then and there produced, shewed and expounded. And on the aforesaid octave of St. Hilary, the said J. Hampden came here as before; and because the barons here further will advise themselves of and upon the premises before they give judgment thereupon, a day is further given to the aforesaid J. Hampden, in the same state as now here, until from the day of Easter, on fifteen days, that the said barons in the mean while, with the aforesaid justices of both benches, may further thereupon deliberate, for that the said barons have not yet thereupon, &c. At which day, the said J. Hampden came here as before; and because the barons here further will advise themselves of and upon the premises, before they give judgment thereupon, a day is further given to the aforesaid J. Hampden, in the same state as now here, until upon the morrow of the Holy Trinity, that the said barons in the mean while, with the aforesaid justices of both benches, may further thereupon deliberate, for that the said barons have not yet thereupon, &c. At which day the aforesaid J. Hampden came here as before; and upon this, the premises being seen, and by the barons here plainly understood, and mature deliberation thereupon being had with the aforesaid justices of both benches, and after the arguments, as well by the said justices, as by the aforesaid barons singly, in the aforesaid Exchequer-Chamber, publicly thereupon made, it appeareth thereupon to the barons, by advice of the justices aforesaid, that the several writs aforesaid, and their returns, and the schedules aforesaid to the same annexed, and the matter therein contained, are sufficient in the law to charge the aforesaid J. Hampden with the aforesaid 20*s.* assessed upon him in the form and for the cause aforesaid: it is therefore agreed by the said barons, that the aforesaid J. Hampden be charged with the said 20*s.* and thereof make satisfaction, &c."

THIS Judgment in the Case of Ship-Money gave much offence to the nation, and occasioned great heart-burnings in the house of commons:* It was particularly taken notice

* "And here I cannot but again take the liberty to say, that the circumstances, and proceedings in those new extraordinary cases, stratagems, and impositions, were very unpolitic, and even destructive to the services intended. And if the business of Ship-Money, being an imposition by the state, under the notion of necessity, upon a prospect of danger, which private persons could not modestly think themselves qualified to discern, had been managed in the same extraordinary way as the Royal Loan (which was the imposing the Five Subsidies after the second parliament spoken of before) was; men would much easier have submitted to it; as it is notoriously known, that pressure was born with much more chearfulness before the Judgment for the king, than ever it was after; men before pleasing themselves with doing somewhat for the king's service, as a testimony of their affection, which they were not bound to do; many really believing the necessity, and therefore thinking the

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of in Mr. *Waller*'s Speech in that house, April 22, 1640, which was as follows:

Mr. Speaker; I will use no preface, as they do who prepare men for something in which they have a particular interest. I will only propose what I conceive fit for the house to consider; and shall be no more concerned in the event than they that shall hear me.—Two things I observe in his majesty's demands. First, the supply. Secondly, our speedy dispatch thereof.

Touching the first: his majesty's occasions for money are but too evident. For to say nothing how we are neglected abroad, and distracted at home; the calling of the parliament, and our sitting here (an effect which no light cause could have in those times produced) is enough to make any reasonable man believe, that the Exchequer abounds not so much in money, as the state does in occasions to use it: and I hope we shall all appear willing to disprove those who have thought to dissuade his majesty from this way of parliaments, as uncertain; and to let him see it is as ready, and more for the advancement of his affairs, than any new or pretended old way whatever.

For the speedy dispatch required, which was the second thing, not only his majesty, but *res ipsa loquitur*; the occasion seems to importune no less; necessity is come upon us like an armed man.—Yet the use of parliaments heretofore (as appears by the writs that call us hither) was to advise with his majesty, of all things concerning the church and commonwealth. And it hath ever been the custom of parliaments, by good and wholesome laws, to refresh the commonwealth in general, yea and to descend into remedies of particular grievances, before any mention made of a supply. Look back upon the best parliaments, and still you shall find, that the last acts are for the free gifts of subsidies on the people's part, and general pardons on the king's part. Even the wisest kings have first acquainted the parliaments with their designs, and the reasons thereof: and then demanded the assistance both of their counsel and purses. But physicians, though they be called of the latest, must not stomach it, or talk what they might have been, but apply themselves roundly to the cure. Let us not stand too nicely upon circumstances, nor too rigidly postpone the matter of supply, to the healing of our lighter wounds. Let us do what possibly may be done with reason and honesty on our parts, to comply with his majesty's desires and to prevent the imminent ills which threaten us.

But consider, Mr. Speaker, that they who think themselves already undone can never apprehend themselves in danger: And they that have nothing left can never give freely. Nor shall we ever discharge the trust of those that sent us hither, or make them believe that they contribute to their own defence and safety, unless his majesty be pleased, first to restore them to the property of their goods and lawful liberties, whereof they esteem themselves now out of possession. One need not tell you that the property of goods is the mother of courage, and the nurse of industry; makes us valiant in war, and good husbands in peace. The experience I have of former parliaments, and my present observation of the care the country has had to chuse persons of worth and courage, makes me think this house like the Spartans, whose forward valour required some softer music to allay and quiet their spirits, too much moved with the sound of martial instruments. It is not the fear of imprisonment, or if need be, of death itself, that keeps a true-hearted Englishman from the care to leave

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burthen reasonable; others observing, that the advantage to the king was of importance, when the damage to them was not considerable; and all assuring themselves, that when they should be weary, or unwilling to continue the payment, they might resort to the law for relief, and find it. But when they heard this demanded in a court of law, as a right, and found it, by sworn judges of the law, adjudged so, upon such grounds and reasons as every stander-by was able to swear was not law, and so had lost the pleasure and delight of being kind, and dutiful to the king; and, instead of giving, were required to pay, and by a logic that left no man any thing which he might call his own, they no more looked upon it as the case of one man, but the case of the kingdom, nor as an imposition laid upon them by the king, but by the judges; which they thought themselves bound in conscience to the public justice not to submit to. It was an observation long ago by Thucydides, "That men are much more passionate for injustice, than for violence; because, says he, the one coming as from an equal, seems rapine; when the other proceeding from one stronger, is but the effect of necessity. So, when Ship-Money was transacted at the council-board, they looked upon it as a work of that power they were all obliged to trust, and an effect of that foresight they were naturally to rely upon. Imminent necessity, and public safety, were convincing persuasions; and it might not seem of apparent ill consequence to them, that upon an emergent occasion the regal power should fill up an *hiatus*, or supply an impotency in the law. But when they saw in a court of law (that law, that gave them title to, and possession of all that they had) reason of state urged as elements of law, judges as sharp-sighted as secretaries of state, and in the mysteries of state; judgment of law grounded upon matter of fact, of which there was neither enquiry, nor proof; and no reason given for the payment of the 20*s.* in question, but what included the estates of all the standers by, they had no reason to hope that doctrine, or the promoters of it, would be contained within any bounds; and it is no wonder that they who had so little reason to be pleased with their own condition, were no less solicitous for, or apprehensive of, the inconveniencies that might attend any alteration." Clarendon.

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this part of his inheritance as entirely to posterity, as he received it from his ancestors.

This therefore let us first do, and the more speedily, that we may come to the matter of supply; let us give new force to the many laws which have been hitherto made for the maintaining of our rights and privileges, and endeavour to restore this nation to its fundamental and vital liberties, the property of our goods, and the freedom of our persons: no way doubting, but we shall find his majesty as gracious and ready, as any of his royal progenitors have been, to grant our just desires therein. For not only the people do think but the wisest do know, that what we have suffered in this long vacancy of parliaments, we have suffered from his ministers: that the person of no king was ever better beloved of his people, and that no people were ever more unsatisfied with the ways of the levying monies, are two truths which may serve, one to demonstrate the other: for such is their aversion to the present courses, that neither the admiration they have of his majesty's native inclinations to justice and clemency, nor the pretended consent of the judges, could make them willingly submit themselves to the late tax of Ship-money: And such is the natural love and just esteem of his majesty's goodness, that no late pressure could provoke them, nor any example invite them, to disloyalty or disobedience.

But what is it then, that hath bred this misunderstanding betwixt the king and his people? How is it, that having so good a king we have so much to complain of? Why, we are told of the son of Solomon, that he was a prince of a tender heart; and yet we see, by the advice of violent counsellors, how rough an answer he gave to his people. 'That his finger should 'be as heavy as his father's loins,' was not his own, but the voice of some persons about him, that wanted the gravity and moderation requisite for the counsellors of a young king. I love not to press allegories too far; but the resemblance of Job's story with ours holds so well, that I cannot but observe it to you. It pleased God to give his enemy leave to afflict him more than once or twice, and to take all he had from him; and yet he was not provoked to rebel so much as with his tongue; though he had no very good example of one that lay very near him, and felt not half that which he suffered. I hope his majesty will imitate God in the benigner parts too: and as he was severe to Job only while he discoursed with another concerning him, but when he vouchsafed to speak himself to him, began to rebuke those who had mistaken and mis-judged his case, and to restore the patient man to his former prosperity; so now, that his majesty hath admitted us to his presence, and spoken face to face with us, I doubt not but we shall see fairer days, and be as rich in the possession of our own as ever we were.

I wonder at those that seem to doubt the success of this parliament, or that the misunderstanding between the king and his people should last any longer, now they are so happily met. His majesty's wants are not so great but that we may find means to supply him; nor our desires so unreasonable, or so incompatible with government, but that his majesty may well satisfy them. For our late experience, I hope, will teach us what rocks to shun and how necessary the use of moderation is: and for his majesty, he has had experience enough, how that prospers which is gotten without the concurrent good-will of his people: Never more money taken from the subject; never more went into the exchequer. If you look upon what has been paid, it is more than ever the people of England were wont to pay in such a time: If we look upon what has been effected therewith, it shews as if never king had been worse supplied. So that we seem to have endeavoured the filling a sieve with water. Whosoever gave advice for these courses, has made good the saying of the wise man; 'qui contur-'bat domum suam, possidebit ventum.' By new ways they think to accomplish wonders; but in truth they grasp the wind, and are at the same time cruel to us, and to the king too. For if the commonwealth flourish, then he that hath the sovereignty can never want, nor do amiss; so as he govern not according to the interest of others, but go the shortest and the safest ways to his own, and the common good.

The kings of this nation have always governed by parliaments; and if we look upon the success of things since parliaments were laid by, it resembles that of the Græcians,

'Ex illo fluere et retro sublapsa referri
'Res Danaum'——————

especially on the subject's part. For though the king hath gotten little, they have lost all.—But his majesty shall hear the truth from us, and we shall make appear the errors of those divines, who would persuade us, that a monarch must be absolute, and that he may do all things *ad libitum*; receding not only from their text (though that be a wandering too) but from the way their own profession might teach them, 'state super vias antiquas,' and 'remove not 'the antient bounds and land-marks which our 'fathers have set.' If to be absolute were to be restrained by no laws, then can no king in Christendom be so; for they all stand obliged to the laws Christian, and we ask no more: for to this pillar are our privileges fixed, our kings at their coronation taking a sacred oath not to infringe them.

I am sorry these men take no more care to gain our belief of things, which they tell us for our soul's health; while we know them so manifestly in the wrong, in that which concerns the liberties and privileges of the subjects of England: but they gain preferment, and then 'tis no matter, though they neither believe themselves, nor are believed by others. But since they are so ready to let loose the conscience of their kings, we are the more careful to provide for our protection against this pulpit law, by declaring and reinforcing the municipal laws of this kingdom.

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It is worth observing, how new this opinion is, or rather this way of ruling, even among themselves. For Mr. Hooker, who sure was no refractory man, (as they term it) thinks that the first government was arbitrary, 'till it was 'found, that to live by one man's will, became 'the cause of all men's misery' (these are his words): concluding, that this was the original of inventing laws. And if we look farther back, our histories will tell us, that the prelates of this kingdom have often been the mediators between the king and his subjects, to present and to pray redress of their grievances; and had reciprocally then as much love and reverence from the people.

But these preachers, more active than their predecessors, and wiser than the laws, have found out a better form of government. The king must be a more absolute monarch than any of his predecessors; and to them he must owe it, though in the mean time they hazard the hearts of his people, and involve him in a thousand difficulties; for suppose this form of government were inconvenient, and yet this is but a supposition; for these 500 years, it hath not only maintained us in safety, but made us victorious over other nations: but, I say, suppose they have another idea of one more convenient, we all know how dangerous innovations are, though to the better: and what hazard those princes must run, that enterprize the change of a long established government. Now, of all our kings that have gone before, and of all that are to succeed in this happy race, why should so pious and so good a king be exposed to this trouble and hazard? besides that, kings so diverted can never do any great matter abroad.

But while these men have thus bent their wits against the laws of their country, whether they have neglected their own province, and what tares are grown up in the field which they should have tilled, I leave to a second consideration; not but that religion ought to be the first thing in our purposes and desires; but that which is first in dignity, is not always to precede in order of time, for well-being purports a being. And the first impediment which men naturally endeavour to remove, is the want of these things, without which they cannot subsist. God first assigned to Adam maintenance of life, and gave him a title to the rest of the creatures, before he appointed a law to observe. And let me tell you, if our adversaries have any such design, as there is nothing more easy than to impose religion on a people deprived of their liberties; so there is nothing more hard than to do the same upon freemen.

And therefore, Mr. Speaker, I conclude with this motion, that there may be an order presently made, that the first thing this house will consider of, shall be the restoring this nation in general to its fundamental and vital liberties, the property of our goods, and freedom of our persons; and that then we will further consider of the supply desired.—And thus we shall discharge the trust reposed in us by those that sent us hither: his majesty will see, that we make more than ordinary haste to satisfy his demands; and we shall let all those know, that seek to hasten the matter of supply, that they will so far delay it, as they give interruption to the former.

Afterwards the House of Commons took the affair directly under consideration, in calling those Judges to an account, who had given their Opinions for the Ship-Money; at which time Lord *Falkland* delivered himself in the following manner:

Mr. Speaker; The constitution of this commonwealth hath established, or rather endeavoured to establish to us the security of our goods, and the security of those laws which would secure us and our goods, by appointing for us Judges, so settled, so sworn, that there can be no oppression, but they of necessity must be accessary; since if they neither deny nor delay us justice, which neither for the great nor little seal they ought to do, the greatest person in this kingdom cannot continue the least violence upon the meanest. But this security hath been almost our ruin; for it hath been turned, or rather turned itself into a battery against us: and those persons who should have been as dogs to defend the sheep, have been as wolves to worry them.

These Judges, to instance not them only, but their greatest crime, have delivered an opinion, and judgment in an extra-judicial manner, that is, such as came not within their cognizance, they being judges, and neither philosophers, nor politicians. In which when that is so absolute and evident, the law of the land ceases; and of general reason and equity, by which particular laws at first were framed, returns to his throne and government, where *salus populi* becomes not only *suprema*, but *sola lex*; at which, and to which end, whatsoever should dispense with the king, to make use of any money, dispenses with us to make use of his, and one another's. In this judgment they contradicted both many and learned acts and declarations of parliaments; and those in this very case, in this very reign: so that for them they needed to have consulted with no other record, but with their memories. 2. They have contradicted apparent evidences, by supposing mighty and imminent dangers, in the most serene, quiet, and halcion days that could possibly be imagined, a few contemptible pirates being our most formidable enemies, and there being neither prince nor state, with whom we had not either alliance or amity, or both. 3. They contradict the writ itself, by supposing that supposed danger to be so sudden, that it would not stay for a parliament, which required but forty days stay, and the writ being in no such haste, but being content to stay seven times over.

It seemed generally strange, that they saw not the law which all men else saw but themselves. Yet though this begot the more general wonder, three other particulars begot the more general indignation. When they had allowed

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to the king, the sole power in necessity, the sole judgment of necessity, and by that enabled him to take both from us, what he would, when he would, and how he would, they yet continued to persuade us, that they had left us our liberties and our properties. And, which I confess moved most, that by the transformation of us from the state of free subjects (a good phrase under Dr. Heylin's favour) unto that of villains, they disable us by legal and voluntary supplies to express our affections to his majesty, and by that to cherish his to us, that is, by parliaments.

The cause of all the miseries we have suffered, and the cause of all the jealousies we have had, that we should yet suffer, is, That a most excellent prince hath been most infinitely abused by his judges telling him, that, By policy he might do what he pleased.

We must now be forced to think of abolishing of our grievances, and of taking away this judgment and these judges together, and of regulating their successors by their exemplary punishment.

Hereupon the Opinions of the Judges, the Ship-Writs, and the Judgment against Mr. Hampden being read openly in the house on Monday, Dec. 7, 1640, after long debate these four several votes were agreed to by the house, nem. con.

1. That the charge imposed upon the subjects for the providing and furnishing of ships, and the assessment for raising of money for that purpose, commonly called Ship-Money, are against the laws of the realm, the subjects right of property, and contrary to former resolutions in parliament, and to the Petition of Right.

2. That the extrajudicial Opinions of the judges, published in the Star-Chamber, and inrolled in the Courts at Westminster, *in hæc verba:*

The Case.

'C. *R.*;—When the good and safety of the 'kingdom in general is concerned, and the 'whole kingdom in danger, whether may not 'the king by writ under the great seal of Eng-'land, command all the subjects in this kingdom 'at their charge to provide and furnish such 'number of Ships, with men, victual, and muni-'tion, and for such a time as he shall think fit, 'for the defence and safe-guard of the kingdom 'from such danger and peril, and by law com-'pel the doing thereof, in case of refusal or 'refractoriness; and whether in such case is 'not the king the sole judge both of the danger, 'and when and how the same is to be prevented 'and avoided?—C. *R.*'

Their Opinions.

'May it please your most excellent majesty, 'We have according to your majesty's com-'mand, severally, and every man by himself, 'and all of us together, taken into serious con-'sideration the case and questions signed by 'your majesty, and inclosed in your letter: 'And we are of opinion, that when the good 'and safety of the kingdom in general is con-'cerned, and the whole kingdom in danger, 'your majesty may by writ under the great seal 'of England, command all the subjects of this 'your kingdom, at their charge to provide and 'furnish such number of Ships, with men, 'victual, and munition, and for such time as 'your majesty shall think fit for the defence and 'safeguard of the kingdom from such danger 'and peril; and that by law your majesty may 'compel the doing thereof in case of refusal or 'refractoriness. And we are also of opinion, 'that in such case your majesty is the sole 'judge both of the danger, and when and how 'the same is to be prevented and avoided:' In the whole, and in every part of them, are against the laws of the realm, the right of property and the liberty of the subjects, and contrary to former resolutions in parliament, and to the Petition of Right.

3. That the Writ following *in hæc verba*; viz. 'Charles by the grace of God, king of England, 'Scotland, France and Ireland, defender of the 'faith, &c. To our right trusty and well-'beloved counsellor, Thomas lord Coventry, 'keeper of our great seal of England, greeting. 'These are to will and require you, that for the 'safeguard of the seas, and defence of the 'realm, you issue forth, or cause to be issued 'forth of our high court of chancery these ensu-'ing writs in the form following, with duplicates 'of them, under our great seal of England, unto 'the counties, cities, towns, and places here-'after ensuing, and for so doing this shall be 'your warrant:' And the other Writs commonly called the Ship-Writs, are against the laws of the realm, the right of property, and the liberty of the subjects, and contrary to former resolutions in parliament, and to the Petition of Right.

4. That the Judgment in the Exchequer in Mr. Hampden's case, a transcript whereof followeth *in hæc verba:* (viz. 'Quod separalia 'brevia prædicta et retorna eorundem, ac 'schedul. prædict. eisdem annexat. ac materia 'in eisdem content. sufficien. in lege exist. ad 'præf. Joh. Hampden de prædictis viginti soli-'dis super ipsum in forma et ex causa præd. 'assessis, onerand. Ideo consideratum est per 'eosdem barones, quod præd. Johannes Hamp-'den de eisdem viginti solidis oneretur, et inde 'satisfaciat.)' in the matter and substance thereof, and in that it was conceived that Mr. Hampden was any way chargeable, is against the laws of the realm, the right of property, the liberty of the subjects, and contrary to former resolutions in parliament, and to the Petition of Right.

These votes were afterwards transmitted by the house of commons to the lords, and delivered by Mr. St. John (afterwards his majesty's solicitor-general) at a Conference of both houses of parliament, held 16 Car. 1640.

Mr. *St. John* addressed himself to the lords as follows:

My lords; The knights, citizens, and bur-

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gesses of the commons house have entrusted me with a message to your lordships of a general and very high concernment; so general, that the whole body of the kingdom, both peers and people, are interested in it; of so high a consequence, as that there is nothing that can concern us nearer.—It is one of the *grandia regni*; so great, as that I shall not need to present it to your lordships in a magnifying glass; it will appear too big in its own dimensions. It is not that Ship-money hath been levied upon us; but it is that right whereby Ship-money is claimed, which, if it be true, is such as that makes the payment of Ship-money the gift and earnest penny of all we have. It is not that our persons have been imprisoned for payment of Ship-money, but that our persons, and (as it is conceived) our lives too, are, upon the same grounds of law, delivered up to bare will and pleasure. It is that our birth-right, our ancestral right, our condition of continuing free subjects, is lost; that of late there hath been an endeavour to reduce us to the state of villainage, nay to a lower. It is true, the lord might tax his villain *de haute et de basse*, might take all his lands and goods; the villain had no property against the lord, the villain he could not *ire quo voluit*, he had no liberty of person, the lord might imprison him at his pleasure: but the villain's life was his own, and not his lord's, the law secured him that. But, my lords, as the law stands now declared, it is disputable whether it doth so much for us.

My lords, the subject of this message, is to present the sense of the commons to your lordships; that the laws of the realm instituted at first, and freely assented unto, and chosen by their ancestors for the preservation of themselves and us their descendants, in our persons, lives and estates, have been of late entrusted unto such hands, as have endeavoured to force upon them a contrary end to that for which they were ordained; from defensive to turn them to offensive; and instead of protecting us, to make the laws the instrument of taking from us all we have. Those carriages which have produced this sense of the commons, I am commanded at this present to declare to your lordships. They are certain extra-judicial opinions delivered by the judges at several times; the one in November 1635, the other a year after, in February 1636. The Ship-Writs, that have issued to all the counties of England for these many years last past without intermission: the principal thing in these writs which I am to present to your lordships, is not the charge and burden which hath been thereby imposed upon the subjects, though that be great, but the declarations in them of the law, and of the right whereby this burden may be imposed.—The last is, the Judgment in Master Hampden's case in the exchequer upon these Ship-Writs.

My lords, the two last, that is, the Ship-Writ and the Judgment, because they are very long, I am only to open them without reading, and to deliver them to your lordship; the other two, I am to read them, and then to deliver to your lordships.

The first Opinion in November 1635, was read as followeth:

I am of opinion, that as where the benefit doth more particularly redound to the good of the ports or maritime parts, as in case of piracy or depredations upon the seas, there the charge hath been, and may be lawfully imposed upon them according to precedents of former times; so where the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, (of which his majesty is the only judge) there the charge of the defence ought to be born by all the realm. This I hold agreeable both to law and reason.

My lords, these opinions were delivered by the judges severally and apart, they were procured by the solicitation of my lord Finch. The judges, as he severally procured their hands, were by him enjoined secrecy: accordingly these opinions walked in the dark for a year and upwards. Afterwards the procurer of them, my lord Finch, liked them so well, as that he presumed to deliver them to his majesty. By his procurement, a letter was directed from his majesty to the judges, for the delivery of their opinions in these and some other additionals. The former that hath been read is more modest; it is only that his majesty is the sole judge of the danger, and that the inland as well as the maritime towns are chargeable to the defence of the kingdom.—It is not declared in these, that this charge may be imposed by his majesty alone; for the expression is only, that the charge may lawfully be imposed; say not by whom.—In the other opinions they proceed *a malo ad pejus*, and speak plain English, which followeth *in hæc verba*:

The Case.

C. R. When the good, and the ease and safety of the kingdom in general is concerned, and the whole kingdom in danger, whether may not the king, by writ under the great seal of England, command all the subjects in this kingdom, at their charge, to provide and furnish such number of ships with men, victuals and ammunition, and for such time as he should think fit, for the defence and safeguard of the kingdom from such danger and peril; and by law compel the doing thereof, in case of refusal or refractoriness? and whether in such case, is not the king the sole judge, both of the danger, and when and how the same is to be prevented and avoided?

The Judges Answer.

May it please your excellent majesty, we have, according to your majesty's command, severally, and every man by himself, and all of us together, taken into serious consideration the case and questions signed by your majesty, and inclosed in your royal letter; and we are of opinion, that when the good and safety of the kingdom in general is concerned, and the whole kingdom is in danger, your majesty may by

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writ under the great seal of England, command all the subjects of this your kingdom at their charge to provide and furnish such number of ships, with men, victuals and ammunition, and for such time as your majesty shall think fit, for the defence and safeguard of the kingdom from such danger and peril; and that by law your majesty may compel the doing thereof, in case of refusal or refractoriness: and we are

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t in such case your majesty both of the danger, and same is to be prevented and

vere subscribed by all the Inn-Hall; they were after- he Star-Chamber, that the notice of them; and that forgotten, they are enrolled Westminster-Hall, in 'per- liam.' Your lordships will ne leave to repeat them in sense, which I conceive to ajesty, as often as himself re that the kingdom is in en, for prevention of such by his writ under the great y alter the property of the out their consent in parlia- ich proportion as his ma- ; and besides, the altering ir goods, for the prevention deprive them of the liberty of their lives, and that in self shall please.

ese, viz. That his majesty ger as often as he pleaseth, words, That the king is the ger, and when the same is avoided. 2. The second, y alter the property of the out consent in parliament, t his majesty may, by writ gland, command and com- f the realm, at their charge, h ships. 3. That this may n his majesty shall please, his majesty may command l furnish such number of als, and ammunition, and ajesty shall think fit. 4. ch concerns our persons,

in these two clauses: 1. That his majesty in case of refractoriness may compel the doing of it. This compulsion in case of refractoriness includes the person as well as the estate; nay, it sounds more in the personality than otherwise. For the other, viz. whether this personal compulsion may extend so far as to life, I humbly leave it to your lordships consideration, upon the other clause; that is, that his majesty is the sole judge of such danger, and when and how the same is to be prevented: whether the words, 'how it is to be prevented,' in this case of personal compulsion, doth not leave the manner of it wholly in his majesty's breast.

My lords, if these Opinions extend only to Ship-Money, it is enough; his majesty takes what he will, and when he will. If all be taken to day, and afterwards by descent or my own labour I got a new stock or livelihood, that is no more mine than the former, so that there is no property left unto the subject, though the Opinions go no further. But, my lords, Ship-Money is not the whole extent of them; Ship-Money, by these Opinions, is not due by any peculiarity in Ship-Money: but Ship-Money is therefore due, because his majesty is the sole judge of the danger of the kingdom, and when and how the same is to be prevented; because his majesty, for the defence of the kingdom, may at his will and pleasure charge the people. This is the ground, and upon the same reason the compulsion may be as well for the making and maintaining castles, forts and bulwarks, making of bridges, for transporting his armies, for provision of wages and victuals, for soldiers, for horses and carriages: it may be multiplied *in infinitum.*—It may be done when the good and safety of the kingdom is concerned; this extends to all things, and at all times: 'Quia 'jacet in terra, non habet unde codet.'

If these opinions be law, I humbly leave it to your lordships considerations, whether the government be not 'imperium legibus solutum.' The next thing I shall offer to your lordships is the Ship-Writs: a transcript of one of them directed to the sheriff of Dorsetshire, I shall deliver; all the rest being of the same form. Because the writ is long, I shall open it briefly; it is to this effect. There is a declaration in it, that 'salus regni periclitabatur:' That the safety of the kingdom was in danger. Therefore the inhabitants of the several counties are commanded, for the defence of the kingdom, for the custody of the seas, for the safeguard of the merchants from piracy inward and outward, that they should provide a ship of war, furnished with guns, gunpowder, double tackle, and all other necessaries; and this ship thus furnished at a day set, to be brought to Portsmouth, to be provided for 26 weeks of mariners wages, victuals and other necessaries: and for the doing of this, authority is given to the sheriffs of the several counties, to assess every one of the inhabitants 'secundum statum et facultates suas,' according to their estates and means; and further power given him, by distraining and selling of the distress, to levy these monies; 'si con- 'trarios invenerit,' then to imprison their persons: And further declares, that all this may be done, 'secundum legem et consuetudinem 'regni.' The sense I conceive is briefly thus: That by the laws of the kingdom, when his majesty shall declare that the kingdom is in danger, he may alter the property of the subjects goods, and imprison their persons; nay, that not only his majesty, but the sheriffs may imprison their persons. By the law the lord might imprison his villain, but could not transfer that power to the bailiff, or to any other; it was personal. That the execution of this power over the persons of the subjects hath gone no farther than their imprisonment, whether therein we be not beholden to his majesty's grace and goodness,

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and nothing at all to the opinions of the judges, I leave it to your lordships considerations.

The last thing is, the Judgment in the Exchequer, in the 13th year of his now majesty's reign, against Mr. Hampden. The Record is very long: I shall briefly open it to your lordships. Quarto Aug. 11 Car. there issued Ship-Writs to the several counties; amongst the rest to the county of Bucks. The sheriff assessed the inhabitants; some of them made default, and did not pay. Upon a Certiorari out of the Chancery, directed to the sheriff, he certifies the persons that made default, together with the sums assessed upon them. From the Chancery, by Mittimus, these certificates were sent into the Exchequer, to the intent processes might issue against the defaulters. A Scire Facias issued to the sheriff of Bucks, who thereupon, amongst other returns, returns that Mr. Hampden had been assessed 20*s.* for some lands in Stoke-Mandeville in that county, which he had not paid. Mr. Hampden appeared, and upon his appearance demands Oyer of the Ship-Writs, and the other proceedings. After his hearing thereof, and understanding the contents, he demurs in law, that is, demands the Judgment and Opinion of the Judges, whether this writ was sufficient in law, and to force him to pay the said 20*s.*

This being a great and general case, the Barons of the Exchequer desired the assistance of the rest of the Judges, who did join accordingly. The case came to be argued; there were four arguments, two on Mr. Hampden's side, and two on the other side: The first was in Michaelmas Term, after All-Hallontide; and all the four arguments were speeded before Christmas day, two of them in the term; and no longer time could be procured for the rest, but the short vacation between Michaelmas Term and Christmas. It was a case of so little concernment, that whereas in Westminster-Hall term after term is usually given to argue any demurrer, this must be argued betwixt All-Hallontide and Christmas throughout. After the arguments, the counsel on both sides were commanded to bring before the Judges the records and authorities cited: They were brought; and for the ease of the Judges, many of them on Mr. Hampden's part were abbreviated on the back sides: those abbreviations were commanded to be expounded. Afterwards the case came to argument at the bench; there the case was judged, and by the greater part of the Judges Judgment was given against Mr. Hampden. When the Judges had delivered their opinions, it was the Barons part to give Judgment; the Judgment was, 'Quod separalia 'brevia prædict' et return' eorundem ac sche-'dulæ prædict' eisdem annex' ac materia in eis-'dem content' sufficien' in lege existunt ad præ-'fatum Johannem Hampden de prædict. viginti 'solidis super ipsum in forma et ex causa præ-'dict. assessis onerand' Ideo consideratum est 'per eosdem baron' quod prædictus Johannes 'Hampden de eisdem viginti solidis oneratum 'exinde satisfiat.'

My lords, this Judgment is a full and plenary execution of the former opinions of the Judges, and of the Ship-Writs, for so much as it concerns our propriety: It was given in Mr. Hampden's case only, but binds all the subjects; for so binding it is, as that an honourable person, now in my eye, in a case depending in the King's-Bench, was denied any argument or debate concerning the right of Ship-Money, for no other reason but that it had been by the former Judgment adjudged already in the Exchequer. My lords, these extra-judicial Opinions of the Judges, these Ship-Writs, and this Judgment, are those carriages which have introduced this sense of the commons, That the fundamental laws of the realm concerning our property and our persons are shaken.

My lords, the commons have taken the extra-judicial Opinions published and enrolled, and the rest, severally into consideration; they have been read openly in the house; and after long debate, and long rather in consideration of the greatness of the matter than of the difficulty of it, they came to vote; four several Votes passed upon them; the Votes passed without so much as one negative voice to any of them. The Votes were in substance, That they were against the laws of the realm, the right of the property, the liberties of the subject, contrary to the former resolutions of the parliament, and to the Petition of Right. The extra-judicial Opinions enrolled, they voted in the whole, and every part of them, to be contrary to all these; for they did conceive, that in these opinions there was not any one clause that was agreeable to the law, but that throughout they were contrary to the laws.

My lords, the things which the commons took into their consideration, before they proceeded to their Votes, were the proceedings in the parliament held 3 Car. when the Petition of Right was framed. The commons went no higher; the reasons inducing them thereto were, because in that parliament all those three had been debated, property of goods, liberty of persons, and security of our lives. Two of them, that is, property of goods and liberty of persons, by the occasion of the Commissions for the Loan, and the instruction wherewith these commissions were accompanied; that concerning our lives, by occasion of the commissions that had issued for the executing of Martial Law. They conceive, that if any thing concerning these had passed both houses and his majesty, or the judgment of both houses without his majesty, it would be in vain to look further, that it would be *actum agere*: Nay, my lords, they had further consideration, that if those were already settled in that parliament, it would not only be derogatory to the jurisdiction of parliament, but dangerous to look higher, as that they would infer a defect in those proceedings, and cast an aspersion upon that parliament. I am commanded now to present to your lordships consideration those things which satisfy the commons, which are these three:

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1. The Commissions for the Loans, with the instructions. 2. A Commission called The Commission of Excise. 3. An addition of saving, which was desired by your lordships to have been added to the Petition of Right, at the time of the framing of it.

The case upon the Commission for the Loans standeth thus: 13 Octob. 2 Car. divers Commissions were directed to sundry commissioners, to the number of 60 or 70 lords and gentlemen, in the several counties issued, whereby a compulsory aid, by way of Loan, was required of the subject: The causes and grounds of this command are in the commissions expressed to be these: The king found the crown engaged in a war, by the advice of both houses in parliament; that not only the king and the subject, but also his allies beyond sea were in danger. The parts beyond sea, where our cloth is vented, and from whence we have most of our provision for shipping, were endangered; his majesty's treasures were exhausted, and his coffers empty. A parliament had been summoned, but no supply. Unavoidable necessity both at home and abroad multiplied the enemies. Great and mighty preparations, both at sea and land, threatened the kingdom daily.

Not only the king's honour, but the safety and very subsistence of the king and people, and of the true religion abroad, are in apparent danger of suffering irreparably, unless not only a speedy, but also a present stop be made; which cannot admit so long delay as the calling of a parliament. The king assured on the royal word of a king, that not one penny should be bestowed, but upon those public services only wherein every one of them, and the whole body of the kingdom, their wives, children, and posterity, have their personal and common interests. The commissioners diligence commanded, as they tendered the king's honour and safety of the realm. Here 'salus regni 'periclitabatur,' the whole kingdom was in danger, as in the judges opinions, and as in the ship-writs, and judgments in the Exchequer. Nay, my lords, further, the safety and very subsistence of the king, people, and true religion, were in danger of suffering irreparably; the dangerous instance, not a speedy, but present stop must be made; the supply could not stay for a parliament; at this time his majesty's coffers were exhausted; the king found the crown engaged in this war, before the access of it to himself, and that by advice in parliament; all this expressed, only lending of monies for prevention required; but it was a compulsory thing, and became compulsory, by the instructions to bind over to the board, and imprisonment for refusal. These commissions were, in the parliament 3 Car. first resolved in the commons house to be against the law, afterwards by your lordships, and consented unto by his majesty; and are declared to be so in the Petion of Right; and the imprisonment of the subjects for refusal, declared in the Petition of Right to be against law.

My lords; The next is the Commission called, The Commission of Excise. This was dated ultimo Feb. it was dated after the summons to that parliament: This commission issued to 33 lords, and others of his majesty's privy-council; the commissioners are thereby commanded to raise monies by impositions, or otherwise; as in their judgments they shall find to be most convenient.

The causes wherefore these monies are to be raised, are expressed to be these: The defence and safety of the king and people, which without extremest hazard of the king, kingdom, and people, and of the king's friends and allies beyond seas, cannot admit any longer delay; inevitable necessity, wherein form and circumstance must rather be dispensed withal, than the substance lost. The commissioners not to fail therein, as they tendered his majesty's honour, and the safety of the kingdom and people. Here 'salus regni periclitabatur,' the whole kingdom declared to be in danger, in greater and nearer than in the opinion of the Ship-Writs, or Judgment in the Chequer.

In the parliament 3 Car. this Commission was adjudged by the commons to be against the laws of this realm, and contrary to the Judgment given in the Petition of Right; and after a conference with your lordships, desired his majesty, that it might be cancelled. The then Lord-Keeper shortly after brought it cancelled to your lordships in the house, and there said, it was cancelled in his majesty's presence: You sent it cancelled to the commons to be viewed, who afterwards sent it back to your lordships.

My lords, The last is the addition of saving, desired to be added to the Petition of Right, which was in these words:

'We humbly present this Petition unto your 'majesty, not only with a care of preserving 'our own liberties, but with due regard to leave 'entire the sovereign power, wherewith your 'majesty is trusted, for the protection, safety, 'and happiness of your people.' Your lordships desire of this addition to the Petition of Right, was taken into consideration by the commons; and after debate, it was thought fit by them to be rejected. A conference was had with your lordships, and Mr. Noy appointed by the commons to declare the reasons of their resolution. Your lordships not receiving satisfaction at that conference, whether this addition should be rejected or not; it was again debated in the commons house, they ventured upon the same bottom again: It was thereupon resolved to be rejected; the reasons of their rejection were these in sum:

First, They confess, that if these words were taken as a bare proposition only, without any further reference to the Petition of Right, that it was a true proposition. That is, that the law hath trusted the king with sovereign power for the protection, safety, and happiness of the people. But if it should be added to the Petition of Right, as was desired, then was it not true, but would make the Petition of Right *falso de se*, and wholly destructive to itself in all the

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parts of it; that it would proceed 'a bene di-'visis ad mala conjuncta:' for then the Petition of Right, as they resolved, would have this sense. Whereas in the Petition of Right it is said, That no aid, tax, taillage, or other charge whatsoever, may be imposed upon the people without their free consent in parliament; it would have this construction. It is true, it cannot be done by the king's ordinary power, but it may be done by that sovereign power wherewith the law hath entrusted his majesty for the protection, safety, and happiness of the people. So likewise for imprisonment, that they ought not to be imprisoned without due process of law. It is true ordinarily, but the king may imprison by his sovereign power, wherewith the law hath intrusted him for the protection, safety, and happiness of the people. So that, for that martial law, that the subjects lives ought not to be taken away, unless by due process of law. It is true ordinarily, but the king may do it by his sovereign power, wherewith the law hath intrusted him for the protection, safety, and happiness of the people. Whereby they conceived that it would not only make the Petition of Right to be wholly destructive of itself, but likewise this Petition of Right would leave the subjects in a far worse condition than it found them; for it would necessarily infer, that which is against the law, viz. That the king, by his sovereign power, when he pleased to declare that it was for the good of the people, might do all this.

Your lordships, at a conference of both houses, engaged on the part of the commons by serjeant Glanvile and sir Henry Martin, received satisfaction from these reasons, and consented to the leaving out this addition; and accordingly the Petition of Right passed, and is printed without it.

My lords, these were the things I was commanded to preseut unto your lordships; other things there were, as the sentence against bishop Mainwaring: but these weighed so much with the commons, as that they conceived they needed no more. My lords, These precedents of that parliament, and these opinions of the judges, the Ship-Writs, and the judgments in the Exchequer; they are like the two buckets of a well, if one go up the other must go down: 'non bene conveniunt.' My lords, we have not cited these precedents out of diffidence that your lordships had forgotten them, but because others have; or that we distrust your lordships justice, if you had forgotten them: for before these were your lordships concurred in opinion with your worthy ancestors, that first gave them. Their noble blood runs in your veins. It is now to confirm your own judgment as well as theirs; in your lordships breasts, there are the same magazines and fountains of honour and justice as were then; these judgments and proceedings were the actions of both houses; the danger by the violation is equal. The commons see nothing in the judges opinions or judgment, why they should recede from their former judgments; they hope the same from your lordships. Besides, my lords, that the case is now much varied from what it was then; not only in the matter, but as it concerns the honour and jurisdiction of this great judicatory, the parliament.

The breach of privileges in the members is tenderly resented, because that without this freedom they cannot advise and consult concerning the *ardua regni*. But when they have done all, to have their judgments and their acts of parl. overthrown by the judges afterwards, this makes parliaments to be nothing; this sets up the judges above the parliament, this puts us out of hope of redress; if they may overthrow the proceedings of that parliament of 3 Car. they may by the same reason overthrow the actions of this, and of all future parliaments.

My lords, this was not the practice of their predecessors, though but in private causes; if difficulty of law arose, they always consulted this oracle, and thence received their answer how to give judgment. Judgments in the highest court of Westminster-Hall, I mean in the King's-bench, where the proceedings are *coram rege*, are here reversable by writ of error. In causes of great and general concernment, they ever adjourned them hither, as things too high for them.—'Quia consulta patrum, qui leges 'juraque servat,' doth well; they have taken that in their hands they had not to do withal; and how they have handled the matter, your lordships have heard.

The judges, as is declared in the Parliament Roll of Rich. 2, are the executors of the statutes, and of the judgments and ordinances of parliament; they have here made themselves the executioners of them; they have endeavoured the destruction of the fundamentals of our laws and liberties. Holland in the Low-Countries lies under the sea, the superficies of the land is lower than the superficies of the sea: it is capital therefore for any man to cut the banks, because they defend the country. Besides our own, even foreign authors, as Commines, observe, that the statute De Tallagio, and other old laws, are the sea-walls and banks which keep the commons from the inundation of the prerogative. These pioneers, they have not only undermined these banks, but they have levelled them even with the ground. If one that was known to be *hostis patriæ* had done this, though the damage be the same, yet the guilt is less. But the *conservatores riparum*, the overseers intrusted with the defence of these banks, for them to destroy them, the breach of trust aggravates, nay, alters the nature of the offence. Breach of trust, though in a private person, and in the least things, is odious amongst all men; much more in a public person, and in things of great and public concernment, because great trust binds the party trusted to greatest care and fidelity. It is treason in the constable of Dover castle to deliver the keys to the known enemies of the kingdom; because that castle is the key of the kingdom; whereas if the house-keeper of a private person delivered possession to his ad-

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versary, it is a crime scarce punishable by law.

The judges under his majesty are the persons trusted with the laws; and in them, with the lives, liberties, and estates of the whole kingdom: this trust of all we have is primarily in his majesty, and from him delegated to his judges.—His majesty, at his coronation, is bound by his oath to execute justice to his people, according to the laws; thereby to assure the people of the faithful performance of this great trust. His majesty again, as he trusts the judges with the performance of this part of the oath, so doth he likewise exact another oath of them, for their due execution of justice to the people, according to the laws: hereby the judges stand entrusted with this part of his majesty's oath. If therefore the judges shall do wittingly against law, they do not only break their oaths, and therein the common faith and trust of the whole kingdom, but do as much as in them lies smear and blemish the sacred person of his majesty with the odious and hateful sin of perjury.

My lords, The heinousness of this offence is most legible in the severe punishments which former ages have inflicted upon those judges who have broken any part of their oaths wittingly, though in things not so dangerous to the subject as in this case in question. Sir Thomas Wayland, chief justice of the Common Pleas, Edw. 1, was attainted of felony for taking bribes, and his lands and goods forfeited, as appears in the Pleas of Parliament, 18 Edw. 1, and he was banished the kingdom as unworthy to live in that state, against which he had so much offended. Sir William Thorpe, chief justice of the King's-Bench, in Edw. 3's time, having of five persons received five several bribes, which in all amounted to 100*l.* was for this alone adjudged to be hanged, and all his lands and goods forfeited. The reason of this Judgment is entered in the roll, in these words; 'Quia prædict' Willielmus Thorpe, qui sacramentum domini regis erga populum suum habuit ad custodiendum, fregit malitiose, false et rebelliter, quantum in ipso fuit;' because that he, as much as in him lay, had broken the king's oath made unto the people, which the king had intrusted him withal.

There is this notable declaration in that judgment; that is, that this judgment was not to be drawn into example against any other officers who should break their oaths, but only against those 'qui prædictum sacramentum fecerunt et fregerunt, et habent leges Angliæ ad custodiendum;' that is, only to the judges oaths, who have the laws entrusted to them. This judgment was given 24 Ed. 3. The next year in the parliament 25 Ed. 3, it was debated in parliament, whether this judgment was legal; *et nullo contradicente*, it was declared to be just and according to the law; and that the same judgment may be given in time to come upon the like occasion. This case is in point, that it is death for any judge wittingly to break his oath, or any part of it. This oath of Thorpe is entered in the roll, and is the same *verbatim* with the judges oath in 18 Ed. 3, and the same which the judges now take.

Your lordships will give me leave to observe the differences between that and the case in question.

First, that of Thorpe was only a selling of the law by retail to those five persons; for he had only five several bribes of those five persons: the passage of the law to the rest of the subjects, for aught appears, was free and open.—But these Opinions are a conveyance of the law by wholesale, and that not to, but from the subject.

In that of Thorpe, as to those five persons, it was not an absolute denial of justice; it was not a damming up, but a streightening only of the channel. For whereas the judge ought *judicium reddere*, that is, the law being the birth-right and inheritance of the subject, the judge, when the parties in suit demand judgment, should *redare*, freely restore this right unto them; now he doth not *dare*, but *vendere*, with the hazard only of perverting justice: for the party that buys the judgment may have a good and honest cause. But these Opinions, besides that they have cost the subject very dear, dearer than any; nay, I think I may truly say, than all the unjust judgments that ever yet have been given: witness the many hundred thousand pounds which under colour of them have been levied upon the subject, amounting to 700,000*l.* and upwards in money paid unto the treasurer of the navy; besides what the subjects have been forced to pay to sheriffs, bailiffs, and others, which altogether, as is conceived, amounts not to much less than a million; besides the infinite vexation of the subjects by suits in law, binding them over to attendance at the council-board, taking of them from their necessary employments in making of assesses and collections, and imprisonment of their persons: I say, my lords, besides what is past, to make our miseries complete, they have as much as in them lies made them endless; for by these opinions they have put upon themselves and their successors an impossibility of ever doing us right again, and an incapacity upon us of demanding it so long as they continue.

My lords, In that sore famine in the land of Egypt, when the inhabitants were reduced to the next door to death, for there they say, 'Why should we die for bread?' First, they gave their money; next, their flocks and cattle; and last of all, their persons and their lands, for bread; and all became Pharaoh's. But by this *lex regia*, there is a transaction made, not only of our persons, but of our bread likewise, wherewith our persons should be sustained. That was for bread, this is of our bread. For, my lords, since these opinions (if we have any thing at all) we are not at all beholden to the law for it, but are wholly cast upon the mercy and goodness of the king.—Again, There the Egyptians themselves sold themselves and all they had to the king; if

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ours had been so done, if it had been done by our own free consent in parliament, we had the less cause to complain: but it was done against our wills, and by those who were trusted, and that upon oath, with the preservation of those things for us.

My lords, The laws are our forts and bulwarks of defence. If the captain of a castle, only through fear and cowardice, and not from any compliance with the enemy, surrender it; this is treason, as was adjudged in the parliament, 1 Ric. 2, in the two cases of Grymes and Weston, and in the case of the lord Gray, for surrendering of Berwick Castle to the Scots in Edw. 3d's time, though good defence had been made by him, and that he lost his eldest son in maintenance of the siege; and yet the loss of a castle only loseth not a kingdom, but the place and adjacent parts, without trouble to the whole. But by these opinions, there is a surrender made of all legal defence of propriety; that which hath been preached is now judged, that there is no *meum et tuum* between the king and the people, besides that which concerns our persons.

My lords, The law, it is the temple, the sanctuary whither the subject is to run for shelter and refuge. Hereby it is become 'templum sine numine,' as was the temple built by the Roman emperor, who, after he had built it, put no gods into it. We have the letter of the law still, but not the sense. We have the fabric of the temple still; but the gods, the 'dii tutelares,' are gone.

But, my lords, this is not all the case, that is, that the law now ceaseth to aid and defend us in our rights, for then possession alone were a good title, if there were no law to take it away; 'occupanti concederetur, et melior esset 'possidentis conditio.' But this, though too bad, is not the worst; for besides that which is privative in these opinions, there is somewhat positive: for now the law doth not only not defend us, but the law itself is made the instrument of taking all away. For whensoever his majesty or his successors shall be pleased to say, That the good and safety of the kingdom is concerned, and that the whole kingdom is in danger, then when and how the same is to be prevented, makes our persons and all we have liable to bare will and pleasure. By this means, the sanctuary is turned into a shambles: the forts are not slighted, that so they might neither do us good or hurt; but they are held against us by those who ought to have held them for us; the mouth of our own cannon is turned upon ourselves.

My lords, in these expressions there is no reflection upon his majesty: It is only that those judges would have forced upon the law an unnatural and contrary motion; his majesty's carriage in the business clears his justice.—The first Opinion of the judges under their hands was procured by my lord Finch's solicitation only, and by him brought to his majesty. These Opinions procured the letter from his majesty for the Opinions inrolled, wherein, as likewise in the case in the Exchequer, the judges were left free, as was acknowledged by two of the judges in the exchequer-chamber, who argued against those Opinions, with this protestation, that if there were any miscarriages in that business, it must fall wholly upon themselves; that the king was blameless.

My lords, we know his majesty's justice is the fairest, the richest diamond in his crown; the dust which these men would have blown and forced upon it, is fallen short; and with your lordships helping hands, it will, we hope, be cast upon their own faces, a fitter place for it than the other. My lords, the oaths of the judges, as they bind them to the due administration of justice to the subjects, according to the laws, so as they be of the king's council by their oaths, they are bound lawfully to counsel him; that is, when their opinions are demanded, they are to deliver them according to the law.

I shall therefore put your lordships in mind of the memorable proceedings against those judges who have broken this part of their oath, in that notable parliament held the eleventh of Richard the Second. In this parliament, judgment of high treason was given against 18 several persons,* and all (save one of them) of eminent rank; three privy counsellors; the archbishop of York, the duke of Ireland, the earl of Suffolk; the bishop of Exeter the king's confessor; five knights, some whereof had been servants to Edward the 3rd, and all, save one, servants to the then king; and some of them of noble descent; six judges, Lockton the king's serjeant at law, Blake of the king's counsel at law, and Uske, the under sheriff of Middlesex. Of these eighteen, eight were executed; that is, sir Robert Tresilian the chief justice, five knights, Blake of the king's counsel at law, and Uske the under sheriff. Three, that is, the archbishop of York, duke of Ireland, and earl of Suffolk, fled. The rest had their lives pardoned, but were banished; their lands and goods forfeited, and little pensions allowed them during their lives. It was made felony for any one to procure their pardons, and they to be dealt with as traitors, if they returned from their banishment: and of those 18 persons all save three were impeached by the commons.

The offences which procured these exemplary punishments, although their proceedings be long, and comprehended all that was done in this parliament, I'll briefly open them to your lordships. During the minority of that king, by ill counsel of some near his person there were miscarriages in government. In the tenth year of his reign, and the twentieth of his age, a parliament was holden: in that parliament, in aid of good government, and of due execution of the laws, a commission was awarded to 12 several peers, and others of greatest wisdom and fidelity. The commissioners had power in all things concerning the houshold, courts of justice, and the revenues; in a word, in all

* Vide No. 12 in this Collection.

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things concerning the good of the realm; with full power finally to determine and put in execution such determination for the honour of the king, the better governance of the peace and laws of the realm, and relief of the people.—This commission was to endure one year; at the year's end the king would be of full age.

My lords, the endeavouring to overthrow this commission issued by authority of parliament for the welfare of the realm, upon pretence that it trenched upon the royal power, tended to the disherison of the king, and derogation of the crown, together with the destruction of the commissioners who procured it, and put the same in execution, upon pretence that they and some others had in parliament forced the royal assent. My lords, the conspiring to overthrow this commission and the procurers of it, is the case in brief: for although there be divers other articles against many of them, yet this was the ground-work of all; and this singly and alone is declared in all the proceedings in parliament to be treason. Of these 18 persons condemned, 5 of them were plotters, viz. the archbishop, duke of Ireland, earl of Suffolk, Tresilian the chief justice, and sir Nicholas Brambre: these insinuated into the king, That this commission was in diminution of his kingly power, that the procurers of it had extorted his royal assent; and that this was treason: Thereupon Blake one of the king's counsel at law was advised withal, who declared his opinion, that it was treason: he was commanded to prepare an indictment of treason against the commissioners, and some of the procurers of it, who had been active therein.

The indictment was drawn by him, which is entered in the roll, and is to this effect: That they had traiterously conspired amongst themselves in the parliament, to make this commission by authority of parliament against the regality of the king, to his disherison, and derogation of the crown; that they compelled the king's consent, and that they confederated and bound themselves to maintain one another in so doing.—It was intended that they should be tried upon this indictment in Middlesex or in London. Uske the under-sheriff of Middlesex was acquainted with the business, who was to prepare things for the effecting of this design, some of the parties to be indicted not being peers: which he performing accordingly, was therefore executed.

The five plotters, that the king might the more confide in their counsels, (for so are the words of the record) and that under the colour of law they might cover their malice from the king and the kingdom, before the trial was to be had, they advise the king to demand the opinion of some of the judges, that is of the two chief justices, and chief baron, the judges of the Common Pleas, six in number, and of Locton the king's serjeant. Blake of the king's counsel at law was commanded to draw up these questions for the judges opinions, who did it accordingly. For the drawing up of these questions, and the indictment, Blake was condemned and executed.

The question being drawn into writing, the judges were sent for to Nottingham Castle; where, in the king's presence, they were commanded upon their allegiance to deliver their opinions.—1. The first question was, Whether the commission was in derogation of the crown? They answered, It was. 2. The second question was, Whether the persuading and urging the king's consent in parliament thereto was treason? They answered, That it was. Though there were some other questions asked, all concerning parliamentary proceedings, yet these were the main, and those for which they were condemned; as appears by the replication of the commons to the judges answer, and by the words of the judgment, viz. That they knew that this commission was awarded in parliament, that it was for the public good; that they knew of the traitorous intents to destroy the procurers of this commission; that they knew the law, and that it was not treason; and had delivered their opinions thereby under colour of law, to cover their treasonable intent: and therefore judgment of treason was given against them, and against Locton the king's serjeant at law, who had subscribed the opinions with the judges.—Sir Simon Burley, one of the five knights that were executed, was condemned only for conspiring the death of the procurers of this commission: and although there be other articles against the rest, yet this alone is adjudged treason in the several judgments against every one of the eighteen.

1. My lords, it is observable in all these judgments, that they are adjudged traitors, as well against the person of the king as against the commonwealth. 2. It is there declared upon great advice taken, that in treasons which concern the king and kingdom, they are not bound to proceed according to the rules of the common law and inferior courts, but according to the course of parliaments, so as may be for the common good. 3. Judgment was given in parliament, and execution awarded, and afterwards a bill of confirmation passed, in respect of their lands, to give them from a day past; and for declaration that this should be no precedent to inferior courts to adjudge the same cases treason, save only in parliament.

These judgments were not huddled up in haste, but they were given upon long and mature deliberation. These judgments were the whole work of that parliament; and the proceedings against the five plotters were begun the fourteenth of November, and the judgments were not given till the thirteenth of February following, which was a quarter of a year. And it is declared in the roll, that they spent a long time, and took great pains to examine the evidences, the better thereby to satisfy their own consciences and the world.

I insist the more upon this, to take away all blemish from these proceedings. It is true, my lords, these judgments were afterwards in the parliament of 21 Rich. 2, revoked and made

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void. But, my lords, that parliament of 21 Rich. 2, of revocation, was held by force, as it is declared in the Parliament Rolls of 1 Hen. 4, n. 21, 22, that it was held 'viris armatis, et 'sagittariis immensis.' The knights of parliament were not elected by the commons, 'prout 'mos exigit, sed per regiam voluntatem:' And so the lords, 'summoniri fecit rex dominos sibi 'adhærentes.'

My lords, by these precedents it doth appear, that this parliament of revocation was no free parliament, if at all it deserves the name of a parliament. But to put all out of doubt, in the parliament of 1 Hen. 4, n. 48, these judgments of revocation are declared to be [illegible], 'iniqua, 'et omni juri et rationi repugnantia,' erroneous, wicked, and contrary to all right and reason. In the parliament of 1 Hen. 4, in print, these attainders are confirmed: So that these judgments of attainder have the authority of two acts of parliament, both of them of force at this day.

Your lordships will give me leave to observe the differences and agreements between the offences of those and of the present judges, and as well in the way and manner of procurement, as in the matter of them. For the manner of procurement, those judges in Rich. 2's time were in the king's presence: and as it is in the Parliament Roll of 1 Hen. 4, n. 18, they were 'violenter attracti,' violently drawn to deliver their opinions, and that 'metu mortis 'et cruciatu corporis,' for the fear of death and tortures of their bodies: and at their trials severally they say, That in part violence had been offered to their persons, because they had differed in the delivery of their opinions. My lords, this was such a miscarriage in the judges, these circumstances considered as might 'cadere in virum fortem et constantem.' But, my lords, fear or cowardice is no plea for delivering up of the forts and bulwarks of the kingdom.

But in the present business there is none of all this; it came from within; there is no outward force. In those of Rich. 2, it was 'actus 'unicus,' once done at Nottingham castle: if the judges had been put to it the second time, perhaps the rest, as well as some of them, had repented, and would not have done it over again; for Belknape, the chief justice of the Common-Pleas, the same day declared his sorrow, and said, That now there remained nothing but a horse, a hurdle, and a halter; and Fulthorp, another of them, the next day declared his grief for what he had done. But here, after the opinion in November 1635, a year after, viz. 1636, they proceed 'a pessimo 'ad pejus pessimo;' for that was with additions: most of them declared their opinions in their circuits, and a year after confirmed it again by the judgment in the exchequer. Here it was done year after year in cold blood: One murderous blow, whereupon death follows, is felony; but to multiply wounds upon the dead body, and to come again in cool blood to do it, it shews the height of malice. In these two things they agree.

1. That which the judges did in Rich. 2's time, they did against their own knowledge; they knew the commission was done by act of parliament; so here these knew the Petition of Right damned the Commissioners of Loans, a stronger case than that; they subscribed many of them, knew that the Commission of Excise was damned in parliament; they knew the other proceedings in parliament, and if they had forgotten them, they were afterwards put in mind of them; they needed not to have consulted with books and journals of parliaments, saving only with their own memories.

2. They agree in this, That their opinions tended to the subversion of the laws and statutes of the kingdom: for in that of Rich. 2, the pretence was, the endeavouring to overthrow parliaments and parliamentary proceedings; the conspiracy of the death of the procurers was only an aggravation. It was not treason to conspire the death of a privy counsellor, or to kill a judge, unless he be upon the bench; and in that case it is treason, because of the malice, not of the person, but to the law: so that there the treason lay in this, not that they conspired barely against their persons, but with reference to their proceedings in parliament; and thereby to overthrow the acts of parliament, wherein these persons had been principal actors. But in this again they disagree; for in that case there was only a conspiracy; no death followed to the procurers of the commission, nor was the commission overthrown; all that was done was only this, That a warrant was directed to the lord mayor of London, for apprehending their persons to bring them to trial, which yet was not done. But here (after the opinions delivered) judgment was afterwards given by them in the exchequer, and execution awarded thereupon, for so much as concerns our property.

And likewise in the King's-Bench, where the judges after the Judgments in the Exchequer refused to hear any more debate of the matter; and so for the liberty of our persons, by keeping divers of the subjects in prison, term after term, for not paying Ship-money, and other things depending upon those opinions, when they had been brought before them upon their Habeas Corpus. In that of Rich. 2, it was for overthrowing but one act of parliament, which was likewise introductive of a new law; for the commission had no rise from the common law; for in truth it was derogatory to the crown: It had only the strength of the parliament to support it, which was sufficient; it was for the common good. But here the endeavour was at once, not to blow up one act of parliament, but all; and these not introductive, but declaratory of the common law; as was the Petition of Right, the statutes there mentioned, and the resolutions. That of Rich. 2, was but the blowing up of the upper deck; this of the common law, and the statutes too, and the old foundations, and the structures built upon them, all together. In that of Rich. 2, it was only to overthrow a temporary act of parliament,

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that was to continue no longer than one year: but this, to make an eternal devastation; for *(toties quoties)* to the world's end, as his majesty or his successors shall say that the kingdom is in danger, may these opinions be put in execution; and likewise they are enrolled in all the courts of Westminster-Hall, 'in perpe-'tuam rei memoriam.'

This sin against the Holy Ghost is therefore unpardonable, because it takes from the party repentance, the means of pardon. To put us therefore into a case of desperation, some of them have publicly, and upon the bench, declared, That this prerogative is so inherent in the crown, as that it cannot be taken away by act of parliament.—As they have put an impossibility upon themselves, so would they put an impossibility upon his majesty, your lordships, and the whole parliament, for ever righting us again.

My lords, 'contraria juxta se posita magis 'elucescunt.' I have presented your lordships, with the obliquity of the ill Judges in Rich. 2's time: give me leave to present your lordships with one example of a contrary nature; and that was in queen Elizabeth's time in the 29th year of her majesty's reign: She erects a new office in the Common-Pleas, for the making of Supersedeas in exigents that issued there; she grants it to Richard Cavendish, her servant, sends to have him admitted: but the judges delay the doing of it, for this reason, because the prothonotaries and philazers claimed the making of those writs. The queen sends a sharp letter, and commands them forthwith to admit him: yet the judges forbear. The queen sends a sharper letter, commanding them to shew the reasons of their contempt and disobedience to the then Lord Keeper and the earl of Leicester, no mean men in those days: the judges deliver their reasons why they had refused, that it was because others claimed the making of those writs.—The queen sends a fourth peremptory message for their admitting him, with this reason, That if the others were put out, they were rich and able men; and that her courts of justice were open, where they might demand their rights.—This was not to take away the right, but to put them to their action.—The Judges humbly returned this Answer, That the queen had taken her oath for the execution of justice according to the law; that they did not doubt, but that when her majesty was informed that it was against law, she would do what befitted her: for their parts, they had taken an oath to God, to her, and the commonwealth; and if they should do it without process of law before them, and only upon her command put the other out of possession, though the right remained to them, it were a breach of their oaths; and therefore if the fear of God were not sufficient, they told her the punishment that was inflicted upon their predecessors for breach of their oaths, (citing these of Thorpe in Rich. 2.'s time) that they might be sufficient warning to them. The queen hearing of these reasons was satisfied; and the Judges heard no more of the business.*—These Judges have had examples of both kinds before them; they might have chosen the good, and refused the bad.

My Lords, besides these judgments and opinions, the commons will in due time bring up these judges with their other judgments, 'cor-'pora cum causis;' for your lordships will easily conceive, that they who have done this, have done more: the principal of them, I mean my Lord Keeper, stands accused before your lordships of High Treason: he is not here: Justice goes 'pede lento, sed certo;' it will overtake him at the last.

The next step that is making after him are the Articles of his Impeachment, which, with your lordship's patience, are now ready to be opened and delivered to your lordships.

Mr. *Hide*† spake afterwards in the following manner:

My Lords; There cannot be a greater instance of a sick and languishing commonwealth than the business of this day. Good God! how have the guilty these late years been punished, when the Judges themselves have been such delinquents! 'Tis no marvel that an irregular, extravagant, arbitrary power, like a torrent, hath broke in upon us, when our banks and our bulwarks, the laws, were in the custody of such persons. Men who had lost their innocence could not preserve their courage; nor could we look that they who had so visibly undone us themselves, should have the virtue or credit to rescue us from the oppression of other men. It was said by one who always spoke excellently, that the twelve Judges were like the twelve lions under the throne of Solomon: 'Under the 'throne in obedience, but yet lions.' Your lordships shall this day hear of six, who (be they what they will be else) were no lions, who upon vulgar fears delivered up the precious forts they were trusted with, almost without assault; and in a tame easy trance of flattery and servitude, lost and forfeited (shamefully forfeited) that reputation, awe, and reverence, which the wisdom, courage, and gravity of their venerable predecessors had contracted and fastened to the places they now hold; and even rendered that study and profession, which in all ages hath been, and I hope now shall be, of an honourable estimation, so contemptible and vile, that had not this blessed day come, all men would have had that quarrel to the law itself, which Marcius had to the Greek tongue; who thought it a mockery to learn that language, the masters whereof lived in bondage under others. And I appeal to these unhappy gentlemen themselves, with what a strange negligence, scorn, and indignation, the faces of all men, even of the meanest, have been directed towards them,

* This remains under the hand of Anderson, the Lord Chief Justice, in his Reports, vol. 1, p. 152—158.

† Afterwards Earl of Clarendon, and Lord Chancellor of England.

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since (to call it no worse) that fatal declension of their understandings, in those judgments of which they stand here charged before your lordships.—But, my lords, the work of this day is the greatest instance of a growing and thriving commonwealth too; and is as the dawning of a fair and lasting day of happiness to this kingdom.

It is in your lordships power (and I am sure it is in your lordships will) to restore the dejected broken people of this island to their former joy and security, the successors of these men to their own privilege and veneration: 'Et 'sepultas prope leges revocare.'—So these Judges enter themselves, and harden their hearts by more particular trespasses upon the law; by impositions and taxes upon the merchants in trade; by burdens and pressures upon the gentry in knighthood; before they could arrive at that universal destruction of the king by Ship-Money, which promised reward and security for all their former services, by doing the work of a parliament to his majesty in supplies; and seemed to delude justice, in leaving none to judge them, by making the whole kingdom party to their oppression.—My lords, the commons assembled in parliament hope that your lordships will call these Judges speedily before you to answer these Articles laid to their charge, that the nation may be satisfied in your lordship's justice upon them, as their crimes demerit.

Then Mr. Pierpoint delivered in the following Articles against sir Robert Berkley, one of the Justices of the King's-Bench:

Articles of Impeachment of Sir Robert Berkley, knt. one of the Justices of the Court of King's-Bench, by the Commons in this present Parliament assembled, in their own name, and in the name of all the Commons of England, in maintenance of their Accusation, whereby he standeth charged with High Treason, and other great Misdemeanours.

Imprimis, That the said sir Robert Berkley, then being one of the justices of the said court of King's-Bench, hath traitorously and wickedly endeavoured to subvert the fundamental laws and established government of the realm of England; and instead thereof, to introduce an arbitrary and tyrannical government against law, which he hath declared by traitorous and wicked words, opinions, judgments, practices, and actions appearing in the several Articles ensuing.

2. Whereas by the statute made in the 25th year of the reign of Henry 8, prices of victuals are appointed to be rated in such manner, as in the said statute is declared; but it is manifest by the said statute, Corn is none of the victuals thereby intended: nevertheless some ill-affected persons endeavouring to bring a charge upon the subjects contrary to law, did surmise, that the prices of Corn might be rated, and set according to the direction of that statute; and thereupon great gain might be raised to his majesty by licences and dispensations for selling Corn at other prices: and a command from his majesty being procured to the Judges, and sent to them by William Noy, esq. his majesty's then Attorney General, to deliver their Opinions touching the question, Whether Corn was such victuals as was intended to have the price rated within the said statute: In answer to which, the said sir Robert Berkley then being one of his majesty's justices of the court of King's-Bench, in furtherance of the said unlawful charge endeavoured to be imposed as aforesaid, the 30th day of November, in the 8th year of his now majesty's reign, did deliver his Opinion, That Corn was such victual as was intended to have the price rated within the said statute; which said Opinion was contrary to law, and to the plain sense and meaning of the said statute, and contrary to his own knowledge, and was given and delivered by him, with a purpose and intention that the said unlawful charge might be imposed upon the subject.

3. That an information being preferred in the court of Star-Chamber by the said William Noy, his majesty's then Attorney-General, against John Overman, and fifteen other soapmakers, defendants, charging them with several pretended offences, contrary to divers letters patents and proclamations touching the making and uttering Soap and using the trade of soapmakers, and other offences in the said information mentioned; whereunto the defendants did plead, and demur as to part, and answer to other parts of the said information: and the said plea and demurrer being over-ruled, for that the particulars therein insisted upon would appear more full after answer and proof; therefore the defendants were ordered to answer without prejudice, and were to be admitted to such exceptions to the said informations, and advantages of the matter of the plea and demurrer upon the hearing as shall be material; and accordingly the defendants did put in their Answers, and set forth several acts of parliament, letters patents, charters, customs, and acts of common-council of the city of London, and other matters materially conducing to their defence; and, in conclusion, pleaded Not Guilty. The said sir Robert Berkley then being one of the justices of the court of King's-Bench, upon the 30th day of March, in the eighth year of his majesty's reign, upon an order of reference to him and others, by the said court of Star-Chamber, to consider of the impertinency of the said Answers, did certify the said court of Star-Chamber, That the whole Answers, excepting the four words and ten last lines, should be expunged; leaving thereby no more substance of the said Answers than the plea of Not Guilty. And after, upon a reference to him and others, by order of the said court, of the impertinency of the Interrogatories, and Depositions of witnesses taken on the defendants part in the same case, sir Robert Berkley, upon the second day of May, in the eighth year of his now majesty's reign, certified, That nine-and-thirty of the said Interrogatories, and the

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Depositions upon them taken, should be suppressed, with the Answers, except as aforesaid, and Depositions: although the same did contain the said defendants most material defence, yet were they expunged and suppressed, according to the said certificates; both which said certificates were contrary to law and justice, and contrary to his the said Robert Berkley's own knowledge, and contrary to the said former order, whereby the advantages were saved to the defendants, as aforesaid: and by reason thereof the said John Overman and the said other fifteen defendants were sentenced in the said court of Star-Chamber to be committed prisoners to the Fleet, and disabled from using their trade of soap-makers; and one of them fined in 1500*l.*, two of them in 1000*l.* a-piece, four of them in 1000 marks a-piece; which fines were estreated into the Exchequer without any mitigation: and the said defendants, according to the said Sentence, were imprisoned, and deprived of their trade and livelihood, tending to the utter ruin of the said defendants, and to the overthrow of free trade, and contrary to the liberty of the subject.

4. That he the said sir Robert Berkley, then being one of the justices of the King's-Bench, and having taken an oath for the due administration of justice, according to the laws and statutes of this realm, to his majesty's liege people, on or about the last of December subscribed an Opinion, *in hæc verba*: 'I am of 'opinion, that as where the benefit doth more 'particularly redound to the good of the ports 'or maritime parts, (as in case of piracy or de-'predations upon the seas) there the charge hath 'been, and may be lawfully imposed upon them, 'according to precedents of former times; so 'where the safety and good of the kingdom in 'general is concerned, and the whole kingdom 'in danger, (of which his majesty is the only 'judge) there the charge of the defence ought to 'be borne by all the realm in general: this I 'hold agreeable both to law and reason.'

5. That he the said sir Robert Berkley, then being one of the justices of the court of King's-Bench, and duly sworn as aforesaid, in Feb. 1636 subscribed an extra-judicial Opinion, in answer to Questions in a letter from his majesty, *in hæc verba*:

'C. R. When the good and safety of the 'kingdom in general is concerned, and the 'whole kingdom in danger; whether may not 'the king, by writ under the great seal of Eng-'land, command all the subjects of this kingdom 'at their charge to provide and furnish such 'number of ships with men, victuals and muni-'tion, and for such time as he shall think fit, 'for the defence and safeguard of the kingdom 'from such danger and peril? and by law com-'pel the doing thereof in case of refusal or re-'fractoriness? And whether in such case, is 'not the king sole judge both of the danger, 'and when and how the same is to be prevent-'ed and avoided?' C. R.

'May it please your most excellent ma-'jesty, we have, according to your majesty's 'command, severally every man by himself, 'and all of us together, taken into serious 'consideration the case and question signed by 'your majesty, and inclosed in your royal let-'ter: and we are of opinion, that when the 'good and safety of the kingdom in general is 'concerned, and the whole kingdom in danger, 'your majesty may, by writ under the great 'seal of England, command all your subjects 'of this your kingdom, at their charge to provide 'and furnish such number of ships with men, 'victuals, and munition, and for such time as 'your majesty shall think fit for the defence and 'safeguard of the kingdom from such danger 'and peril; and that by law your majesty may 'compel the doing thereof in case of refusal 'and refractoriness: and we are also of opi-'nion, that in such case your majesty is the sole 'judge, both of danger, and when and how the 'same is to be prevented and avoided. John 'Bramston, John Finch, Humphry Davenport, 'John Denham, Richard Hutton, William 'Jones, George Crooke, Thomas Trevor, 'George Vernon, Robert Berkley, Francis 'Crawley, Richard Weston.'

6. That he the said sir Robert Berkley, then being one of the justices of the court of King's-Bench, and duly sworn as aforesaid, did on the deliver his opinion in the Exchequer-Chamber against John Hampden, esq. in the case of Ship-Money. That he the said John Hampden, upon the matter and substance of the case, was chargeable with the money then in question; a copy of which proceeding and judgment the commons of this present parliament have delivered to your lordships.

7. That he the said sir Robert Berkley, then being one of the justices of the court of King's-Bench, and one of the justices of Assize for the county of York, did, at the assizes held at York in Lent 1636, deliver his charge to the grand-jury, 'That it was a lawful and inseparable 'flower of the crown for the king to command, 'not only the maritime counties, but also those 'that were inland, to find ships for the defence 'of the kingdom.' And then likewise falsly and maliciously affirmed, That it was not his single Judgment, but the Judgment of all his brethren, witnessed by their subscriptions. And then also said, That there was a rumour, that some of his brethren that had subscribed were of a contrary judgment; but it was a base and unworthy thing, for any to give his hand contrary to his heart; and then wished for his own part, that his hand might rot from his arm, that was guilty of any such crime; when as he knew that Mr. Justice Hutton and Mr. Justice Crooke, who had subscribed, were of a contrary opinion, and was present when they were persuaded to subscribe; and did subscribe for conformity, only because the major number of the judges had subscribed. And he the said sir Robert Berkley then also said, That in some cases the Judges were above an act of parliament; which said false malicious words were uttered, as aforesaid, with intent and purpose to countenance and maintain the said unjust

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opinions, and to terrify his majesty's subjects that should refuse to pay Ship-Money, or seek any remedy by law against the said unjust and illegal taxation.

8. That whereas Richard Chambers merchant, having commenced a suit for trespass, and false imprisonment, against sir Edw. Bromfield knt. for imprisoning him the said Chambers for refusing to pay Ship-Money, in the time that the said sir E. Bromfield was lord mayor of the city of London; in which suit the said sir E. Bromfield did make a special justification: the said sir R. Berkley, then being one of the justices of the court of King's-bench, in Trinity term last, then sitting on the Bench in the said court, upon debate of the said case between the said Chambers and sir E. Bromfield, said openly in the court, 'That there 'was a rule of law, and a rule of government;' and that 'many things which might not be 'done by the rule of law, might be done by 'the rule of government:' and would not suffer the point of legality of Ship-Money to be argued by Chambers's counsel. All which opinions, declarations, words, and speeches, contained in the 3rd, 4th, 5th, 6th, 7th and 8th, articles, are destructive to the fundamental laws of this realm, the subjects right of property, and contrary to former resolutions in parliament, and to the Petition of Right; which resolution in parliament, and Petition of Right, were well known to him, and resolved and enacted when he was the king's serjeant at law, and attendant in the lords house of parliament.

9. That the said sir R. Berkley, then being one of the Judges of the court of King's-bench, and being in commission of the peace, and duly sworn to execute the office of a justice of the peace in the county of Hertford, on or about the 7th of January 1638, at which time the general sessions of the peace for the said county were there holden; the said sir R. Berkley, then and there sitting on the bench, did revile and threaten the grand-jury returned to serve at the said sessions, for presenting the removal of the communion table in All-Saints Church in Hertford aforesaid, out of the place where it anciently and usually stood, and setting it altar-ways, against the laws of this realm in that case made and provided, as an innovation in matters concerning the church; the said grand-jury having delivered to them in charge at the said sessions, by Mr. Serj. Atkins, a justice of the peace for the said county of Hertford, that by the oath they had taken, they were bound to present all innovations concerning church-matters. And he the said sir Robert Berkley compelled the foreman of the jury to tell him who gave him any such information; and thereby knowing it to be one Henry Brown, one of the said grand-jury, he asked the said Brown, how he durst meddle with church-matters? Who affirming, that in the said charge from Mr. serjeant Atkins the said jury was charged so to do, he the said sir Robert Berkley told the said Brown, he should therefore find sureties for his good behaviour; and that he the said sir R. Berkley would set a great fine on his head, to make him an example to others: and thereupon the said Brown offered sufficient bail; but he the said sir R. Berkley being incensed against him, refused the said bail, and committed the said Brown to prison, where he lay in irons till the next morning; and used to the said Brown, and the rest of the jurors, many other reviling and terrifying speeches; and said, he knew no law for the said presentment; and told the said Brown, that he had sinned in the said presentment: and he compelled the said grand-jurors to say, they were sorry for what they had done in that presentment, and did bid them to trample the said presentment under their feet; and caused Brown to tear the said presentment in his sight. And he the said sir R. Berkley, when as John Houland and Ralph Pemberton, late mayors of St. Albans, came to desire his opinion on several indictments against John Brown, parson of St. Albans, and Anthony Smith, vicar of St. Peter's in St. Albans, at the quarter-sessions held at the said town of St. Albans, on the 21th of June 1639, for the removal of the Communion Table out of the usual place, and not administering the Sacrament according to law in that case provided; he the said sir R. Berkley then told them, that such an indictment was before him at Hertford, and that he quashed the same, and imprisoned the promoters: by which threatening and reviling speeches, unjust actions and declarations, he so terrified the jurors in those parts, that they durst not present any innovations in church-matters, to their great grief, and trouble of their consciences.

And whereas several indictments were preferred against Matthew Brook, parson of Yarmouth, by John Ingram and John Carter, for refusing several times to administer the Sacrament of the Lord's Supper to them without any lawful cause, at the assizes held at Norwich in the year 1633; he the said sir R. Berkley, then being one of the judges of the assize, proceeded then to the trial on the said indictments; where the matter in issue being, that the said Brook refused to administer the said Sacrament, because the said Ingram and Carter, would not receive tickets with their sir-names before their Christian-names; which was a course never used amongst them, but by the said Brook: and the said sir R. Berkley did then much discourage the said Ingram's counsel, and over-rule the cause for matter of law, so as the jury never went from the bar, but there found for the said Brook: and the said sir R. Berkley bound the said Ingram to the good behaviour for the prosecuting the said indictments, and ordered him to pay costs to the said Brook for wrongfully indicting him. And whereas the said Carter, not expecting the trial at the same assizes he preferred his indictment, was then absent; whereupon the said sir R. Berkley did cause to be entered upon the said indictment a Vacat, 'quia non

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'sufficiens in lege,' and ordered an attachment against the said Carter: which said proceedings against the said Ingram and Carter, by the said sir R. Berkley, were contrary to law and justice, and to his own knowledge.

10. That the said sir R. Berkley, being one of the justices of the court of King's-bench, and duly sworn as aforesaid, in Trinity Term 1637, deferred to discharge or bail Alexander Jennings prisoner in the Fleet, (brought by Habeas Corpus to the bar of the said court; the return of his commitment being, that he was committed by two several warrants from the lords of the council, dated the 5th of November 1636, the first being only read in court, expressing no cause; the other, for not paying messengers fees,) until he should bring a certificate that he had paid his assessment for Ship-Money in the county of Bucks, but remitted him. And in Michaelmas term after, the said Jennings being brought by another Habeas Corpus before him as aforesaid, and the same returned; yet he, the said sir R. Berkley, refused to discharge or bail him, but remitted him. And in Easter-term, after several rules were given for his majesty's counsel to shew cause why the said Jennings should not be bailed, a fourth rule was made for the said Jennings to let his majesty's attorney-general have notice thereof, and notice was given accordingly: and the said Jennings by another Habeas Corpus being brought to the bar in Trinity term after, and the same return made, with this addition, of a new commitment of the 4th of May, suggesting the said Jennings had used divers scandalous words in derogation and disparagement of his majesty's government: He the said Jennings after several rules, in the end of the said Trinity term, was again remitted to prison. And he the said sir R. Berkley did, on the 5th of June last, defer to grant his majesty's writs of Habeas Corpus for William Pargiter and Samuel Danvers esquires, prisoners in the Gate-House, and in the Fleet: and afterwards having granted the said writ of Habeas Corpus, the said Pargiter and Danvers were on the 18th of June last brought to the bar of the said court, where the returns of their commitments were several warrants from the lords of the council not expressing any cause: yet he the said sir Robert Berkley, then sitting in the said court, deferred to bail the said Pargiter and Danvers, and the 18th of June last made a rule for a new return to be received, which was returned the 25th of June last *in hæc verba*:

'Whereas his majesty finding that his subjects of Scotland have in rebellious and hostile 'manner assembled themselves together, and 'intend not only to shake off their obedience 'unto his majesty, but also as enemies to invade and infest this his kingdom of England, 'to the danger of his royal person, &c.

'For prevention whereof his majesty hath by 'the advice of his council-board, given special 'commandment to all the Lord-Lieutenants 'of the counties of this realm, to assemble the 'militia at the places appointed for their rendezvous in their several and respective counties, there to be conducted and drawn together 'into a body for this service. And whereas his 'majesty, according to the laws and statutes of 'this realm, and the constant custom of his predecessors kings and queens of this realm, hath 'power for the defence of this kingdom and resisting the force of the enemies thereof, to 'grant forth commissions under his great seal 'to such fit persons as he shall make choice of, 'to array and arm the subjects of this kingdom, 'and to compel those who are of able bodies 'and able estates, to arm themselves; and 'such as should not be of able bodies, but of 'ability in estate, to assess them according to 'their estates to contribute towards the charge 'of arraying others, being able of body and not 'able in estate to arm themselves; and such 'persons as should be contrarient to commit 'to prison, there to remain until the king should 'take further order therein: And whereas the 'earl of Exeter, by virtue of his majesty's commission to him directed for the arraying and 'arming of a certain number of persons in the 'county of Northampton, hath assessed William 'Pargiter, being a man unfit of body for that service, but being of estate and ability to contribute amongst others to pay the sum of 5*s.* towards the arraying and arming of others of able 'bodies, and wanting ability to array and arm 'themselves: And whereas we have received 'information from the said earl, that the said 'William Pargiter hath not only in a wilful disobedient manner refused to pay the said money 'assessed upon him towards so important a 'service, to the disturbance and hindrance of 'the necessary defence of this kingdom; but 'also by his ill example hath misled many 'others; and, as we have just cause to believe, 'hath practised to seduce others from that 'ready obedience which they owe, and would 'otherwise have yielded to his majesty's just 'command for the public defence of his person 'and kingdom, which we purpose with all convenient speed to enquire further of and examine: These are therefore to will and require 'you to take into your custody the persons of 'the said William Pargiter and Samuel Danvers, and them safely to keep prisoners till 'further order from this board, or until by due 'course of law they shall be delivered.'

Yet he the said sir R. Berkley being desired to bail the said Pargiter and Danvers, remitted them, where they remained prisoners till the 9th of November last, or thereabouts; although the said Jennings, Pargiter and Danvers, on all and every the said returns, were clearly bailable by law; and the counsel of the said Jennings, Pargiter and Danvers, offered in court very sufficient bail. And he the said sir R. Berkley, being one of the justices of the court of King's-Bench, denied to grant his majesty's writs of Habeas Corpus to very many others his majesty's subjects; and when he had granted the said writs of Habeas Corpus to very many others his majesty's subjects, and on the return no cause appeared, or such only as was

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clearly bailed by law; yet he remanded them, where they remained prisoners very long: which said deferring to grant the said writs of Habeas Corpus, and refusals and delays to discharge prisoners, or to suffer them to be bailed, contained in this article, are destructive to the fundamental laws of this realm, and contrary to former resolutions in parliament, and to the Petition of Right; which said resolutions and Petition of Right were well known to him the said sir R. Berkley, and were resolved on and enacted when he was the king's serjeant at law, and attendant in the lords house of parliament.

11. That whereas there was a cause depending in the Court-Christian at Norwich, between Samuel Booty clerk and Collard for 2*s.* in the pound, for tithes for rents and houses in Norwich, and the said Collard moved by his counsel in the court of King's-Bench for a prohibition to stay proceedings in the Court-Christian at Norwich, and delivered into the said court of King's-Bench his suggestions, that the said cause in the said Court-Christian was only for tithes for rents of houses in Norwich, which was determinable by the common-law only; yet he the said sir R. Berkley, being one of the justices of the said court of King's-Bench, and sitting in the said court, deferred to grant a prohibition to the said Court-Christian in the said cause, although the counsel did move in the said court many several times, and several terms, for a prohibition. And he the said sir R. Berkley deferred to grant his majesty's writ of prohibition to several other courts, on the motions of divers others of his majesty's subjects, where the same by the laws of this realm ought to have been granted, contrary to the laws of this realm and his own knowledge.

All which words, opinions, and actions, were so spoken and done by him the said sir R. Berkley traitorously and wickedly, to alienate the hearts of his majesty's liege people from his majesty, and to set a division betwixt them, and to subvert the fundamental laws and established government of his majesty's realm of England: For which they do impeach him the said sir R. Berkley, one of the Justices of the court of King's-Bench, of High-Treason against our sovereign lord the king, his crown and dignity, and of the misdemeanors above-mentioned.—And the said Commons by protestation, saving to themselves only the liberty of exhibiting at any time hereafter any other Accusation or Impeachment against the said sir R. Berkley, and also of replying to the Answer that he the said sir R. Berkley shall make to the said Articles, or any of them, or of offering proof of the premises, or any other Impeachments or Accusations that shall be exhibited by them, as the case shall, according to the course of parliaments, require; do pray that the said sir R. Berkley, one of the justices of the court of King's-Bench, may be put to answer to all and every the premises; and that such proceedings, examinations, trials, judgments and executions may be upon every of them had and used, as is agreeable to law and justice.

At the presenting these Articles, Mr. Pierpoint delivered himself as follows:

My lords; I am commanded to present your lordships these Articles, with which the knights, citizens, and burgesses of the Commons house of parliament, in their own name and in the name of all the commons of England, impeach sir R. Berkley, kt. one of the justices of his majesty's court of King's-Bench, in maintenance of their Accusation of High-Treason, and other great misdemeanors; the Articles they desire may be read.

Whereupon the Articles were read by Mr. Francis Newport, a member of the house of commons.

Then Mr. *Pierpoint* proceeded and said,

The high-treason is in the first article, in his endeavours to subvert the fundamental laws of this realm, and to introduce an arbitrary and tyrannical government, which hath been lately adjudged treason in the cause of the earl of Strafford. The other articles prove the first by his opinions, certificates, judgments, by his denials of the benefit of our laws, which have been read by your lordships. No fundamental law to the subjects is left; our goods, our lands, our bodies, the peace of a good conscience, are by him given up to arbitrary tyrannical government. Nothing hath been omitted to make a judge know the laws, to make him just, or fright him from being evil: We have inns of court peculiar to that study, judges from thence only chosen; seldom any but what have been 20 years there; honours and revenues are given to judges, encouragement to do well; this judge had these: judges are sworn according to law to serve the king, and his people; according to law to counsel the king; and for not so doing, to be at his will for body, lands, and goods. This judge took that oath; the laws (the judges study) impose the greatest punishment upon unjust judges; they shew that these punishments have been inflicted, and more could not be done to persuade or fright a judge.

His offences shew in him great ambition, yet he was most timorous of displeasing the great in power; he did not only forbear doing what he was sworn to do, but was most active against our laws, and in opposing and punishing any that did maintain them. To have only received bribes, (though they blind the eyes, and though the desire to get money increaseth with age) that heinous crime in a judge had been, in comparison with his offences, a tolerable vice; for from such a judge justice is also to be had for money. Ambition is violent, and ruins whilst covetousness is making a bargain.

The words of his Opinion and Judgment are for the king's power. It is pleasing to the nature of man, that others should obey his will; and well-framed dispositions of princes may easily be persuaded their power is unlimited, when they are also put in mind, that therefore they have more cause to do well, and for doing

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well are more renowned: for in the most oppressive designs, (which we have suffered under) the pretences of his majesty have ever been the good of his subjects; his is the sin, that is to judge by the laws, and knows the laws are to the contrary, yet puts and confirms such thoughts in his prince. He that incites another to arbitrary government, when his self-ends are thereby compassed, hates him for taking that power he persuaded him unto. The Writs, those monsters of necessity, to provide Ships to avoid imminent danger, that could not stay 40 days for the calling of a parliament, were therefore to go out in September, to have ships ready in March. This hath been adjudged by your lordships to be destructive to the fundamental laws of this realm, and to the subjects right of property and liberty, &c. that I shall say but this concerning them; that this judge published them to be inseparable flowers of the crown; and that we have lived to see for five years together imminent danger, and thus to be prevented.

This judge did advise to such a government, as future kings here might exercise the highest tyranny, and the subjects want the benefit of restraints, known to the most slavish eastern nations; where, if their prince do unjustly, he hath hatred for it, and the dangers that follow that. This judge will have that hatred to go to our good laws: No such bondage, as when the laws of freedom are mis-interpreted by judges to make men slaves.—What can be considered of in a judge of law, to give his opinion and advice to his prince, how the laws (the mutual covenants of kings and subjects) are to be broken, but that his intentions are to have his prince do ill, by making his evil servants to study, and to be pleased with their wicked designs; because they see means to put them in execution, by making them to persuade their prince, because in imminent danger his subjects goods are at his will, that there is such danger when there is not, and that they have only some by-ends of their own?

This judge will have the law to be what to him seems reason: the reason limited to him to judge of, is what the common law saith is so, what a statute hath so enacted. For him to judge this or that is law, else a mischief shall follow, because the law in such a thing is imperfect, therefore he will make a law to supply it; or because that the law written in such particulars is against his reason, therefore his reasons to be law; then must follow, as often as a judge's reason changes, or judges change, our laws change also. Our liberties are in our laws, which a subject may read, or hear read; this is his, this he may do and be safe: and that thus the judge ought to give judgment, and then he is free. The excessive growth of courts of reason and conscience came from great and cunning persons; and though not the most sudden, yet the most dangerous, and sure ways to eat out our laws, our liberties. Unlimited power must be in some to make and repeal laws, to fit the dispositions of times and persons: Nature placeth this in common consent only; and where all cannot conveniently meet, instructeth them to give their consents to some they know or believe so well of, as to be bound to what they agree on. His majesty, your lordships, and the commons, are thus met in parliament; and so long as we are often reduced to this main foundation, our king and we shall prosper.

This judge will not allow us our knowledge, or any reason; he will have our minds, our souls, slaves. A grand-jury-man gave his fellows true information; they present an innovation in church, are threatened and reviled for it; he that told this truth is charged, I shall use this judge's own words, to sin in that, and that he made others forswear themselves; this judge sent him to the common gaol, where he is laid in irons; and all this, because he and they durst meddle with church matters. He is forced to tear the presentment in pieces in open court. Our laws provide for the peace of our consciences, many acts of parliament are for it, and the trust by those acts set to juries: this judge well knew all this: your lordships have heard what he did to the jury at Hertford; he would have us know no more divinity than to obey what the chief of the clergy directed, no more law than what he said was so. Judges in former times, except only such as were examples of punishment, as of injustice in cases of great and public concernment, forbear proceedings till the next parliament. This necessitated the calling of parliaments. This judge had as many such causes before him, as ever any had; yet he never desired the resolution of parliament in any one; for the ways he went, the necessity was never to have a parliament; he would pull up that root of our safeties and liberties, which whilst ye enjoy, the malice and injustice of all other courts and persons can never ruin; and when near to ruin, (as most near of late) this only sure remedy will help us; nothing can ruin a parliament, but itself. The evils which we have suffered under, they were committed by the judges: or by them ought to have been, and might have been prevented.

This judge assisted in causing the miseries we suffered in the Star-Chamber, and at the council-table: he denied the known rights, which he ought to have granted us, to stop our grievances in the ecclesiastical courts: he was the causer of our sufferings in other courts. The best lovers of their laws and liberties, the most honest, suffer most by an unjust judge; they most oppose his vices; dishonest persons find such a judge to fit their purposes; the judge finds them for his; the bond of iniquity confederates them. He that will do no wrong, will suffer none which he can help: The man that knows himself born free, will do his utmost to live so, and to leave freedom to his posterity: were he in slavery, when by outward gesture thought to be most delighted, were his mind then known, there would be found vexation, and his busy thoughts employed to redeem himself and his posterity from thraldom. But to say,

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could this judge intend to make himself and his own posterity slaves? What he did was through error of judgment only. No, my lords; what his aims and endeavours were, is apparent. To consider man in the general, we shall find in every age he will be a slave to some few, that many may be slaves to him, he looks to himself only; this he would do, or forbear doing, to be great, to be rich, had he children or kindred, or had he none. This highly unjust judge, by continuing sins, maintained his actions to preserve himself; he knows, to be found guilty in one of his offences, the penalty of the law for it, therefore covers the offences committed with inventing and acting other. For a judge to be unjust, more hurts the public than any other; he is not suspected. What a judge doth, is looked on as a thing that ought to be done. The most pernicious great man, that by cunning hath got to himself the heart and tongue of his prince, his ill acts have died with him, if not taken up by others, and then they walk in darkness; no man will justify what he doth, by saying such a favourite did it: But the unjust judgments of this judge were given in noon-day, were done in the face of the whole kingdom, in the hearing of such as might carry the news to all parts of the realm, and was therefore done; his unjust judgments were our records. We have seen wicked great men most craftily politic; they hated our laws, yet not meeting with active judges moulded to their purposes, they and their acts have died, the realm flourished; but of late, others less politic, meeting with most unjust judges, every way as ill as they could wish them to be, then did the kingdom faint, under the load of its misery did long struggle: Now it is rising, I assure myself your lordships will assist to take off the burden.

If the designs of some would not have such a man to be at liberty, a warrant from some lords of the council would soon have laid him in prison, and given no cause; had he moved this judge to be discharged or bailed, he could have obtained neither. If their ways would not have endured that man to live, a judge reviling the prisoner, and the counsel that moved for his discharge or bail, joined with the hate of some great man, might soon have moved a gaoler for unwholesome rooms and lodging, and ill diet for his prisoner, and they may soon take life away. Offenders in prisons are looked after to be safe only; such as are brought in by power against law, are abused. Had a great man desired the estates of others, the breach of a proclamation might readily have been charged against them in Star-Chamber; but they, it may be, could have answered and cleared themselves, and proved their answer by testimonies: had they been referred to this judge, he would have expunged the one, suppressed the other. Then followed fines to the value of their estates, or more; then imprisonment of course, till they paid such fines; your lordships have heard what this judge did to the Soap-boilers. The countryman followed the plough, and to his thinking he was assured of his right, property, and liberty, which gave him ability to do it. He believed his neighbour, his landlord, his king, could not take his goods from him without his consent. He knew the usual payments by law; and in extraordinary causes thought to have that care to chuse such for the knights of his shire, or for his burgesses, as might be mindful of the cause of payment, and of his estate. This countryman hath heard the opinions and judgment of this judge, hath seen his goods taken from him without his, or his knights of the shire, or burgesses consent or advice. These have made him, his wife and children, to join in tears, to wish they had never been born; they have made them think on many ways to keep safe that estate which was yet left them, have made them desire to sell all their goods, and hide the money: but then he remembers this judge, how that he shall be carried to prison, and remain there, if he pay not what it pleases others to assess him. Then they think idle persons (the drones and moths of the commonwealth) to be a wise people, whilst the countrymen expect, and can think of nothing but being beggars. Where public and enormous offences have been committed, eminent and notorious punishments must be: such will make your lordships proceedings highly esteemed; else there will be so many offenders, and none without danger can be punished.

This judge subverting our laws, took away the hearts of many; he subscribes for the king's power, but so as he put him on taking his subjects goods; and of all other, such ways be most dangerous: for we know his majesty is not the last that suffers, and Is not the king worth many thousands? The place of this judge was to have given and preserved to the king the hearts of his subjects; the due execution of the laws had done this; and when such notice is taken of a prince, none will conspire against him, who cannot feign to themselves safety before or after any fact committed; foreign enemies will not invade his kingdoms. Thus hath his majesty now got our hearts, and will for ever have them. This judge is to answer for what his majesty, and for what we have suffered.

I am commanded by the house of commons to desire of your lordships, that the proceedings against sir Robert Berkley, kt. one of the justices of his majesty's court of King's-bench, may be put in as speedy a way of trial, as the course of parliament will allow.

At the same time Mr. *Hollis* made a Speech in behalf of sir Randolph Crew, formerly Lord Chief Justice of the King's-bench, but removed for giving his Opinion against Loan-Money.

My lords; these gentlemen have presented unto your lordships the sad object of justice perverted, liberty oppressed, of judgment turned into wormwood, the laws, which should be the bars of our gates to protect us, keep us, and all that is ours in safety, made weak and impo-

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tent, to betray us unto the hands of violence; instead of props to support us, become broken reeds to deceive us, and run into our sides when we lean upon them; even so many snares to entrap and entangle us. And all this by the perfidiousness of those who are intrusted with our laws, who call themselves the guardians and the interpreters of the law; but by their accursed glosses have confounded the text, and made it speak another language, and another sense, than ever our ancestors the lawmakers intended.

Our ancestors made laws to keep themselves, and their posterity after them, in the possession of their estates: these judges could make the law itself rob us, and despoil us of our estates. Were we invaded or prosecuted at any time for pretended crimes, or rather because we were free from crimes? And did we put ourselves upon a legal defence, and shelter ourselves under the buckler of the law, use those lawful weapons which justice, and truth, and the common right of the subject did put into our hands, would this avail us? No: these judges would make the law wrest our weapons from us, disarm us, take away all our defence, expunge our answers, even bind us hand and foot, and so expose us naked and bound to the mercilessness of our oppressors. Were our persons forced, and imprisoned by an act of power, would the law relieve us when we appealed unto it? No; it would join hands with violence, and add bitterness to our sorrow. These judges would not hear us when we did cry; no importunity could get a Habeas Corpus: nay, our cries would displease them, and they would beat us for crying; and over-do the unjust judge in the gospel, with whom yet importunity could prevail.

My lords, the commons of England finding themselves in this lamentable condition, by the wickedness of these judges, it is no wonder that we complain of them. It is no wonder if the knights, citizens, and burgesses assembled in parliament, have sent up some of their members to stand upon mount Ebal to curse these judges; to denounce a curse upon them who have removed our land-marks, have taken away the bound-stones of the propriety of the subject, have left us no *meum et tuum;* but he that had most might had most right, and the law was sure to be of his side.—It hath been the part of these gentlemen who have spoken before me, to pray for justice upon those men who would not do justice to others. My lords, I come upon another errand, and yet for justice too; for there is justice upon mount Gerizim, as well as upon mount Ebal. It is a great point of justice to give a blessing, a reward where it is due, as punishment where punishment is due: for reward and punishment, *premium et pœna*, be the two legs that justice walks on; and reward is her right leg, the more noble and the most glorious supporture of that sacred and divine body, that which God himself, the foundation of justice, doth more delight in.—'Tardior ad pœnas Deus est, ad præmia velox:' Punishment is as good as physic in the consequence, reward as wholesome and nourishing food in the essence, the one we do, because we must do it as necessary; the other, because we love to do it, as being pleasing and delightful.

Your lordships, then, I doubt not, will as willingly join with the commons in doing good to a good judge, as in publishing of the bad.—My lords, We honour them, and reckon them martyrs for the commonwealth, who suffer any thing by defending the common right of the subject, when they will not part with their own goods contrary to law; when indeed their private interest goes along with it, or rather before it; and the public concernment seems to come but in a second place. Such were those many whom these judges have oppressed; yet these men we magnify, and judge worthy of praise and reward. But what honour, then, is he worthy of, who merely for the public hath suffered himself to be divested and deprived of his particular? such a judge as would lose his place, rather than to do that which his conscience told him was prejudicial to the commonwealth? Is not he worthy of double honour?

And this did that worthy reverend judge, the Chief Judge of England at that time, sir Randal Crew. Because he would not, by subscribing, countenance the Loan in the first year of the king, contrary to his oath and conscience, he drew upon himself the displeasure of some great persons about his majesty, who put on that project, which was afterwards condemned by the Petition of Right, in the parliament of *tertio*, as unjust and unlawful; and by that means he lost his place of Chief Justice of the King's-bench; and hath these 14 years, by keeping his innocency, lost the profit of that office, which upon a just calculation, in so long a revolution of time, amounts to 26,000*l.* or thereabout. He kept his innocency when others let theirs go; when himself and the commonwealth were alike deserted: which raises his merit to a higher pitch. For to be honest when every body else is honest, when honesty is in fashion, and is trump, as I may say, is nothing so meritorious; but to stand alone in the breach, to own honesty when others dare not do it, cannot be sufficiently applauded, nor sufficiently rewarded. And that did this good old man do; in a time of general desertion he preserved himself pure and untainted—'Temporibusque malis ausus is esse bonis.'

My lords, the house of commons are therefore suitors unto your lordships, to join with them in the representation of this good man's case unto his majesty, and humbly to beseech his majesty to be so good and gracious unto him, as to give him such honour (the quality of this case considered) as may be a noble mark of sovereign grace and favour, to remain to him and his posterity; and may be in some measure a proportionable compensation for the great loss he hath with so much patience and resolution sustained.

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After the Conference the Lords came to the following Resolutions:

Die Mercur. 20 die Jan. 1640.

It was resolved by the lords upon the question, nem. con. 1. That the Ship-Writs, the extra-judicial Opinions of the Judges therein, both first and last, and the Judgment given in Mr. Hampden's Case, and the proceedings thereupon in the Exchequer-Chamber, are all illegal, and contrary to the laws and statutes of this realm, contrary to the rights and properties of the subjects of this realm, contrary to former judgments in parliaments, and contrary to the Petition of Right.

2. That the extra-judicial Opinions enrolled in the Exchequer-Chamber, and in other Courts concerning Ship-Money, and all the proceedings thereupon, are illegal in part and in whole, and contrary to the laws and statutes of this realm, and contrary to the rights and properties of the subjects of this realm, and contrary to former judgments in parliaments, and contrary to the Petition of Right.

Die Veneris, 26 die Februarii, 1640.

Upon the report of the right honourable the lords committees appointed to consider of the way of vacating of the Judgment in the Exchequer concerning Ship-Money, it was ordered by the Lords spiritual and temporal in the high court of parliament assembled, That the lord keeper or the master of the rolls, the two lord chief justices, and the lord chief baron, and likewise the chief clerk of the Star-chamber, shall bring into the upper house of parliament the record in the Exchequer of the Judgment in Mr. Hampden's Case concerning Ship-Money; and also the several rolls in each several court of King's-Bench, Common-Pleas, Exchequer, Star-Chamber, and Chancery, wherein the Judges extra-judicial Opinions in the cases made touching Ship-Money be entered; and that a Vacat shall be made in the upper house of parliament of the said several records: and likewise the Judgment of parliament touching the illegality of the said Judgments in the Exchequer, and the proceedings thereupon; and touching the illegality of the extra-judicial Opinions of the Judges in the said several courts concerning Ship-Money, be annexed and apostiled unto the same. And that a copy of the Judgment of the parliament concerning the illegality of the said Judgment in the Exchequer, and the said extra-judicial Opinions of the said Judges concerning Ship-Money, be delivered to the several Judges of Assize; and that they be required to publish the same at the Assizes in each several county within their circuits, and to take care that the same be entered and enrolled by the several clerks of Assizes: and if any entry be made by any Custos Rotulorum, or clerk of Assize, of the said Judgment in the Exchequer, or of the said extra-judicial Opinions of the Judges, that several Vacats be made thereof, 'per judicium in parliamento:' and that an act of parliament be prepared against the said Judgment and extra-judicial Opinions, and against the proceedings touching Ship-Money.

Memorandum quod vicesimo septimo die Febr. 1640 Annoque regni regis domini nostri Caroli Angliæ decimo sexto;

Vacatur istud recordum et judicium inde habitum per considerationem et judicium dominorum spiritual. et temporal. in curia parliam. et irrotulamentum ejusdem cancellatur.

Memorand' quod vicesimo septimo die Febr. præd.

Istud irrotul. et omnia et singula in eodem contenta et expressa vacantur per judicium dominorum spiritualium et temporalium in curia parliament.

And that all the rolls be rased cross with a pen, and subscribed with the Clerk of the Parliament's hand. All which was accordingly done in open court.

After this it was Resolved upon the question, nem. con. That the Resolutions of the Judges touching the Shipping-Money, and the Judgment given against Mr. Hampden in the Exchequer, and all the proceedings thereupon, are against the Great Charter, and therefore void in law.

That Vacats and cancellations shall be made of the Resolutions of the Judges touching the Shipping-Money; and of the enrolments thereof in the several courts, and of the warrants for Ship-Writs, and proceedings therein; and the Judgment given against Mr. Hampden, and proceedings thereupon; and that entries be made of those Vacats upon the several rolls, according to the form read in the house.

The same session an Act of Parliament passed for that purpose, viz. That the charge imposed upon the subject for providing and furnishing of ships, commonly called Ship-Money, and the extra-judicial Opinions of the justices and barons, and the writs, and every of them, and the agreement or opinion of the greater part of the justices and barons, and the Judgment given against John Hampden, esq. for the payment of Ship-Money, were and are contrary to, and against the laws and statutes of the realm, the right of property, the liberty of the subjects, former resolutions of parliament, and the Petition of Right made in the third year of his majesty that now is.

That all and every the particulars prayed and desired in the Petition of Right, shall from henceforth be put in execution, and shall be firmly and strictly holden and observed, as in the same Petition they are prayed and expressed; and that all and every the records and remembrances of all and every the said Judgments against the said John Hampden, and all and every the proceedings whatsoever, upon or by colour of any of the said writs, called Ship-Writs, and all and every the dependants on every of them, shall be adjudged to all intents, constructions and purposes, to be utterly void; and that all and every the said Judg-

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ment, inrolment, entries, proceedings, and dependants of what kind soever shall be vacated and cancelled, in such manner and form as records use to be that are vacated.

Afterwards Articles were exhibited against the other Judges. Those against Mr. Justice Crawley were delivered by Mr. *Waller*, July 6, 1641, who spoke as follows.

My Lords; I am commanded by the house of commons to present you with these Articles against Mr. Justice Crawley, which when your lordships shall have been pleased to hear read, I shall take leave, according to custom, to say something of what I have collected from the sense of that house, concerning the crimes therein contained.

Then the Charge was read, containing his extra judicial Opinions subscribed, and Judgment given for Ship-Money: and after a declaration in his Charge at an Assize, That Ship-Money was so inherent a right in the crown, that it would not be in the power of a parliament to take it away.

My Lords; Not only my wants, but my affections, render me less fit for this employment; for though it has not been my happiness to have the law a part of my breeding, there is no man honours that profession more, or has a greater reverence towards the grave judges, the oracles thereof. Out of parliament, all our courts of justice are governed or directed by them; and when a parliament is called, if your lordships were not assisted by them, and the house of commons by other gentlemen of that robe, experience tells us, it might run a hazard of being styled *Parliamentum indoctorum*. But as all professions are obnoxious to the malice of the professors, and by them most easily betrayed; so, my lords, these articles have told you, how these brothers of the coif are become *fratres in malo;* how these sons of the law have torn out the bowels of their mother: but the judge, whose charge you last heard, in one expression of his, excels no less his fellows, than they have done the worst of their predecessors, in this conspiracy against the commonwealth. Of the judgment for Ship-Money, and those extra-judicial opinions preceding the same, (wherein they are jointly concerned) you have already: how unjust and pernicious a proceeding that was, in so public a cause, has been sufficiently expressed to your lordships: but this man adding despair to our misery, tells us from the bench, That Ship-Money was a right so inherent in the crown, that it would not be in the power of any act of parliament to take it away. Herein, my lords, he did not only give as deep a wound to the commonwealth as any of the rest, but dipped his dart in such a poison, that, so far as in him lay, it might never receive a cure. As by those abortive opinions, subscribing to the subversion of our property, before he heard what could be said for it, he prevented his own; so by this declaration of his, he endeavours to prevent the judgment of your lordships too, and to confine the power of a parliament, the only place where this mischief might be redressed. Sure he is more wise and learned, than to believe himself in this opinion, or not to know how ridiculous it would appear to a parliament, and how dangerous to himself: and therefore, no doubt, but by saying no parliament could abolish this judgment, his meaning was, That this judgment had abolished parliaments.

This imposition of Ship-Money springing from a pretended necessity, was it not enough that it was now grown annual, but he must entail it upon the state for ever; making necessity inherent to the crown, and slavery to the subject? Necessity, which, dissolving all law, is so much more prejudicial to his majesty than to any of us, by how much the law has invested the royal state with a greater power and ample fortune: For so undoubted a truth it has ever been, that kings as well as subjects are involved in the confusion which necessity produces, that the heathen thought their gods also obliged by the same: 'Pareamus necessitati, quam nec 'homines nec dii superant.' This judge then having in his charge at the assize declared the dissolution of the law, by this supposed necessity; with what conscience could he, at the same assize, proceed to condemn and punish men, unless, perhaps, he meant the law was still in force for our destruction, and not for our preservation? that it should have power to kill, and none to protect us? A thing no less horrid, than if the sun should burn without lighting us, or the earth serve only to bury, and not to feed and nourish us. But, my lords, to demonstrate that it was a suppositious, imposed necessity, and such as they could remove when they pleased; at the last convention in parliament, a price was set upon it, for twelve subsidies you may reverse this sentence. It may be said, that so much money would have removed the present necessity; for twelve subsidies you shall never suffer necessity again, you shall for ever abolish that judgment. Here this mystery is revealed, this vizor of necessity is pulled off; and now it appears, that this parliament of judges hath very frankly and bountifully presented his majesty with twelve subsidies, to be levyed on your lordships and the commons. Certainly there is no privilege, which more properly belongs to us, than to open the purse of a subject; and yet these judges, who are neither capable of sitting amongst us in the house of commons, nor with your lordships otherwise than your assistants, have not only assumed to themselves the privilege of parliament, but presumed at once to make a present to the crown of all that either your lordships or the commons of England do or shall hereafter possess.

And because this man has had the boldness to put the power of parliament in balance with the opinion of the judges, I shall intreat your lordships to observe, by way of comparison, the solemn and safe proceeding of the one, with the precipitate dispatch of the other. In parliament (as your lordships know well) no new law can pass, or old be abrogated, till it ha

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been thrice read with your lordships, thrice in the commons house, then it receives the royal assent; so that it is like gold seven times purified: Whereas these judges, by this one resolution of theirs, would persuade his majesty, that by naming necessity, he might at once dissolve (at least suspend) the Great Charter, thirty-two times confirmed by his royal progenitors, the Petition of Right, and all other laws provided for the maintenance of the right and property of the subject. A strange force, my lords, in the sound of this word necessity, that like a charm it should silence the laws, while we are despoiled of all we have; for that but a part of our goods was taken, was owing to the grace and goodness of the king: for so much as concerns these judges, we have no more left than they perhaps may deserve to have, when your lordships shall have passed judgment upon them for this neglect of their oaths, and betraying that public trust, which, for the conservation of our laws, was reposed in them.

Now, for the cruelty and unmercifulness of this judgment, you may please to remember, that in the old law they are forbid to seethe a kid in his mother's milk; of which the received interpretation is, That we should not use that to the destruction of any creature, which was intended for its preservation. Now, my lords, God and nature have given us the sea, as our best guard against our enemies; and our ships, as our greatest glory above other nations: And how barbarously would these men have let in the sea upon us at once, to wash away our liberties; and to overwhelm, if not our land, all the property we have therein, making the supply of our navy a pretence for the ruin of our nation! For observe, I beseech you, the fruit and consequence of this judgment, how this money has prospered, how contrary an effect it has had to the end for which they pretended to take it. On every county a ship is annually imposed; and who would not expect, but our seas by this time should be covered by the number of our ships? Alas! my lords, the daily complaints of the decay of our navy tell us, how ill Ship-Money has maintained the sovereignty of the sea; and by the many petitions which we receive from the wives of those miserable captives at Algiers (being between four and five thousand of our countrymen) it does too evidently appear, that to make us slaves at home is not the way to keep us from being made slaves abroad. So far has this judgment been from relieving the present, or preventing the future necessity, that as it changed our real property into a shadow of a property, so of a feigned it is made a real necessity.

A little before the approach of the Gauls to Rome, while the Romans had yet no apprehension of that danger, there was heard a voice in the air, louder than ordinary, The Gauls are come; which cry, after they had sacked the city and besieged the capitol, was held so ominous, that Livy * relates it as a prodigy. This anticipation of necessity seems to have been no less ominous to us: These Judges, like ill-boding birds, have called necessity upon the state, in a time which, I dare say, they thought themselves in greatest security. But if it seem superstitious to take this as an omen, sure I am we may look on it as a cause of the unfeigned necessity we now suffer: For what regret and discontent had this Judgment bred among us? And as when the noise and tumult in a private house grows so loud as to be heard in the streets, it calls in the next dwellers, either kindly to appease, or to make their own use of domestic strife; so in all likelihood, our known discontentments at home have been a concurrent cause to invite our neighbours to visit us, so much to the expence and trouble of both these kingdoms.

And here, my Lords, I cannot but take notice of the most sad effect of this Oppression, the ill influence it has had upon the antient reputation and valour of the English nation: And no wonder; for if it be true, that oppression makes a wise man mad, it may well suspend the courage of the valiant. The same happened to the Romans, when, for renown in arms, they most excelled the rest of the world; the story is but short. It was in the time of the Decemviri (and I think the chief troublers of our state may make up that number.) The Decemviri, my lords, had subverted the Laws, suspended the Courts of Justice, and (which was the greatest Grievance both to the nobility and people) had, for some time, omitted to assemble the Senate, which was their Parliament: This, says the Historian, did not only deject the Romans, and make them despair of their liberty, but caused them to be less valued by their neighbours. The Sabines take the advantage, and invade them; and now the Decemviri are forced to call a long-desired Senate, whereof the people were so glad, that 'Hostibus belloque gra-'tiam habuerunt:' This Assembly breaks up in discontent, nevertheless the war proceeds; Forces are raised, led by some of the Decemviri; and with the Sabines they meet in the field. I know your lordships expect the event: My Author's words of his countrymen are these: 'Ne-'quid ductu aut auspicio decemvirorum prospere 'gereretur, vinci se patiebantur?' they chose rather to suffer a present diminution of their honour, than by victory to confirm the tyranny of their new masters. At their return from their unfortunate Expedition, after some distempers and expostulations of the people, another Senate, that is, a second parliament, is called; and there the Decemviri are questioned, deprived of their authority, imprisoned, banished, and some lose their lives: And soon after this vindication of their Liberties, the Romans, by their better success, made it appear to the world, that liberty and courage dwell always in the same breast, and are never to be divorced. No doubt, my lords, but your justice shall have the like effect upon this dispirited people. It is not the restitution of our antient laws alone, but the restoration of our antient courage,

* Lib. 5. c. 32.

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which is expected from your lordships. I need not say any thing to move your just indignation, that this man should so cheaply give away that which your noble ancestors, with so much courage and industry, had so long maintained. You have often been told how careful they were, though with the hazard of their lives and fortunes, to derive those Rights and Liberties as entire to posterity as they received them from their fathers; what they did with labour, you may do with ease; what they did with danger, you may do securely. The foundation of our laws is not shaken with the engine of War; they are only blasted with the breath of these men, and by your breath they may be restored.

What Judgment your predecessors have given, and what punishments their predecessors have suffered for offences of this nature, your lordships have already been so well informed, I shall not trouble you with a repetition of those precedents. Only, my lords, something I shall take leave to observe of the person with whose charge I have presented you, that you may the less doubt of the wilfulness of this offence.—His education in the Inns of Court, his constant practice as a Counsellor, and experience as a Judge, considered with the mischief he has done, makes it appear that this progress of his through the law has been like that of a diligent spy through a country into which he meant to conduct an enemy.

To let you see he did not offend for company, there is one crime so peculiar to himself, and of such malignity, that it makes him at once uncapable of your lordships favour, and his own subsistence incompatible with the right and property of the Subject. For if you leave him in a capacity of interpreting the laws; has he not declared his Opinion, That your Votes and Resolutions against Ship-Money are void, and that it is not in the power of parliament to abolish that Judgment? To him, my lords, that has thus played with the power of parliament, we may well apply what was once said to a goat browsing on a vine:

> 'Rode, caper, vitem, tamen hinc cum stabis ad aras,
> 'In tua quod fundi cornua possit, erit.'

He has cropt and infringed the Privileges of a banished parliament; but now it is returned, he may find it has power enough to make a sacrifice of him, to the better establishment of our laws: and in truth, what other satisfaction can he make his injured country, than to confirm, by his example, those Rights and Liberties which he had ruined by his opinion? For the Proofs, my lords, they are so manifest, that they will give you little trouble in the disquisition; his crimes are already upon record; the delinquent and the witness is the same; having from several seats of judicature proclaimed himself an enemy to our laws and nation, 'ex ore 'suo judicabitur.' To which purpose I am commanded by the knights, citizens, and burgesses of the house of commons, to desire your lordships, that a speedy proceeding may be had against Mr. Justice Crawley, as the course of parliament will permit.

The following is a Latin Copy of the Writ given at p. 846.:

REX *versus* JOHANNEM HAMPDEN, in the Case of SHIP-MONEY.

Trin' 13 Car' 1, in Scacc'.

Memorand', quod brev' domini regis nunc sub sigillo hujus Scaccar' per concess' baron' hic emanavit in hæc verba:

ss. CAROLUS Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ rex, fidei defensor, &c. Vic' Bucks salutem. Cum diversæ et separal' denar' summæ in schedul' huic brevi annex' spec', virtute brevis nostri sub magno sigillo nostro Angliæ geren' dat' quarto die Augusti, anno regni nostri undecimo, assessat' et onerat' fuer' super separal' person' in ead' schedul' nominat', in et versus provision' navis pro guerra, una cum apparat' et al' eid' pertin', in eod' brevi particular' mentionat'; quibus quid' separal' denar' summis sic assessat' et onerat', et non solut' et satisfact' existen', per breve nostrum de certiorar' geren' dat' nono die Martii, anno regni nostri duodecimo, sub magno sigillo nostro' præd' emanat', nomina earund' separal' person' una cum separal' denar' summis super ipsos onerat', in cur' Cancellar' nostræ certificat' fuer'. Ac per breve nostrum de Mittimus sub eodem sigillo, geren' dat' quinto die instant' mensis Maii in Scaccar' nostr' miss' fuer' pro ulterior' process' super inde habend', prout per tenorem prædicti brevis geren' dat' quarto die Augusti, anno regni nostri undecimo, ac per prædict' breve de Certiorar' et certificat' super inde fact' in dictum Scaccar' nostrum miss', et ibid' de record' in custodia Rememorat' nostri remanen' plenius apparet, tibi præcipimus, quod non omitt' propter aliqu' libertat' quin ea ingr', et per probos et legales homines de bal' tua scir' fac' præfat' separal' person' in dict' schedul' nominat' et spec', quod sint coram Baron' de Scaccar' nostro apud West' in octab' sanctæ Trinit' proxim' futur, ad ostend' et proponend', siquid pro se habeant, vel dicere sciant, quare ipsi de præd' separal' denar' summis super ipsos modo et forma prædict' assessat', et non solut', in schedul' il' spec', onerari et inde satisfacere non deb' et ad ulterius faciend' et recipiend' in præmissis, quod cur' nostra tunc ibidem duxerit ordinand' et habeas ibi tunc hoc breve, et nomina eor' per quos eis sciri feceris. Teste Humfr. Davenport' mil, apud Westm', vicesimo secundo die Maii, anno regni nostri decimo tertio. Per rotulum.

Memorandum de eodem anno regis in recordor' rotulo termini Paschæ, tenor schedul' præd' in brevi prædict' mentionat', quoad Johannem Hampden, sequitur in hæc verba: *ss.* Schedul' de nominibus certar' personar' in com' Bucks, et cert' denar' summar' super ipsos assessat' et onerat' in et versus provision' navis de guerra, una cum apparat et al' eid' pertin', virtute cujusd' brevis sub magno sigillo Angliæ, geren' dat' quarto die Augusti, anno regni do-

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mini reg' nunc Caroli undecimo, et in cur' Cancellar' dom' regis, virtute brevis de Certiorar' sub sigillo præd' eman', geren' dat' nono die Martii, anno regni sui duodecimo, certificat' esse insolut', ac per breve de Mittimus sub eodem sigillo in Scaccar' dict' dom' regis nunc unssis pro ultérior' process' super inde faciend', prout per tenor' prædict' brevis geren' dat' quarto die Augusti, anno regni dicti domini regis nunc undecimo suprædict', ac per breve de Certiorar', et certificat' superinde fact' in dictum Scacca' nostr' miss', et ibidem de record' in custod' Rememorat' dom' regis reman' plenius apparet.

Stoake Mandivile, *ss.* Johann' Hampden esq; Ad quem diem Anthonius Chester baronet', vic' com' prædict', quoad præfat' Johannem Hampden retorn', quod per Nicolaum Aris, Robertum Alexander, Richardum Harrison, et Will'um Heyborne, probos et legales homines de ball' sua, sciri fecit, præfat' Johann' Hampden, inter al', quod sit coram baron' infra script' ad diem et locum infra content', ad ostendend' et proponend' si quid pro se habeat, vel dicere sciat, quare ipse de prædict' summa super ipsum assessat', et non solvit', in schedul' prædict' spec', onerari et inde satisfacere non debeat, prout ulterius sibi præcipitur: Et modo, scilicet a die sanctæ Trinitatis in tres septiman' venit hic præd' Johannes Hampden, in schedul' præd' nominat', in propria persona sua, et petit audit' brevis de Sciri Facias præd', retorn' ejusdem, ac præd' schedul' eid' annexat', et ei leguntur; petit etiam audit' præd' brevis, geren' dat' quarto die Augusti, anno regni dicti domini regis nunc Caroli undecimo, in brevi de Sciri Facias mentionat', et ei legitur in hæc verba:

ss. Carolus Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ rex, fidei defensor, &c. vic' com' nostri Bucks, ball' et burgens' burgi et paroch' de Buckingham, majori, ball' et burgens' burgi de Chipping-Wiccombe, alias Wiccombe, ac probis hominibus in eisdem burgis et paroch', et membris eorund', et in villis de Agmondesham, Wendover, et Marlow magna, ac in omnibus aliis burgis, villat', hamlet' et al' locis in dicto com' Bucks, salutem. Quia dat' est nobis intelligi, quod prædones quid', pirati, et mar' grassatores, tam nominis Christiani hostes Mahumetani, quam alii congregati, naves et bona ac mercim' non solum subditor' nostr', verum etiam suditor' amicor' nostr' in mari, quod per gent' Anglican' ab olim defend' consuevit, nefarie diripientes et spoliantes, ad libitum suum deportavere, homines in eisdem in captivitate miserrima mancipantes: Cumque ipsos conspicimus navigium indies præparantes ad mercatores nostros ulterius molestand', et ad regnum gravand', nisi citius remedium apponatur, eorumque conatui virilius obvietur: Consideratis etiam periculis, quæ undique his guerrinis temporibus imminent, ita quod nobis et subditis nostris, defension' maris et regni omni festinatione, qua poterimus, accelerare convenit: Nos volentes defensioni regni, tuitioni maris, securitati subditor' nostr', salva conductione navium et merchandizar' ad regnum nostrum Angliæ venien', et de eod' regno ad partes exteras transeun', auxiliante Deo, providere; maxime cumque nos et progenitores nostri reges Angliæ domini maris præd' semper hactenus extiter', et plurimum nos tæderet, si honor iste regius nostris temporibus depereat, aut in aliquo minuatur; cumque onus istud defensionis, quod omnetangat, per omnes debeat supportari, prout per legem et consuetudinem regni Angliæ fieri consuevit, vobis præfat' viceconiti, ball' burgens', majori, probis hominibus, et omnibus aliis quibuscunq; supra mentionat' in burgis, villis, villat' hamlet' et locis suprædict', eorumque membris, in fide et ligeantia, quibus nobis tenemini, et sicut nos et honorem nostrum diligitis, necnon sub forisfactur' omnium quæ nobis forisfacere poteritis, firmiter injungend' mandamus, quod unam navem de guerra, portagii quadringint' et quinquagint' dolior', cum hominibus tam magistris peritis, quam marinar' valentibus et expertis cent' et octogint' ad minus, ac etiam tormentis tam majoribus quam minoribus, pulvere tormentario, ac hastis et teliis, aliisque armaturis necessar' pro guerra sufficien', et cum duplici eskippamento, necnon cum victualibus usque ad primum diem Martii jam proxime sequent', ad tot homines competen', et abinde in vigint' et sex septiman' ad custag' vestra, tam in victualibus, quam in hominum salariis, et al' ad guer' necessar' per tempus illud, super defensionem maris in obsequio nostro in comitiva custodis maris (cui custod' maris ante præd' primum diem Martii committemus) et prout ipse ex parte nostra dictaverit moratur', parari, et ad portum de Portsmouth citra dictum primum diem Martii duci faciatis, ita quod sint ibid' eod' die ad ultimum, ad proficiend' exinde cum navibus nostris, et navibus alior' fidelium subditor' nostr', pro tuitione maris, defensione nostrum et nostrorum, repulsioneque et debellatione quorumcunq; mercatores nostros, et alios subditos fideles prædict' in dominia nostra ex causa mercaturæ se diversantes, vel abinde ad propria declinantes super mare gravare seu molestare satagentium. Assignavimus autem vos vic' com' nostr' Bucks, ball' et major' burgor' et paroch' prædict', aut aliquos duos vel plures vestrum, quorum te præfat' vic' com' nostri Bucks unum esse volumus, infra triginț' dies post receptionem hujus brevis, ad assidend' quantum de custag' prædict' super præd' burgos de Buckingham et Chipping-Wiccombe, alias Wiccombe, cum membris eorund', separatim poni aut assideri debeat. Et si hujusmodi assessament' infra prædict' triginta dies per vos duos, vel plures vestrum fieri non contigerint, tunc assignavimus te præfat' vic' com' nostri Bucks ad assessamen' hujusmodi super prædict' burgos et paroch', et membr' eorund', faciend' prout rationabiliter vides faciend'; et volumes, quod de toto facto tu præfat' vic' Bucks, sub sigillo tuo prædict' majorem et ballivos reddas certiores. Assignavimus etiam te præfat' ball' burgi et paroch' de Buckingham, ad assidend' omnes homines in eodem burgo et paroch', et membris ejusd', et

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terr' tenentes, in eisdem navem vel partem navis prædict' non habentes, vel in eadem non deservientes, ad contribuend' expensis circa provision' præmissor' necessar'; et super prædict' burgum et paroch', cum membris ejusd' (sicut præfertur) assidend' et ponend', viz. quemlibet eor' juxta statum suum et facultates suas et portiones suas ipsis assessat' per districtiones, aliosve modos debitos levand' et collectores in hac parte nominand' et constituend', et omnes eos, quos rebelles et contrarios inveneris in præmissis carcere mancipand', in eodem moratur' quousque pro eod' deliberatione ulterius duxerimus ordinand'. Assignavimus etiam te præfat' major' burgi de Chipping-Wiccombe, alias Wiccombe, ad assidend' omnes homines in eod' burgo et membris ejusdum, et ter' tenentes, in eisd' navem vel partem navis præd' non habentes, vel in eadem non deservientes, ad contribuend' expensis circa provision' præmissor' necessar'; et super prædict' burg', cum membris ejusd' (sicut præfertur) assidend' et ponend', viz. quemlibet eorum juxta statum suum et facultates suas, et portiones super ipsos assess' per districtiones, aliosve modos debitos levand', et collectores in hac parte nominand' et constituend' et omnes eos, quos rebelles et contrarios inveneris in præmissis in carcere mancipand', in eod' moratur', quousque pro eor' deliberatione ulterius duxerimus ordinand'. Et ulterius assignavimus te præfat' vicecomitem com' nostr' Bucks ad assidend' omnes homines in præd' villis de Agmondesham, Wendover, et Marlow magna, et in membris eorund', et in omnibus aliis villis, villat', burgis, hamlet', et aliis locis in prædict' com' Bucks, et terr' tenentes in eisdem, navem vel partem navis præd' non habentes, vel in eadem non deservientes, ad contribuend' expensis circa provisionem præmissor' necessar', et super prædict' villas, villat', burgos, hamlet' et locos, cum membris eorund' (sicut præfertur) assidend' et ponend', viz. quemlibet eor' juxta statum suum, et facultates suas, et portiones super ipsos assessat' per districtiones, aliosve modos debitos levand' et collectores in hac parte nominand' et constituend', et omnes quos rebelles et contrarios inveneris in præmissis carcere mancipand', in eod' moratur', quousque pro eor' deliberatione ulterius duxerimus ordinand'. Et ulterius vobis mandamus, quod circa præmissa diligenter intendatis, et ea faciatis, et exequamini cum effectu sub periculo incumbente. Nolumus autem quod colore prædict' mandat' nostr', plus de eisd', hominibus levari faciatis, quam ad præmissor' sufficiet expensas necessar', aut quod quisquam, qui pecuniam de contributionibus ad prædict' custag' faciend' levaverit, eam, vel partem inde aliquam penes se detineat, vel ad al' usus quovis quæsito colore appropriare præsumat, volentes, quod si plus quam sufficiat collect' fuerit, hoc inter solventes pro rata portionis ipsis contingen' exsolvatur. Teste me ipso apud Westm' quarto die Augusti, anno regni nostri undecimo. Petit etiam audit' prædict' brevis geren' dat' nono die Martii, anno regni dicti domini regis xii, in prædict' brevi de sciri facias mentionat', et ei similiter legitur.

Carolus Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ rex, fidei defensor, &c. vic' com' nostri Bucks, qui fuer' inter quartum diem Augusti anno regni nostri undecimo, et primum diem Martii tunc proxime sequent,' ball' burg' et paroch' de Buckingham, et major et ball' burg' de Chipping-Wiccombe, alias Wiccombe, in dicto com' Bucks, qui fuer' inter tempus prædict', salutem. Per breve nostrum sub magno sigillo nostro Angliæ confect' geren' dat' prædict' quarto die Augusti, anno undecimo supradict' pro defensione regni, tuitione maris, securitate subditor' nostr', ac salva conductione navium et merchandizarum ad regn' nostr' Angliæ venien', et de eodem ad partes exteras transeun', vic' com' nostri Bucks, ball' burgi et paroch' de Buckingham, necnon Burgens' ejusd' burgi, major' et ball' de Chipping-Wiccombe, alias Wiccombe, necnon burgens' ejusd' burgi, et probis hominibus in eisdem burgis et paroch' et membris eorund' et in villis de Agmondesham, Wendover, et Marlow magna, ac in omnibus aliis villis, burgis, villat,' hamlet', et aliis locis in dicto com' Bucks, mandavimus, quod unam navem de guerra portagii quadringent' et quinquagint' dolior', cum hominibus tam magistris peritis, quam marinar' valentioribus et expertis centum et octogint' ad minus, ac etiam tormentis tam majoribus quam minoribus, pulvere tormentario, ac hastis et telis, aliisque armaturis necessar' pro guerra, sufficien', et cum duplici eskippamento, necnon cum victualibus ad certum diem (in eod' brevi content') ad tot homines competen', et ab inde in vigint' et sex septiman', ad custag hominum et terr' tenen' burg', paroch', vill', villat', et al' locor' supra mentionat' in dicto com' Bucks, tam in victualibus, quam in hominum salariis, et al' ad guerr' necessar' per tempus illud, super defensionem maris moratur' parari, et ad portum de Portsmouth citra tempus in eod' brevi limitat' duci faceretis. Cumque etiam per idem breve assignaverimus vic' com' nostri Bucks præd', ball' burgi et paroch' de Buckingham præd', et major' burgi de Chipping-Wiccombe præd', aut aliquos duos vel plures eorum, quor' vic' dicti com' nostri Bucks unum esse volumus, infra certum terminum proxim' post receptionem brevis illius, ad assidend' quantum de custag' præd' super præd' burg' et paroch' de Buckingham, et super præd' burg' de Chipping-Wiccombe, alias Wiccombe, cum membris eorund', separatim poni seu assideri deberet. Cumque etiam per præd' breve nostrum assignaverimus ball' burgi et paroch' de Bucking,' et Majorem de burgo de Chipping-Wiccombe, alias Wiccombe, separatim et respective, ad assidend' omnes homines in eisd' separal' burg' et paroch', et membr' eorund', et terr' tenentes in eisdem, navem vel partem navis præd' non habentes, vel in eadem non deservientes, ad contribuend' ad expens' circa provisionem præmissor' necessar'; et super præd' burg' et paroch' de Buckingham, et super præd' burg' de Chipping-Wiccombe, alias Wic-

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combe, cum membris eorund', sicut præfertur, ad tunc separatim et distinctive ponend', viz. quemlibet eorum juxta statum suum et facultates suas, et portiones super ipsos assessat', per districtiones aliosve modos debitos levand', et collectores in ea parte nominand' et constituend, modo et forma prout in eodem brevi præcept' fuit. Cumque per idem breve nostrum ulterius assignaverimus vic' dicti com' nostri Bucks ad assidend' omnes homines in præd' villis de Agmondesham, Wendover, Marlow magna, et in membris eorund', ac in omnibus aliis villis, villat', burgis, hamlet', et aliis locis in præd' com' Bucks, et terr' tenentes in eisd', ad contribuend' expensis circa provisionem præmissor' necessar' et ad cætera faciend' et exequend' modo et forma, quibus per breve illud præceptum fuit. Et quia nonnulli homines et terr' tenentes in prædict' com' burg' paroch', vill', villat' hamlet', et aliis locis, per separal' taxationes et denar' summas, per vos super ipsos respective erga contribution' oneris præd, juxta exigen' brevis præd' posit' et assessat', nondum solverint nec satisfacerint, sed eas solvere recusaver', et adhuc contradicunt, prout informamur: Cumq; nos nuper voluimus certiorari, tam de nominibus hominum et terr' tenent,' qui ad contribuend' expensis supradict' assess fuissent, ac denar' sic assess' non solvissent, quam de separal' portionibus vel denar' summis super ipsos imposit', vos tamen nihil in return' ejusdem brevis nostri misistis, in nostrum contemptum: Vobis igitur præfat' nuper vic' com' nostri Bucks mandamus, sicut al' mandaverimus, quod tam de nominibus hominum et ter' tenen' in com' præd' per vos respective virtute dicti brevis nostri assessat', quas denar' summis super ipsos sic assessat', quam nondum solver' nec satisfec', sed eas solvere recusant, quas de separal' portionibus et denar' summis per vos præfat' nuper vic' com' nostri Bucks super ipsos assessat', in script' reduct' cum omnibus ill' tangen,' nos in cancellar' nostram sub sigillis vestris distincte et aperte, sine delatione, vel ad ultimum ante vicesimum sextum diem April' proxime futuro, ubicunque tunc fuerit', reddat' certiores, una cum hoc brevi. Ac vobis præfat' nuper ball' burgi et paroch' de Bucking' et major' burg' de Chipping-Wiccombe, al' Wiccombe, mandamus, sicut alias mandaverimus, quod tam de nominibus præd' hominum et terr' tenen' in burg' et paroch' de Buckingham, et burg' de Chipping-Wiccombe, alias Wiccombe, per vos respective virtute dicti brevis nostri superius primo mentionat' assess', quam de separal' denar' summis super ipsos assess', quas nondum solver' nec satisfecer', sed eas solvere recusant, quam de separal' portionibus et denar' summis per vos super ipsos respective assess' in scriptis fideliter reduct', cum omnibus illis tangen', nos in cancellariam nostr' præd' sub sigillo nostro distincte et aperte, sine delatione, vel ad ultim' ante prædict' vicesimum diem Aprilis proxime futur', ubicunque tunc fuerit', separatim reddatis certiores, una cum hoc brevi. Teste meipso apud Westm' nono die Martii, anno regni nostri duodecimo.—EYRE.

Ad quem diem Petrus Temple et Heneagius Proby return' brev' præd' dors' sic: ss. Executio hujus brevis patet in quibusd' schedul' huic brevi annexat', quarum quidem schedul' tenor, quond præfat' Johan' Hampden per præfat' Petrum Temple retornat', sequitur in hæc verba: ss. Ego Petrus Temple mil' et baronet' qui fui vic' com' Bucks, viz. inter quartum diem Augusti, anno regni domini nostri Caroli nunc regis Angliæ, &c. undecimo, et vicesimum secundum diem Feb. tunc proxime sequen', quo die exivi ab officio meo vic' com' præd', dicto domino regi in cancellar' suam, virtute brevis ejusdem domini regis huic schedul' annex', certifico, quod virtute et secundum exigen' brevis ipsius domini regis e cancellar' sua emanat', et ibidem de record' irrotulat', et vic' dicti com' Bucks inter al' direct', geren' dat' quarto die Augusti, anno undecimo supradict', assessavi, Anglice 'have assessed,' super separal' homines et ter' tenentes com' Bucks præd', quorum nomina subscribuntur, separal' portiones et denar' summas ad eor' particular' inferius posit' ad contribuend' expensis circa provisionem navigii in eod' brevi mentionat'; quas quidem portiones et denar' summas, sive aliquam inde parcell', ante exitum ab officio meo vic' com' prædict', ad manus meas, vel ad manus collector' in ea parte, virtute brevis ult' mentionat' per me constitut', præd' homines et ter' tenentes, aut eor' aliquis, quor' nomina subscribuntur, non solverunt, sed eas solvere recusaver', viz. Stoake Mandivile, ss. John Hampden esq. et tenor al' schedul' per præfat' Heneag' Proby fidelit' return', et eid' brevi annex,' sequitur etiam in hæc verba: viz. 'There is to be accounted upon by the assessors, high constables, petty constables 'within the said county in general, which 'cannot be accounted for by sir Peter Temple, 'being, as it is conceived, short four pounds.'

Ego Heneagius Proby arm', qui fui vic' com' Bucks inter vicesimum secundum diem Februar', anno regni dom' nostri Caroli nunc reg' Angliæ, &c. undecimo, et ab eodem die et anno usque primum diem Martii tunc proxime sequen', dicto domini regi in Cancellar' suam virtute brevis ejusdem domino reg' huic schedul' annex', certifico, quod homines et ter' tenentes com' Bucks præd', aut eor' aliquis, quor' nomina in quibusd' schedul' huic brevi annex' exprimuntur, qui assess' fuer' per Petrum Temple mil' et baronet' nuper vic' com' Bucks præd', dum in officio vic' ejusd' com' steterit, in separal' denar' portionibus, et denar' summis ad eor' separal' nomina superius posit, ad contribuend' expensis circa provisionem navigii, virtute et secundum exigen' brevis ipsius domini regis e cancell' sua emanat', et ibidem de record' irrot', vic' dicti com' Bucks inter alios direct' geren' dat' quarto die Augusti, anno undecimo supradict', Heneag' Proby existen'. vic' predict' com' Bucks proxime post exitum dicti Petri Temple mil' et baronet' ab officio vic' ejusd' com', vel ad manus collector'

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in ea parte virtute brevis ultimo mentionat' constitut', non solver', sed eas solvere,' recusaverunt. Et ulterius præfat' Johannes Hampden petit similiter audit' præd' brevis de Mittimus, de quo in brevi de Sciri Facias præd' fit mentio, et ei legitur in hæc verba.

ss. Carolus Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ Rex, fidei defensor, &c. Thesaur' et baronibus de Scaccario suo, salutem, Tenore cujusdam brevis nostri sub magno sigillo nostro Angliæ confect', geren' dat' quarto die Augusti, anno regni nostri undecimo, in rotulis Cancellar' nostræ irrotulat', per quod vic' com' nostri Bucks, ball' et burgen' burgi et paroch' de Buckingham, major', ball', et burgens' burgi de Chipping Wiccombe, alias Wiccombe, ac probis hominibus in eisd' burgis et paroch', et membris eorund', et in villis de Agmondesham, Wendover, et Marlow magna, et in omnibus aliis burgis, villis, villatis, hamlet', et aliis locis in dicto com' Bucks, mandavimus, quod pro defensione regni, tuitione maris, securitate subditorum nostrorum, ac salva conductione navium et merchandizarum ad regnum nostrum Angliæ venien', et de eod' ad partes exteras transeun', pararent unam navem de guerra portagii quadringent' et quinquagint' dolior', cum hominibus tam magistris peritis, quam marinariis valentioribus et expertis centum et octogint' ad minus, ac etiam tormentis tam majoribus quam minoribus, pulvere tormentario, ac hastis et telis, aliisque armaturis nece-sar' pro guerra sufficien', et cum duplici eskippamento, necnon cum victualibus ad certum diem, in eod' brevi content', ad tot homines competen', et abinde in vigint' et sex septiman', ad custag' hominum et terr' tenen' burgor', vill', villat', hamlet', et al' locor' supra mentionat' in dicto com' Bucks, tam in victualibus, quam in hominum salar', et al' ad guerram necessar' per tempus illud super defensionem maris in obsequio nostro, in comitiva custod' maris moratur', et ad portum de Portsm', circa tempus in eod' brevi limitat', duci facerent. Quodque respective assiderent omnes homines in præd' burg' et paroch' de Buckingham, et burg' de Chipping Wiccombe, alias Wiccombe, et cæteris burgis, villis, villat', hamlet' et aliis locis in dicto com' Bucks, et membris eorund', et ter' tenentes in eisd', ad contribuend' expensis circa provisionem præmissor', et ad cætera faciend' et exequend', modo et forma prout per idem breve præcept' fuit; vobis mittimus præsentibus inter claus' breve, pro eo quod salus regni nostri Angliæ, et populi nostri ejusdem periclitabatur, quod e dicta cancellar' nostra emanari narravimus, inter al' brevia ad hujusmodi provisionem et assessament' faciend' per singulos com', civitat', burg', vill' villat', hamlet', et locos regni nostri Angliæ et Walliæ, et membris eorund', e cancellar' nostr' præd' nuper emanat', et ibidem similiter irrot'; ac etiam quod dictum al' breve nostrum ad certificand' nobis in eand' cancellar', tam de nominibus hominum et terr' tenend' in præd' burg' et paroch' de Buckingham, et burg' de Chipping Wiccombe, alias Wiccombe, et in cæteris burgis, villis, villat', hamlet' et locis dicti com' Bucks, qui de mandato nostro præd' ad contribuend' ergа provision' præmissor' assess' fuerint, ac denar' super ipsos sic assess' non solver', quam de separal' portionibus et denar' summis super homines et terræ tenen' illos sic onerat' et imposit', necnon certificationes quasdam in scriptis, virtute brevis illius reduct', et in dictam cancellar' nostram miss'. Vobis etiam mittimus præsentibus interclaus', mandantes, quod inspectis brevibus et certificat' præd', ulterius inde pro levatione, collectione, et receptione omnium et singularum præd' denar' summar' de præd' contributionibus adhuc non solut', fieri fac', prout de jure et secundum legem et consuetudinem regni nostr' Angliæ fuerit faciend'. Teste meipso apud Westm' quinto die Maii, anno regni nostri tertio decimo. EYRE. Sicut in eisdem brevibus, et schedul' eisd' annex' in Scaccar' dicti dom' regis certificat', et ibidem in custod' Rememorator' ejusd' dom' regis de record' remanen' plenius continetur. Quibus lectis, auditis, et per ipsum intellectis, idem Johannes queritur, se colore separal' brev', return' eorund', et schedul' eisd' annexat', graviter vexat' fore et inquietat', et hoc minus juste; quia dicit, quod præd' separal' brevia superius mentionat', return' eorund', et schedul' eisdem annexat', materia in eisd' content,' minus sufficien' in lege existunt ad onerand' ipsum Johannem Hampden de aut cum solutione præd' summ' vigint' solid' super ipsum in schedul' præd, modo et forma præd', taxat' et assessat', aut alicujus inde parcell', ad quæ ipse necesse non habet, nec per legem terr' tenetur respondere. Unde ob insufficien' præd' separal' brevium superius mentionat', return' eorund', schedul' eisdem annex', ac materiæ in eisdem brevibus ac schedul' content', ipse idem Johannes Hampden petit judicium, si dictus dominus rex nunc ipsum de præd' vigint' solid', aut aliqua inde parcell', ulterius impeterе, seu onerare debeat aut velit.

ROBERT HOLBORNE.

Et Johannes Banks mil' Attorn' dom' regis nunc general', qui pro eodem domino rege sequitur, præsens hic in cur' ad eund' diem in propria persona sua, dicit, quod præd' separat' brevia, et return' eorund', ac schedul' præd' eisdem annex', materiaq; in eisdem content', sufficien' in lege existunt ad præd' Johan' Hampden de præd' vigint' solid' super ipsum in forma et ex causa præd' assessat' onerand': quam quidem materiam ipse dictus Attornat' dicti dom regis general', pro eodem dom' rege paratus est verificare; quamq; materiam præd' Johannes Hampden non didicit, nec ad eam aliqualiter respondit, sed verificationem illam admittere omnino recusat: pro eodem dom' rege idcirco petit judicium, et quod præd' Johannes Hampden de eisd' vigint' solid' onerетur, et inde satisfaciat, &c. JOHANNES BANKS.

A Copy of the JUDGMENT, as it is entered upon Record, in pursuance of the said motion, and according to the major votes.

Et quia barones hic se advisare volunt de et super præmissis, priusq' judicium inde reddant

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dies dat' est præfat' Johanni Hampden eod' statu quo nunc hic in octab' sancti Michaelis, ut dicti barones se interim de iisdem præmissis advisare possint, ac cum justiciar' de utroq' banco inde deliberent, eo quod iidem barones hic inde nondum, &c. Et super hoc concordat' est inter barones hic, tam ex assensu dict' Attornat' dict' domini reg' general', quod dict' Attornat' præd' Johannes Hampden, et consiliarior' in lege peritor' ejusdem Johannis Hampden, quod aliqui legis periti, tam de consilio et parte dict' domini reg', quam de consilio et parte dict' Johannis Hampden, de præd' materia in lege, et cæteris præmissis in camera hujus Scaccarii, vulgariter nuncupat' The Exchequer Chamber, coram iisd' baronibus, assidentibus eis justiciar' de utroque banco, argumentari interim publice audiantur. Ad quas quid' octabas sancti Michaelis præd' Johannes Hampden venit hic ut prius. Et quia barones hic ulterius se advisare volunt de et super præmissis, priusq' judicium inde reddant, dies ulterius dat' est præfat' Johanni Hampden, eod' statu quo nunc hic usq' in octab' sancti Hilarii, ut aliqui leges periti, tam de consilio et parte dict' domini reg', quam de consilio et parte dict' Johannis Hampden, de præd' materia in lege, et cæteris præmissis, in præd' camer' hujus Scaccarii, coram baronibus præd', assidentibus eis præd' justiciar' de utroque banco, argumentari interim publice audiantur; ac iid' barones, cum iisd' justiciar' inde deliberent, eo quod nullus in lege peritus, vel de consilio ipsius domini reg', vel de consilio dict' Johannis Hampden adhuc auditur, et barones hic inde non advisantur, &c. Posteaq' medio tempore in præd' octab' sancti Michaelis, et præd' octab' sancti Hilarii, tum Attornat' et Solicitator ipsius domini reg', quam duo legis periti de consilio præd' Johannis Hampden, in præmissis existen' ex parte ejusd' Johannis Hampden, duodecim separal' diebus in præd' camer' Scaccarii, coram baronibus hujus Scaccarii, assidentibus eis tunc ibid' præd' justiciar' de utroq' banco, de præd' mater' in lege et cæteris præmissis (recitato tunc ibid' record' præd') ad largum et summat' argumentari quidq' inde ex utraq' parte dicere potuissent aut voluer', palam et singulatim audit' fuer'. Et præd' Attornat' et Solicitator general' diversa et quamplurima record', brevia, commissjon', et præceden' tam hujus Scaccarii, quam cur' Cancellar', cur' de Banco Reg', ac de Commu' Banco', mater' in lege, et cætera præmissa in separal' brevibus return', et schedulis præd' content', ex parte dict' domini reg' proban', confirman', et manutenen', ad tunc et ibid' produxer', ostenser', et exposuer'; et ad præd' octabas sancti Hilar' præd' Johannes Hampden venit hic ut prius, et quia barones hic ulterius se advisare volunt de et super præmissis priusquam judicium inde reddant, dies ulterius dat' est præfat' Johanni Hampden, eod' statu quo nunc hic, usq' a die Paschæ in quindecim dies, ut dicti barones interim, cum præfat' justiciar' de utroq' banco ulterius deliberent, eo quod iidem barones hic inde nondum, &c. Ad quem diem præd' Johannes Hampden venit hic ut prius, et quia barones hic ulterius se advisare volunt de et super præmissis priusquam judicium inde reddant, dies ulterius dat' est eid' Johanni, eod' statu quo nunc hic, usq' in cro' sanctæ Trin', et dict' barones interim cum præfat' justiciar' de utroq' banco ulterius inde deliberent, eo quod iidem justiciar' hic inde nondum, &c. Ad quem diem præd' Johannes Hampden venit hic ut prius, et super hoc visis præmissis, et per barones hic plene intellectis, habitaque inde matura deliberatione cum præd' justiciar' de utroque banco, ac post argumenta tam per eosd' justiciar', quam per præd' barones singulatim in præd' camer' Scaccarii publice inde fact', videtur inde baronibus, ex advisamento justiciar' præd', quod separal' brevia præd', et return' eorund', ac schedulæ præd' eisd' annex', ac mater' in eisd' content', sufficien' in lege existunt ad præfat' Johannem Hampden de præd' vigint, solid,' super ipsum in forma et ex causa præd' assessat' onerand'. Ideo considerat' est per eosd' barones, quod præd' Johannes Hampden de eisd' vigint' solid' oneretur, et exinde satisfaciet, &c.

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148. The Trial of JOHN LILBURN and JOHN WHARTON, for Printing and Publishing Seditious Books. In the Star-Chamber: 13 CHARLES I. A. D. 1637. [Written by John Lilburn.]

BEFORE the Lord Archbishop of Canterbury; the Lord-Keeper, lord Coventry; the Lord-Treasurer, bishop of London; the lord Privy-Seal, earl of Manchester; the Earl-Marshal, earl of Arundel; the earl of Salisbury; the earl of Dorset; lord Cottington; lord Newburgh; Lord Chief-Justice Bramston; sir Henry Vane; Mr. Secretary Cooke; Mr. Secretary Windebank; Judge Jones, and others.

Upon Tuesday the 11th or 12th Dec. 1637, I was treacherously and Judasly betrayed (by one that I supposed to be my friend) into the hands of the pursuivant, with four of his assistants, as I was walking in Soperlane with one John Chilburne, servant to old Mr. John Wharton, in Bow-lane, a hot-presser. And about twelve of the clock the next day, I was committed to the Gate-house, by sir John Lamb, the prelate of Canterbury's chancellor, with others, without any examination at all, for sending of factious and scandalous Books out of Holland into England. And having not been at the foresaid prison above three days, I was removed, by a warrant from the Lords of the Council, to the Fleet, where I now remain. And after my being there some time, I drew a Petition to the Lords of the Council for my liberty; and their Answer to it was, that I

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should be examined before sir John Banks, the king's Attorney: The copy of which Examination thus follows.

Upon Tuesday the 14th Jan. 1637, I was had to sir John Banks the Attorney-General's chamber, (now Lord Chief-Justice of the Court of Pleas) and was referred to be examined by Mr. Cockshey his chief clerk; and at our first coming together, he did kindly intreat me, and made me sit down by him, and put on my hat, and began with me after this manner; Mr. Lilburn, what is your Christian name? I said John.—Did you live in London before you went into Holland? Yes, that I did.—Where? Near London-stone.—With whom there? With Mr. Thomas Hewson.—What trade is he? A dealer in cloth, I told him.—How long did you serve him? About five years.—How came you to part? After this manner: I perceiving my master had an intention to leave off his trade, I often moved him that I might have my liberty, to provide for myself, and at the last he condescended unto it: and so I went into the country, to have the consent of my friends; and after that went into Holland.—Where were you there? At Rotterdam.—And from thence you went to Amsterdam? Yes, I was at Amsterdam.—What books did you see in Holland? Great store of books, for in every bookseller's shop as I came in, there were great store of books.—I know that, but I ask you, if you did see Dr. Bastwick's Answer to my master's Information, and a Book called his Litany? Yes, I saw them there; and if you please to go thither, you may buy an hundred of them at the booksellers, if you have a mind to them.—Have you seen the "Unbishoping of Timothy and Titus," the "Looking-glass," and a "Breviate of the Bishop's late Proceedings"? Yes, I have, and those also you may have there, if you please to send for them.—Who printed all those books? I do not know.—Who was at the charges of printing them? Of that I am ignorant.—But did you not send over some of these books? I sent not any of them over.—Do you know one Hargust there? Yes, I did see such a man.—Where did you see him? I met with him one day accidentally at Amsterdam.—How oft did you see him there? Twice upon one day.—But did not he send over books? If he did, it is nothing to me, for his doings are unknown to me.—But he wrote a letter, by your directions, did he not? What he writ over I know no more than you.—But did you see him no where else there? Yes, I saw him at Rotterdam.—What conference had you with him? Very little: but why do you ask me all these questions? these are beside the matter of my imprisonment; I pray come to the thing for which I am accused, and imprisoned.—No, these are not beside the business, but do belong to the thing for which you are imprisoned.

But do you know of any that sent over any books? What other men did, doth not belong to me to know or search into; sufficient it is for me to look well to my own occasions.—Well, here is the Examination of one Edmund Chillington, do you know such a one? Yes.—How long have you been acquainted with him? A little before I went away, but how long, I do not certainly know.—Do you know one John Wharton? No.—Do you not? he is a hot-presser.—I know him, but I do not well remember his other name.—How long have you been acquainted with him, and how came you acquainted? I cannot well tell you.—How long do you think? I do not know.—What speeches had you with Chillington since you came to town? I am not bound to tell you: but sir (as I said before) why do you ask me all these questions? these are nothing pertinent to my imprisonment, for I am not imprisoned for knowing and talking with such and such men, but for sending over Books; and therefore I am not willing to answer you to any more of these questions, because I see you go about by this Examination to ensnare me: for seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination: and therefore if you will not ask me about the thing laid to my charge, I shall answer no more: but if you will ask of that, I shall then answer you, and do answer that for the thing for which I am imprisoned, which is for sending over books, I am clear, for I sent none; and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence, and not answer to your interrogatories; and that my accusers ought to be brought face to face, to justify what they accuse me of. And this is all the answer that for the present I am willing to make: and if you ask me of any more things, I shall answer you with silence.—At this he was exceeding angry, and said, there would be a course taken with me to make me answer. I told him, I did not regard what course they would take with me; only this I desire you to take notice of, that I do not refuse to answer out of any contempt, but only because I am ignorant of what belongs to an Examination, (for this is the first time that ever I was examined;) and therefore I am unwilling to answer to any impertinent questions, for fear that with my answer I may do myself hurt.—This is not the way to get liberty: I had thought you would have answered punctually, that so you might have been dispatched as shortly as might be. I have answered punctually to the thing for which I am imprisoned and more I am not bound to answer, and for my liberty I must wait God's time.—You had better answer, for I have two Examinations wherein you are accused. Of what am I accused?—Chillington hath accused you for printing ten or twelve thousand of books in Holland, and that they stand you in about 80*l.* and that you had a chamber at Mr. John Foot's at Delft, where he thinks the books were kept, and that you would have printed the "Unmasking of the Mystery of Iniquity," if you could have got a true copy of it. I do not believe that Chillington said any such things; and if he did, I know

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and am sure, that they are all of them lies.—You received money of Mr. Wharton since you came to town, did you not? What if I did?—It was for books? I do not say so.—For what sort of books was it? I do not say it was for any, and I have already answered you all that for the present I have to answer; and if that will give you content, well and good; if not, do what you please.—If you will not answer no more (here I told him, if I had thought he would have insisted upon such impertinent questions, I would not have given him so many answers) we have power to send you to the place from whence you came. You may do your pleasure, said I.—So he called in anger for my keeper, and gave him a strict charge to look well to me. I said, they should not fear my running away. And so I was sent down to sir John Banks himself. And after he had read over what his man had writ, he called me in, and said, I perceive you are unwilling to confess the truth.

Lilburn. No, sir, I have spoken the truth.

Sir John Banks. This is your Examination is it not? What your man hath writ, I do not know.—Come near, and see that I read it right. Sir, I do not own it for my Examination, for your man hath writ what it pleased him, and hath not writ my answer; for my answer was to him, and so it is to you, that for the thing for which I am imprisoned (which is for sending over Books) I am clear, for I did not send any, and for any other matter that is laid to my charge, I know it is warrantable by the law of God, and I think by the law of the land, for me to stand upon my just defence, and that my accusers ought to be brought face to face, to justify what they accuse me of: and this is all that I have to say for the present.—You must set your hand to this your Examination. I beseech you, sir, pardon me, I will set my hand to nothing but what I have now said.—So he took the pen and writ, 'The examined is 'unwilling to answer to any thing but that for 'which he is imprisoned.' Now you will set your hand to it; I am not willing, in regard I do not own that which your man hath writ; but if it please you to lend me the pen, I will write my answer, and set my hand to it. So he gave me the pen, and I began to write thus: 'The Answer of me, John Lilburn, is,' and here he took the pen from me, and said he could not stay, that was sufficient. Then one of my keepers asked him if they might have me back again? And he said yea; for he had no order for my inlargement.

And about ten or twelve days after, I was had forth to Grays-Inn again; and when I came there, I was had to the Star-Chamber office; and being there, as the order is, I must enter my appearance, they told me. I said, To what? For I was never served with any subpœna; neither was there any bill preferred against me, that I did hear of. One of the clerks told me, I must first be examined, and then sir John would make the bill. It seems they had no grounded matter against me for to write a bill, and therefore they went about to make me betray my own innocency, that so they might ground the bill upon my own words: and at the entrance of my appearance, the clerk and I had a deal of discourse, (the particulars whereof for brevity sake I now omit;) but in the conclusion he demanded money of me, for entering of my appearance: and I told him I was but a young man, and a prisoner, and money was not very plentiful with me, and therefore I would not part with any money upon such terms. Well (said he) if you will not pay your fee, I will dash out your name again. Do what you please (said I) I care not if you do; so he made complaint to Mr. Goad, the master of the office, that I refused to enter my appearance. And then I was brought before him, and he demanded of me what my business was? I told him, I had no business with him, but I was a prisoner in the Fleet, and was sent for, but to whom and to what end I do not know, and therefore if he had nothing to say to me, I had no business with him. And then one of the clerks said, I was to be examined. Then Mr. Goad said, tender him the book: so I looked another way, as though I did not give ear to what he said; and then he bid me pull off my glove, and lay my hand upon the book. What to do, sir? said I. You must swear, said he. To what? 'That you shall make true 'answer to all things that are asked you.' Must I so, sir? but before I swear, I will know to what I must swear. As soon as you have sworn, you shall, but not before.—To that I answered, sir, I am but a young man, and do not well know what belongs to the nature of an oath, and therefore before I swear, I will be better advised.—Saith he, how old are you? About 20 years old, I told him.—You have received the Sacrament, have you not? Yes, that I have.—And you have heard the ministers deliver God's word, have you not? I have heard sermons. Well then, you know the holy Evangelists? Yes, that I do.—But, sir, though I have received the Sacrament, and have heard sermons, yet it doth not therefore follow that I am bound to take an oath, which I doubt of the lawfulness of.—Look you here, said he (and with that he opened the book), we desire you to swear by no foreign thing, but to swear by the holy Evangelists.—Sir, I do not doubt or question that; I question how lawful it is for me to swear to I do not know what.—So some of the clerks began to reason with me, and told me every one took that oath: and would I be wiser than all other men? I told them, it made no matter to me what other men do; but before I swear, I will know better grounds and reasons than other men's practices, to convince me of the lawfulness of such an oath, to swear I do not know to what.—So Mr. Goad bid them hold their peace, he was not to convince any man's conscience of the lawfulness of it, but only to offer and tender it. Will you take it or no, saith he? Sir, I will be better advised first: Whereupon there was a messenger sent to sir John Banks, to certify him, that I would

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not take the Star-Chamber oath; and also to know of him what should be done with me. So I looked I should be committed close prisoner, or worse. And about an hour after came Mr. Cockshey, sir John's chief clerk; What, said he, Mr. Lilburn, it seems you will not take your Oath, to make true answer? I told him, I would be better advised before I took such an oath. Well then, saith he, you must go from whence you came.

Upon Friday the 9th of February, in the morning, one of the officers of the Fleet came to my chamber, and bid me get up and make me ready to go to the Star-Chamber-Bar forthwith. I having no time to fit myself, made me ready in all haste to go. And being at the bar, sir John Banks laid a verbal accusation against me; which was, that I refused to answer, and also to enter my appearance, and that I refused to take the Star-Chamber oath: and then was read the affidavit of one Edmond Chillington, button-seller, made against Mr. John Wharton and myself: the sum of which was, that he and I had printed at Rotterdam, in Holland, Dr. Bastwick's Answer, and his Litany, and divers other scandalous Books. And then after I obtained leave to speak, I said, My noble lords, as for that affidavit, it is a most false lye and untrue.

Lord-Keeper. Why will you not answer?

Lilburn. My honourable lord, I have answered fully before sir John Banks to all things that belong to me to answer unto: and for other things, which concern other men, I have nothing to do with them.—But why do you refuse to take the Star-Chamber oath? Most noble lord, I refused upon this ground, because that when I was examined, though I had fully answered all things that belonged to me to answer unto, and had cleared myself of the thing for which I am imprisoned, which was for sending Books out of Holland, yet that would not satisfy and give content, but other things were put unto me, concerning other men, to insnare me, and get further matter against me; which I perceiving refused, being not bound to answer to such things as do not belong unto me. And withal I perceived the oath to be an oath of inquiry; and for the lawfulness of which oath, I have no warrant; and upon these grounds I did and do still refuse the oath.—Upon this some of the king's counsel and some of the lords spoke; Would I condemn and contradict the laws of the land, and be wiser than all other men to refuse that which is the oath of the court, administered unto all that come there?

Lord Keeper. Well; tender him the book.—I standing against the prelate of Canterbury's back, he looked over his shoulder at me, and bid me pull off my glove, and lay my hand upon the book. Unto whom I replied, Sir, I will not swear; and then directing my speech unto the lords, I said, Most honourable and noble lords, with all reverence and submission unto your honours, submitting my body unto your lordships pleasure, and whatsoever you please to inflict upon it, yet must I refuse the oath.

My Lords, said the Arch Prelate, (in a deriding manner) do you hear him? he saith, with all reverence and submission he refuseth the oath.

Well, come, come, (said my Lord Keeper), submit yourself unto the court.

Lilburn. Most noble lords, with all willingness, I submit my body unto your honours pleasure; but for any other submission, most honourable lords, I am conscious unto myself, that I have done nothing that doth deserve a convention before this illustrious assembly; and therefore for me to submit is to submit I do not know wherefore.

Earl of *Dorset.* My lords, this is one of their private spirits; do you hear him, how he stands in his own justification? Well, my lords, said the great prelate, this fellow (meaning me) hath been one of the notoriousest dispersers of libellous Books that is in the kingdom; and that is the father of them all (pointing to old Mr. Wharton).

Lilburn. Sir, I know you are not able to prove, and to make that good which you have said.—I have testimony of it, said he. Then, said I, produce them in the face of the open court, that we may see what they have to accuse me of; and I am ready here to answer for myself, and to make my just defence.—With this he was silent, and said not one word more to me; and then they asked my fellow soldier, old Mr. Wharton, whether he would take the Oath; which he refused, and began to tell them of the Bishop's cruelty towards him; and that they had had him in five several prisons within these two years, for refusing the Oath.—And then there was silence; after which was read how the court had proceeded against some that had harboured Jesuits and Seminary-priests (those traitors) who refused to be examined upon oath; and in regard that we refused likewise to be examined upon oath, it was fit, they said, that we should be proceeded against, as they were. So they were the precedent by which we were censured, though their cause and ours be much unlike, in regard theirs were little better than treason; but our crime was so far from treason that it was neither against the glory of God, the honour of the king, the laws of the land, nor the good of the commonwealth: but rather for the maintaining of the honour of them all, as all those that read the books without partial affections and prejudicate hearts can witness and declare; and if the books had had any treason, or any thing against the law of the land in them, yet we were but supposedly guilty; for the things were never fully proved against us. Indeed there were two Oaths read in court, which they said were sworn against us by one man, but he was never brought face to face, and in both his oaths he hath forsworn himself, as in many particulars thereof we are both able to make good.—In the conclusion, my Lord Keeper stood up, and said, My Lords, I hold it fit, that they should be both for their contempt committed close prisoners till Tuesday next; and if they do not conform themselves betwixt

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this and then to take the Oath, and yield to be examined before Mr. Goad, then that they shall be brought hither again, and censured, and made an example. Unto which they all agreed; and so we were committed close prisoners, and no friends admitted to come unto us.

In Camera Stellat' coram Concilio ibidem 9. die Febr. anno 13 Car. regis.

'Upon Information this day to this honourable court, by sir John Banks, knight, his majesty's Attorney General, That John Lilburn and John Wharton, who are now at the bar of this court, were the 24th of January last ordered to be examined upon Interrogatories touching their unlawful printing, publishing, and dispersing of libellous and seditious Books, contrary to the decree of this Court, which was verified by affidavit: and being brought up to the office to appear and be examined accordingly, the said Lilburn refused to appear, and both of them denied to take an Oath to make answer to Interrogatories, as appears by Certificate of Mr. Goad: it was humbly prayed that their appearance may be recorded, they being now present in court, and that they may now have their oaths tendered unto them; which if they shall refuse to take, that then this court will proceed to a censure against them for their high contempt therein, as hath been used in like cases, which the court held fit: and hath therefore ordered, That their appearance shall be recorded, as is desired. And for that the said Delinquents do now again most contemptuously refuse to take their Oaths now tendered to them in open court, their lordships have further ordered, That the said Lilburn and Wharton shall be remanded to the prison of the Fleet, there to remain close prisoners until they conform themselves in obedience to take their oaths, and be examined; and that unless they do take their oaths, and yield to be examined by Monday night next, their lordships will, on the last sitting of this term, proceed to censure against them for their contempts therein, as is desired.'

And upon Monday after we were had to Gray's-Inn, and I being the first there, Mr. Goad said to me, according to the lords order upon Friday last, I have sent for you to tender the Oath unto you.—Sir, I beseech you, let me hear the lords order. So he caused it to be read unto me, and then tendered me the book. Well, sir, said I, I am of the same mind I was; and withal I understand, that this Oath is one and the same with the High Commission Oath, which Oath I know to be both against the law of God, and the law of the land; and therefore in brief I dare not take the oath, though I suffer death for the refusal of it. Well, said he, I did not send for you to dispute with you about the lawfulness of it, but only according to my place to tender it unto you.—Sir, I dare not take it, though I lose my life for the refusal of it. So he said, he had no more to say to me; and I took my leave of him, and came away. And after that, came the old man, Mr. Wharton, and it was tendered unto him, which he refused to take: and, as he hath told me, he declared unto him how the bishops had him eight times in prison for the refusal of it, and he had suffered the bishops merciless cruelty for many years together, and he would now never take it as long as he lived; and withal told him, that if there were a cart ready at the door to carry him to Tyburn, he would be hanged, before ever he would take it. And this was that day's business.

Upon the next morning, Feb. 13, about seven a-clock, we were had to the Star-Chamber Bar again, to receive our Censure; and stood at the bar about two hours before sir John Banks came: but at last he began his accusation against us, that we did still continue in our former stubbornness. And also there was another Affidavit of the foresaid Edmund Chillington's read against us; the sum of which was, that I had confessed to him, that I had printed Dr. Bastwick's "Answer to sir John Banks's Information," and his "Litany;" and another Book, "An Answer unto certain Objections;" and another Book of his called, "The Vanity and Impiety of the old Litany;" and that I had divers other books of Dr. Bastwick's a-printing. And that Mr. John Wharton had been at the charges of printing a Book called, "A Breviate "of the Bishops late Proceedings;" and another Book, called "Sixteen new Queries," and divers other factious Books: and that one James Ouldam, a turner in Westminster-hall, had dispersed divers of these Books. Then I said after this manner: Most noble lords, I beseech your honours, that you would be pleased to give me leave to speak for myself, and to make my just defence; and I shall labour so to order my speeches, that I shall not give your honours any just distaste; and withal shall do it with as much brevity as I can. So having obtained my desire, I began and said, My lords, it seems there were divers Books sent out of Holland, which came to the hands of one Edmund Chillington, who made this Affidavit against us; and, as I understand, he delivered divers of these Books unto one John Chilburne, servant to this old man Mr. Wharton; and his master being in prison, he dispersed divers of them for the foresaid Chillington's use; whereupon the Books were taken in his custody: he being found dispersing of them, goes to one Smith, a taylor, in Bridewell, (as I am informed) and desires him to get his peace made with the bishops. Whereupon he covenants with some of the bishops creatures to betray me into their hands, being newly come out of Holland, which, (as he said) did send over these Books. So, my lords, he having purchased his own liberty, lays the plot for betraying me, and I was taken by a pursuivant and four others of his assistants, walking in the streets with the foresaid John Chilburne, who had laid and contrived the plot before (as I am able to make good;) and the next morning I was committed by sir John Lamb to the Gate-house. Now, my

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lords, I do protest before your honours on the word of a Christian, that I did not send over these Books, neither did I know the ship that brought them, nor any that belongs to the ship, nor to my knowledge did never see with my eyes, either the ship, or any that belongs unto it. —And being at the Gate-house, I was removed (by six of your honours) to the Fleet, at which time the said Chillington was removed from Bridewell to Newgate; and being kept close there, he, by their threats and persuasions, and the procuring of his own liberty, goes and accuses me for printing ten or twelve thousand Books in Holland. And at my examination before sir John Banks, I cleared myself of that; and upon Friday last he made an Affidavit against me, in which he hath most falsly forsworn himself, and to-day he hath made another, which is also a most false untruth: and withal, my lords, he is known to be a notorious lying fellow, and hath accused me for the purchasing of his own liberty, which he hath got. And therefore, I beseech your honours, to take it into your serious consideration, whether I am to be censured upon such a fellow's Affidavit or no.

Then said the Lord-Keeper, Thou art a mad fellow, seeing things are thus, that thou wilt not take thine Oath, and answer truly.

My honourable lord, I have declared unto you the real truth; but for the oath, it is an oath of inquiry, and of the same nature as the High-Commission Oath; which oath I know to be unlawful; and withal I find no warrant in the Word of God for an oath of inquiry, and it ought to be the director of me in all things that I do: and therefore, my lords, at no hand, I dare not take the oath. (When I named the Word of God, the court began to laugh, as though they had had nothing to do with it.) My lords (said Mr. Goad) he told me yesterday, he durst not take the oath, though he suffered death for the refusal of it. And with that my Lord Privy-Seal spoke: Will you (said he) take your oath, that that which you have said is true? My lord (said I) I am but a young man, and do not well know what belongs to the nature of an oath, (but that which I have said, is a real truth) but thus much; by God's appointment, I know an oath ought to be the end of all controversy and strife, Heb. 6, 16. and if it might be so in this my present cause, I would safely take my oath, that what I have said is true. So they spoke to the old man, my fellow-partner, and asked him whether he would take the oath? So he desired them to give him leave to speak; and he began to thunder it out against the Bishops, and told them, they required three oaths of the king's subjects; namely, the oath of Churchwardenship, and the oath of Canonical Obedience, and the oath *ex officio*; which (said he) are all against the law of the land, and by which they deceive and perjure thousands of the king's subjects in a year. And withal, my lords, (said he) there is a maxim in divinity, that we should prefer the glory of God, and the good of our king and country, before our own lives. But the Lords wondering to hear the old man begin to talk after this manner, commanded him to hold his peace, and to answer them, whether he would take the oath or no? To which he replied, and desired them to let him talk a little, and he would tell them by and bye. At which all the court burst out a-laughing; but they would not let him go on, but commanded silence (which if they would have let him proceed, he would have so peppered the Bishops, as they were never in their lives in an open court of judicature.) So they asked us again, whether we would take the oath? Which we both again refused; and withal I told them, that for the reasons before I durst not take it. Then they said, they would proceed to censure. I bid them do as they pleased, for I knew myself innocent of the thing for which I was imprisoned and accused; but yet, notwithstanding, did submit my body to their honours pleasure. So they censured us 500*l.* a-piece; and then stood up judge Jones, and said, It was fit, that I being a young man, for example sake, should have some corporal punishment inflicted upon me. So my Censure was to be whipt, but neither time nor place allotted. And for the old man, in regard of his age, being 85 years old, they would spare his corporal punishment, though (said they) he deserves it as well as the other (meaning me,) yet he should stand upon the pillory: but I could not understand or perceive by my censure, that I was to stand upon the pillory. And when I came from the bar, I spoke in an audible voice, and said, My lords, I beseech God to bless your honours, and to discover and make known unto you the wickedness and cruelty of the prelates.

In Camera Stellata coram Concilio ibidem 13 die Febr. anno decimo tertio Car. regis.

'Whereas, upon Information to this Court 'the ninth of this instant February, by sir John 'Banks knight, his majesty's Attorney-General, 'that John Lilburn and John Wharton, then 'present at the bar, were the 24th of January 'last ordered to be examined upon Interroga-'tories touching their unlawful printing, im-'porting, publishing, and dispersing of libellous 'and seditious Books, contrary to the Decree 'of this court, which was verified by Affidavit; 'and being brought up to the office to appear 'and be examined, the said Lilburn refused to 'appear, and both of them denied to take an 'oath to make some answer to interrogatories, 'as appeared by the certificate of Mr. Goad, 'deputy-clerk of this court: the court did on 'that day order, that their appearances should 'be recorded, they being present in court as 'aforesaid; and that in respect the said de-'linquents did then again contemptuously re-'fuse to take their oaths tendered to them in 'open court, they should be remanded to the 'prison of the Fleet, there to remain close pri-'soners, until they conformed themselves in 'obedience to take their oaths and be examin-'ed; and that unless they did take their oaths,

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'and yield to be examined by Monday-night 'next then next following, and now last past, 'their lordships would on this sitting-day pro- 'ceed to a censure against them for their con- 'tempts therein. Now this day the said Lil- 'burn and Wharton being again brought to the 'bar, his majesty's said attorney informed this 'honourable court, that they still continued in 'their former obstinacy, and contemptuously 'refused to take their oaths, to make true an- 'swer to the interrogatories, although they had 'been sent for, and their oaths assented to be 'given unto them by Mr. Goad, deputy clerk 'of this court, who now certified the same in 'court: and therefore his majesty's said Attor- 'ney humbly pleaded on his majesty's behalf, 'that their lordships would now proceed to 'censure against the said delinquents, for their 'great contempts and disobedience therein. 'Whereupon their lordships endeavoured, by 'fair persuasions, to draw them to conformity 'and obedience, and withal offered, that if 'they yet would submit and take their oaths, 'their lordships would accept thereof, and not 'proceed to censure against them. But such 'was the insufferable disobedience and con- 'tempt of the said delinquents, that they still 'persisted in their former obstinacy, and wil- 'fully refused to take their oaths. In respect 'whereof the whole court did with unanimous 'consent, declare and adjudge the said Lilburn 'and Wharton guilty of a very high contempt 'and offence, of dangerous consequence and 'evil example, and worthy to undergo very 'sharp, severe, and exemplary censure, which 'might deter others from the like presump- 'tuous boldness in refusing to take a legal 'oath; without which, many great and exorbi- 'tant offences, to the prejudice and danger of 'his majesty, his kingdoms, and loving subjects, 'might go away undiscovered, and unpunished. 'And therefore their lordships have now order- 'ed, adjudged, and decreed, That the said 'Lilburn and Wharton shall be remanded to 'the Fleet, there to remain until they conform 'themselves in obedience to the orders of this 'court, and that they shall pay 500*l.* a-piece 'for their several fines to his majesty's use; 'and before their enlargements out of the 'Fleet, become bound with good sureties for 'their good behaviour. And to the end that 'others may be the more deterred from daring 'to offend in the like kind hereafter, the court 'hath further ordered and decreed, That the 'said John Lilburn shall be whipt through the 'streets, from the prison of the Fleet unto the 'pillory,* to be erected in such time, and 'place, as this court shall hold fit and direct; 'and that both he and the said Wharton shall 'be both of them set in the said pillory, and 'from thence be returned to the Fleet, there 'to remain according to this decree.'

After our Censure, we had the liberty of the prison for a few days; but the old man, my fellow-partner, went to the warden of the Fleet, and told him the sum of that which he intended in the Star-Chamber, to have spoke against the Bishops, if the lords would have let him. He told the warden, how the Bishops were the greatest tyrants that ever were since Adam's creation; and that they were more cruel than the Cannibals, those men-eaters, for, said he, they presently devour men, and put an end to their pain, but the Bishops do it by degrees, and are many years in exercising their cruelty and tyranny upon those that stand out against them; and therefore are worse than the very Cannibals, &c.

This came to the Lords of the Council's ears, whereupon we were the next Monday after brought both together, and locked up close prisoners in one chamber, without any order or warrant at all, but only Warden Ingram's bare command and pleasure. But the old man, about three weeks after, made a Petition to the Lords of the Council, that he might have some liberty; and being very weak, more likely to die than to live, he had his liberty granted in the Term: but I do still remain close prisoner.

Upon Wednesday the 18th of April, 1638, I was cruelly whipped through the streets to Westminster,* and at the last came to the Pillory, where I was unloosed from the cart, and having put on some of my clothes, went to the tavern, where I staid a pretty while waiting for my surgeon, who was not yet come to dress me; where were many of my friends, who exceedingly rejoiced to see my courage, that the Lord had enabled me to undergo my punishment so willingly.

I having a desire to retire into a private room from the multitude of people that were about me, which made me like to faint; I had not been there long, but Mr. Lightbourne, the tipstaff of the Star-Chamber, came unto me, saying, the lords sent him to me, to know if I would acknowledge myself to be in a fault, and then he knew what to say unto me. To whom I replied, Have their honours caused me to be whipped from the Fleet to Westminster, and do they now send to know if I will acknowledge a fault? They should have done this before I had been whipped; for now, seeing I have undergone the greatest part of my punishment, I hope the Lord will assist me to go through it all: and beside, if I would have done this at the first, I needed not to have come to this: but as I told the Lords when I was before them at the bar, so I desire you to tell them again, that I am not conscious to myself of doing any thing that deserves a submission, but yet I do willingly submit to their lordships pleasures in my censure. He told me, if I would confess my fault, it would save me a standing in the Pillory: otherwise, I must undergo the burthen of it.

* The pillory was placed between Westminster-Hall Gate and the Star-Chamber.

* And as the cart drew him along, he repeated several texts of Scripture, and talked enthusiastically to the people.

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Well, said I, I regard not a little outward disgrace for the cause of my God; I have found already that sweetness in him, in whom I have believed, that through his strength, I am able to undergo any thing that shall be inflicted on me: but methinks that I had very hard measure, that I should be condemned and thus punished upon two Oaths, in which the party has most falsely forsworn himself; and because I would not take an oath to betray mine own innocence. Why, Paul found more mercy from the heathen Roman Governors, for they would not put him to an oath to accuse himself, but suffered him to make the best defence he could for himself: neither would they condemn him, before his accusers and he were brought face to face, to justify, and fully to prove their accusation: but the Lords have not dealt so with me, for my accusers and I were never brought face to face, to justify their accusation against me. It is true, two false oaths were sworn against me, and I was thereupon condemned; and because I would not accuse myself. And so he went away, and I prepared myself for the Pillory, to which I went with a joyful courage; and when I was upon it, I made obeisance to the lords, some of them, as I suppose, looking out at the Star-Chamber window towards me. And so I put my neck into the hole, which being a great deal too low for me, it was very painful to me, in regard of continuance of the time that I stood on the pillory, which was about two hours; my back being also very sore, and the sun shining so exceeding hot, and the Tipstaff-man not suffering me to keep on my hat to defend my head from the heat of the sun, so that I stood there in great pain: yet through the strength of my God I underwent it with courage, to the very last minute; and lifting up my heart and spirit unto my God, I began to speak after this manner:

"My Christian Brethren; To all you that love the Lord Jesus Christ, and desire that he should reign and rule in your hearts and lives, to you especially, and to as many as hear me this day, I direct my speech. I stand here in the place of ignominy and shame; yet to me it is not so, but I own and embrace it, as the welcome Cross of Christ, and as a badge of my Christian Profession: I have been already whipped from the Fleet to this place, by virtue of a Censure from the honourable Lords of the Star-Chamber; the cause of my Censure I shall declare unto you as briefly as I can.

"The Lord, by his special hand of Providence, so ordered it, that not long ago I was in Holland, where I was like to have settled myself in the course of trading, that might have brought me in a pretty large portion of earthly things, (after which my heart did too much run): but the Lord having a better portion in store for me, and more durable riches to bestow upon my soul, by the same hand of Providence, brought me back again, and cast me into easy affliction, that thereby I might be weaned from the world, and see the vanity and emptiness of all things therein. And he hath now pitched my soul upon such an object of beauty, amiableness, and excellency, as is as permanent and endurable, as eternity itself; namely, the personal excellency of the Lord Jesus Christ, the sweetness of whose presence no affliction can ever be able to wrest out of my soul.

"Now, while I was in Holland, it seems there were divers Books of that noble and renowned Dr. John Bastwick sent into England, which came into the hands of one Edmund Chillington; for the sending over of which I was taken and apprehended, the plot being before laid by one John Chilburne (whom I supposed, and took to be my friend), servant to my old fellow-soldier, Mr. John Wharton, living in Bow-lane, after this manner. I walking in the street with the said John Chilburne, was taken by the pursuivant and his men; the said John, as I verily believe, having given direction to them where to stand, and he himself was the third man that laid hands on me to hold me.

"Now, at my censure before the Lords, I there declared upon the word of a Christian, that I sent not over those Books, neither did I know the ship that brought them, nor any of the men that belonged to the ship, nor to my knowledge did I ever see either ship, or any appertaining to it in all my days. Besides this, I was accused at my examination before the king's Attorney, at his chamber, by the said Edmund Chillington, button-seller, living in Cannon-street, near Abchurch-lane, and late prisoner in Bridewell and Newgate, for printing 10 or 12,000 Books in Holland; and that I would have printed the 'Unmasking the Mystery of Iniquity,' if I could have gotten a true copy of it; and that I had a chamber in Mr. John Foot's house at Delft, where he thinks the books were kept.

"Now, here I declare before you all, upon the word of a suffering Christian, that he might as well have accused me of printing 100,000 books, and the one been as true as the other. And for the printing the 'Unmasking the Mys-'tery of Iniquity,' upon the word of an honest man, I never saw, nor to my knowledge heard of the book, till I came back again into England. And for my having a chamber at Mr. John Foot's house at Delft, where he thinks the books were kept; I was so far from having a chamber there, as I never lay in his house but twice or thrice at the most: and upon the last Friday of the last term, I was brought to the Star-Chamber Bar, where before me was read the said Edmund Chillington's Affidavit, upon oath against Mr. John Wharton and myself; the sum of which oath was, That he and I had printed, at Rotterdam in Holland, Dr. Bastwick's 'Answer,' and his 'Litany,' with divers other scandalous books.—Now, here again I speak it in the presence of God, and all you that hear me, that Mr. Wharton and I never joined together in printing either these, or any other books whatsoever; neither did I receive any money from him toward the printing any.

"Withal, in his first oath, he peremptorily

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swore, that we had printed them at Rotterdam: unto which I likewise say, That he hath in this particular forsworn himself: for mine own part, I never in all my days either printed, or caused to be printed, either for myself, or for Mr. Wharton, any books at Rotterdam; neither did I come into any printing-house there, all the time that I was in the city.

" And then upon the Tuesday after, he swore against both of us again. The sum of which oaths was, that I had confessed to him (which is most false) that I had printed Dr. Bastwick's Answer to sir John Banks's 'Information,' and his 'Litany;' and another book, called, 'Certain Answers to certain Objections:' and another book, called, 'The Vanity and Impiety of the Old Litany.' And that I had divers other books of the said Dr. Bastwick's in printing, and that Mr. Wharton had been at the charges of printing a Book, called, 'A Breviate of the Bishops late Proceedings;' and another book, called, 'Sixteen New Queries;' and in this his oath hath sworn they were printed at Rotterdam, or somewhere else in Holland; and that one James Oldham, a turner, keeping shop at Westminster-hall gate, dispersed divers of these books. Now, in this oath he hath again forsworn himself in a high degree; for whereas he took his oath that I had printed the book, called, 'The Vanity and Impiety of the Old Litany; I here speak it before you all, that I never in all my days did see one of them in print: but I must confess, I have seen and read it in written hand, before the Doctor was censured. And as for other books, for which he saith I have divers in printing; to that I answer, that for my own particular, I never read nor saw any of the Doctor's Books, but the forenamed four in English; and one little thing more of about two sheets of paper, which is annexed to the 'Vanity of the Old Litany.' And as for his Latin books, I never saw any but two; namely, his 'Flagellum,' for which he was first censured in the High-Commission court, and his 'Apologeticus,' which were both in print long before I knew the Doctor. But it is true, there is a second edition of his 'Flagellum,' but that was at the press above two years ago; namely, anno 1684, and some of this impression was in England before I came out of Holland.

" And these are the main things for which I was censured and condemned, being two oaths in which the said Chillington hath palpably forsworn himself; and if he had not forsworn himself, yet by the law (as I am given to understand) I might have excepted against him, being a guilty person himself, and a prisoner, and did that which he did against me for purchasing his own liberty, which he hath by such Judasly means got and obtained; who is also known to be a lying fellow, as I told the lords I was able to prove and make good.

" But besides all this, there was an inquisition Oath tendered unto me (which I refused to take) on four several days; the sum of which oath is thus much: 'You shall swear that you 'shall make true answer to all things that sh 'be asked of you: so help you God.' N this oath I refused as a sinful and unla oath: it being the High-Commission oath, w which the prelates ever have, and still co butcherly torment, afflict and undo, the d saints and servants of God. It is an oa against the law of the land (as Mr. Nich Fuller in his Argument doth prove): And it is expressly against the Petition of Right, act of parliament enacted in the 3d and year of our king. Again, it is absolutely a the law of God; for that law requires n to accuse himself; but if any thing be l his charge, there must come two or three w nesses at least to prove it. It is also agai the practice of Christ himself, who, in all examinations before the high priest, would accuse himself, but upon their demands, turned this answer, 'Why ask you me? G 'to them that heard me.'

" Withal, this Oath is against the very la of nature; for nature is always a preserver itself, and not a destroyer: But if a man tak this wicked oath, he destroys and undoes h self, as daily experience doth witness. Nay, is worse than the law of the heathen Roma as we may read, Acts xxv. 16. For wh Paul stood before the pagan governors, and the Jews required judgment against him, the governor replied, 'It is not the manner of t 'Romans to condemn any man, before he 'his accusers be brought face to face, to jus 'their accusation.' But for my own part, if I had been proceeded against by a Bill, I w have answered and justified all that they c have proved against me; and by the stre of my God, would have sealed whatsoev I have done with my blood: for I am priv to mine own actions, and my conscience bears witness, that I have laboured, ever since Lord in mercy made the riches of his gr known to my soul, to keep a good conscie and to walk inoffensively both towards G and man. But as for that Oath that was upon me, I did refuse to take it as a sinf unlawful oath, and by the strength of my enabling me, I will never take it, though I pulled in pieces by wild horses, as the a Christians were by the bloody tyrants Primitive Church; neither shall I think man a faithful subject of Christ's kingdom, shall at any time hereafter take it, seeing the wickedness of it hath been so apparently open by so many, for the refusal whereof many do suffer cruel persecution to this day.

" Thus have I, as briefly as I could, declared unto you, the whole cause of my standing here this day; I being upon these grounds censured by the Lords at the Star-Chamber on the last court-day of the last term, to pay 500*l.* to the king, and to receive the punishment, which with rejoicing I have undergone, unto whose censure I do with willingness and cheerfulness submit myself. But seeing I now stand here at this present, I intend, the Lord assisting me with his power, and guiding me by his spirit, to

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declare my mind unto you. I have nothing to say to any man's person, and therefore will not meddle with that; only the things that I have to say, in the first place are concerning the Bishops and their calling: They challenge their callings to be *Jure Divino;* and for the oppugning of which, those three renowned living martyrs of the Lord, Dr. Bastwick, Mr. Burton, and Mr. Prynn, did suffer in this place, (See No. 145) and they have sufficiently proved, that their calling is not from God: which men I love and honour, and do persuade myself that their souls are dear and precious in the sight of God, though they were so cruelly and butcherly dealt with by the prelates. And as for Mr. Burton and Mr. Prynn, they are worthy and learned men, but yet did not in many things write so fully as the Doctor did, who hath sufficiently and plentifully set forth the wickedness, both of the Prelates themselves, and of their callings (as you may read in his Books), that they are not *Jure Divino;* which noble and reverend doctor I love with all my soul: and as he is a man that stands for the truth and glory of God, my very life and heart-blood I will lay down for his honour, and the maintaining of his cause for which he suffered, it being God's cause. As for the Bishops, they used in former times to challenge their jurisdiction, callings and power from the king; but they have now openly, in the High-Commission-Court, renounced that, as was heard by many, at the Censure of that noble Doctor: and as you may fully read in his 'Apologeticus;' and in his 'Answer to sir 'John Banks's Information.' Now I will here maintain it before them all, that their calling is so far from being *Jure Divino* (as they say they are) that they are rather *Jure Diabolico;* which if I am not able to prove, let me be hanged up at the hall-gate. But, my brethren, for your better satisfaction, read the 9th and 13th chapters of the Revelation, and there you shall see, that there came locusts out of the Bottomless Pit, part of whom they are, and they are there lively described. Also you shall there find, that the Beast (which is the Pope, or Roman State and Government) hath given to him by the Dragon (the Devil) his power, seat, and great authority. So that the Pope's authority comes from the Devil; and the prelates, and their creatures, in their printed Books, do challenge their authority, jurisdiction and power (that they exercise over all sorts of people) is from Rome.

"And for proving the Church of England to be a true Church, their best and strongest argument is, that the Bishops are lineally descended from his Holiness (or Impiousness) of Rome, as you may read in Pocklington's book, called 'Sunday no Sabbath.' So that by their own confession they stand by that same power and authority, that they have received from the pope. So that their calling is not from God, but from the devil. For the pope cannot give a better authority or calling to them than he himself hath; but his authority and calling is from the devil, therefore the prelate's calling and authority is from the devil also, Revel. ix. 3. 'And there came out of the smoke, locusts 'upon the earth, and unto them was given 'power, as the scorpions of the earth have 'power to hurt and undo men,' as the prelates daily do: and also, Revel. xiii. 2. 'And the 'Beast which I saw' (saith St. John) 'was like 'unto a leopard, and his feet were as the feet 'of a bear, and his mouth as the mouth of a 'lion; and the dragon,' (that is to say, the devil) 'gave him his power, his seat and great 'authority:' and verse 15, 16, 17. And whether the Prelates, as well as the pope, do not daily the same things, let every man that hath but common reason judge.

"For do not their daily practices and cruel burthens imposed on all sorts of people, high and low, rich and poor, witness that their descent is from the Beast, part of his state and kingdom: so also Revel. xvi. 13, 14, all which places do declare, that their power and authority being from the pope (as they themselves confess) therefore it must originally come from the devil. For their power and callings must of necessity proceed either from God, or else from the devil; but it proceeds not from God, as the Scriptures sufficiently declare; therefore their calling and power proceeds from the devil, as both Scripture and their own daily practices do demonstrate and prove. And as for that last place cited, Rev. xvi. 13, 14. if you please to read the second and third parts of Dr. Bastwick's Litany, you shall find, he there proves, that the Prelates practices do every way suit with, and make good that portion of Scripture to the utmost. For in their sermons that they preach before his majesty, how do they incense the king and nobles against the people of God, labouring to make them odious in his sight, and stirring him up to execute vengeance upon them, though they be the most harmless generation of all others?

"And as for all these officers that are under them, and made by them, for mine own particular, I cannot see but that their callings are as unlawful as the Bishops themselves; and in particular, for the callings of the ministers, I do not, nor will not speak against their persons, for I know some of them to be very able men, and men of excellent gifts and qualifications; and I persuade myself, their souls are very dear and precious in the sight of God.

"Yet notwithstanding, this proves not their callings to be ever the better, as it is in civil government: If the king (whom God hath made a lawful magistrate) make a wicked man an officer, he is as true an officer, and as well to be obeyed, coming in the king's name, as the best man in the world coming with the same authority; for in such a case, he that is a wicked man, hath his calling from as good authority as the godliest man hath; and therefore his calling is as good as the other's. But on the other side, if he that hath no authority make officers, though the men themselves be ever so good and holy, yet their holiness makes

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their calling never a whit the truer; but still is a false calling, in regard his authority was not good nor lawful that made them. And even so the ministers, be they ever so holy men, yet they have one and the same calling with the wickedest that is amongst them; their holiness proves not their callings to be ever the truer, seeing their authority that made them ministers is false: and therefore they have more to answer for than any of the rest, by how much the more God hath bestowed greater gifts upon them than upon others, and yet they detain the truth in unrighteousness from God's people, and do not make known to them, as they ought, the whole will and counsel of God.

"And again, the greater is their sin, if their callings be unlawful (as I verily believe they are), in that they still hold them, and do not willingly lay down and renounce them; or they do but deceive the people, and highly dishonour God, and sin against their own souls, while they preach unto the people by virtue of an Antichristian and unlawful calling. And the more godly and able the minister is, that still preaches by virtue of this calling, the more hurt he doth; for the people that have such a minister will not be persuaded of the truth of things, though one speak, and inform them in the name of the Lord; but will be ready to reply, our minister that preaches still by virtue of this calling, is so holy a man, that were not his calling right and good, I do assure myself he would no longer preach by virtue thereof. And thus the holiness of the minister is a cloak to cover the unlawfulness of his calling, and make the people continue rebels against Christ, his sceptre and kingdom, which is an aggravation of his sin: for by this means the people are kept off from receiving the whole truth into their souls, and rest in being but almost Christians, or but Christians in part. But, O my brethren, it becomes all you that fear God, and tender the salvation of your own souls, to look about you, and to shake off that long security and formality in religion that you have lain in: for God, of all things, cannot endure lukewarmness, Rev. iii. 16, and search out diligently the truth of things, and try them in the balance of the sanctuary. I beseech you take things no more upon trust, as hitherto you have done, but take pains to search and find out those spiritual and hidden truths that God hath enwrapped in his sacred Book, and find out a bottom for your own souls: for if you will have the comforts of them, you must bestow some labour for the getting of them, and you must search diligently before you find them, Prov. ii. Labour also to withdraw your necks from under that spiritual and Antichristian bondage (unto which you have for a long time subjected your souls), lest the Lord cause his plagues, and the fierceness of his wrath, to seize both upon your bodies and souls; seeing you are now warned of the danger of these things.

"For he himself hath said, Rev. xiv. 9, 10, 11. 'That if any man worship the Beast and 'his Image, and receive his mark in his fore-'head, or in his hand; the same shall drink of 'the wine of his wrath, which is poured out 'without mixture, into the cup of his indigna-'tion, and he shall be tormented with fire and 'brimstone, in the presence of the holy An-'gels, and in the presence of the Lamb: and 'the smoke of their torment ascended up for 'ever and ever, and they have no rest, day nor 'night, who worship the Beast and his Image, 'and whosoever receiveth the mark of his 'name.' Therefore as you love your own souls, and look for that immortal crown of happiness in the world to come, look that you withdraw yourselves from that Antichristian power and slavery that you are now under, even as God himself hath commanded and enjoined you, in Rev. xviii. 4, 'Come out of her, 'my people, that you be not partakers of 'her sins, and that you receive not of her 'plagues; for her sins have reached unto 'heaven, and God hath remembered her ini-'quities.' Here is the voice of God himself, commanding all his chosen ones, though they have lived under this Antichristian slavish power and state a long time, yet at last to withdraw their obedience and subjection from it. My brethren, we are all at this present, in a very dangerous and fearful condition, under the idolatrous and spiritual bondage of the prelates, in regard we have turned traitors unto our God, in seeing his almighty great name, and his heavenly truth, trodden under foot, and so highly dishonoured by them; and yet we not only let them alone in holding our peace, but most slavishly and wickedly subject ourselves unto them, fearing the face of a piece of dirt, more than the Almighty great God of heaven and earth, who is able to cast both body and soul into everlasting damnation.

"Oh repent, I beseech you therefore repent, for that great dishonour you have suffered to be done unto God by your fearfulness and cowardliness; and for the time to come put on courageous resolutions like valiant soldiers of Jesus Christ, and fight manfully in this his spiritual battle, in which battle some of his soldiers have already lost part of their blood; and withal, study this Book of the Revelation, and there you shall find the mystery of iniquity fully unfolded and explained; and also you shall see what great spiritual battles have been fought betwixt the Lamb and his servants, and the Dragon, the Devil, and his vassals; and some are to fight.

"Therefore gird on your spiritual armour, spoken of, Ephes. 6, that you may quit yourselves like good and faithful soldiers, and fear no colours, the victory and conquest is ours already; for we are sure to have it, I do not speak of any bodily and temporal battle, but only of a spiritual one, and be not discouraged and knocked off from the study of it, because of the obscurity and darkness of it; for the Lord hath promised his enlightening Spirit unto all his people that are labourous and studious to know him a-right, and also he hath promised

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a blessing, and pronounced a blessedness unto all that read and labour to keep the things contained in this Book, Rev. 1, 3. My Christian Brethren, in the bowels of Jesus Christ, I beseech you, do not contemn the things that are delivered to you, in regard of the meanness and weakness of me the instrument, being but one of the meanest and unworthiest of the servants of Jesus Christ, for the Lord many times doth great things by weak means, that his power may be more seen: for we are too ready to cast our eye upon the means and instrument, not looking up unto that Almighty power that is in God, who is able to do the greatest things by the weakest means, and therefore 'out of 'the mouths of babes and sucklings he hath 'ordained strength,' Psal. viii. 2. And he hath chosen the foolish things of the world to confound the wise, and God hath chosen the weak things of the world to confound the things which are mighty, and base things of the world, and things which are despised, hath God chosen; yea, things which are not, to bring to nought the things that are, 1 Cor. i. 27, 28. And he gives the reason wherefore he is pleased so to do; 'That no flesh should glory in his 'presence.'—So you see God is not tied to any instrument and means to effect his own glory, but he by the least instrument is able to bring to pass the greatest things.

"It is true, I am a young man, and no Scholar, according to that which the world counts scholarship, yet I have obtained mercy of the Lord to be faithful, and he, by a Divine Providence, hath brought me hither this day; and I speak to you in the name of the Lord, being assisted with the spirit and power of the God of heaven and earth: and I speak not the words of rashness or inconsiderateness, but the words of soberness, and mature deliberation; for I did consult with my God, before I came hither, and desired him that he would direct and enable me to speak that, which might be for his glory and the good of his people. And as I am a soldier, fighting under the banner of the great and mighty Captain the Lord Jesus Christ; and as I look for that Crown of immortality, which one day I know shall be set upon my temples, being in the condition that I am in, I dare not hold my peace, but speak unto you with boldness in the might and strength of my God, the things which the Lord in mercy hath made known unto my soul, come life, come death."

[When I was hereabout, there came a fat lawyer, I do not know his name, and commanded me to hold my peace, and leave my preaching. To whom I replied and said, Sir, I will not hold my peace, but speak my mind freely, though I be hanged at Tyburn for my pains. It seems he himself was galled and touched, as the Lawyers were in Christ's time, when he spake against the Scribes and Parisees, which made them say, 'Master, in saying 'thus thou revilest us also.' So he went his way, and, I think, complained to the lords, but I went on with my speech, and said:]

"My Brethren, be not discouraged at the ways of God for the affliction and cross that doth accompany them, for it is sweet and comfortable drawing in the yoke of Christ for all that, and I have found it so by experience; for my soul is filled so full of spiritual and heavenly joy, that with my tongue I am not able to express it, neither are any capable, I think, to partake of so great a degree of consolation, but only those upon whom the Lord's gracious afflicting hand is. And for mine own part, I stand this day in the place of an evil doer, but my conscience witnesseth that I am not so." [And hereabout I put my hand into my pocket, and pulled out three of worthy Dr. Bastwick's Books, and threw them among the people, and said,] "There is part of the Books for which I suffer, take them among you, and read them, and see if you find any thing in them against the law of God, the law of the land, the glory of God, the honour of the king or state.

"I am the son of a gentleman, and my friends are of rank and quality in the country where they live, which is 200 miles from this place, and I am in my present condition deserted of them all; for I know, not one of them dare meddle with me in my present estate, being I am stung by the Scorpions, (the Prelates) and for any thing that I know, it may be I shall never have a favourable countenance from any of them again: and withal, am a young man, and likely to have lived well, and in plenty, according to the fashion of the world; yet notwithstanding, for the cause of Christ, and to do him service, I have and do bid adieu to father, friends, and riches, pleasures, ease, contented life and blood, and lay all down at the foot-stool of Jesus Christ, being willing to part with all, rather than I will dishonour him, or in the least measure part with the peace of a good conscience, and that sweetness and joy which I have found in him. For in naked Christ is the quintessence of sweetness, and I am so far from thinking my affliction and punishment, which I have this day endured, and still do endure and groan under, a disgrace, that I receive it as the welcome Cross of Christ, do think myself this day more honoured by my sufferings, than if a crown of gold had been set upon my head: for I have in some part been made conformable to my Lord and Master, and have in some measure drank of the same cup, which he himself drank of, while he was in this sinful world. For he shed his most precious blood for the salvation of my poor soul, that so I might be reconciled to his Father; therefore am I willing to undergo any thing for his sake, and that inward joy and consolation within me, that carries me high above all my pains and torments. And you, (my brethren) if you be willing to have Christ, you must own him, and take him upon his own terms, and know that Christ and the Cross is inseparable; for he that will live godly in Christ Jesus, must suffer persecution and affliction; it is the lot and portion of all his chosen ones, through many afflictions and trials we

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must enter into glory; and the Apostle saith, 'That if ye be without affliction, whereof all 'are partakers, then are ye bastards, and not 'sons.' And therefore, if you will have Christ, sit down and reckon before ever you make profession of him, what he will cost you; lest when you come to the trial, you dishonour him; and if you be not willing and contented withal, and let all go for his sake, you are not worthy of him. If parents, husbands, wife or children, lands or livings, riches or honours, pleasure or ease, life or blood, stand in the way, you must be willing to part with all these, and to entertain Christ naked and alone, though you have nothing but the Cross, or else you are not worthy of him; Math. 10, 37, 38.

"Oh, my brethren, there is such sweetness and contentedness in enjoying the Lord Jesus alone, that it is able, where it is felt, to make a man go through all difficulties, and endure all hardships that may possibly come upon him. Therefore, if he call you to it, do not deny him, nor his truth in the least manner; for he hath said, 'He that denies him before men, him will 'he deny before his Father, which is in Hea-'ven.' And now is the time that we must shew ourselves good soldiers of Jesus Christ, for his truth, his cause and glory lies at stake in a high degree; therefore put on courageous resolutions, and withdraw your necks and souls from all false power and worship, and fight with courage and boldness in this spiritual battle, in which battle, the Lord before your eyes hath raised up some valiant champions that fought up to the ears in blood: therefore be courageous soldiers, and fight it out bravely, that your God may be glorified by you, and let him only have the service, both of your inward and outward man, and stand to his cause, and love your own souls, and fear not the face of any mortal man; for God hath promised to be with you, and uphold you, that they shall not prevail against you, Isa. xli. 10, 11. But alas, how few are there that dare shew any courage for God and his cause, though his glory lies at the stake, but think themselves happy and well, and count themselves wise men, if they can sleep in a whole skin; when Christ hath said, 'He 'that will save his life shall lose it; and he that 'will lose his life for his sake, shall find it. 'What shall it profit a man, if he gain the 'whole world and lose his own soul?'

"Therefore it is better for a man to be willing and contented to let all go for the enjoying of Christ, and doing him service, than to sit down and sleep in a whole skin, though in so doing he gain all the world, and see him dishonoured, his glory and truth trodden under foot, and the blood of his servants shed and spilt.—Yes, without doubt, it is; but many are in these times, so far from suffering valiantly for Christ, that they rather dissuade men from it, and count it a point of singularity and pride, and self-ends, for a man to put himself forward to do God service; asking, what calling and warrant any private man hath thereunto, seeing it belongs to the ministers to speak of these things? Yes, so it doth; but alas, they are so cowardly and fearful, that they dare not speak. —And therefore it belongs also to thee, or me, or any other man, if thou be'st a soldier of Jesus Christ, whatsoever by place or calling thy rank or degree be, be it higher or lower, yet if he call for thy service, thou art bound, though others stand still, to maintain his power and glory to the utmost of thy power and strength, yea, to the shedding the last drop of thy blood; for he hath not loved his life unto the death for thy sake, but shed his precious blood for the redemption of thy soul. Hath he done this for thee; and darest thou see him dishonoured, and his glory lie at the stake, and not speak in his behalf, or do him the best service thou canst?—If out of a base and cowardly spirit thus thou doest, let me tell thee here, and that truly to thy face, thou hast a Dalilah in thy heart, which thou lovest more than God, and that thou shalt one day certainly find by woful experience. Alas, if men should hold their peace in such times as these, the Lord would cause the very stones to speak, to convince man of his cowardly baseness."

Having proceeded in a manner thus far by the strength of my God, with boldness and courage in my speech, the Warden of the Fleet came with the fat Lawyer, and commanded me to hold my peace. To whom I replied, I would speak and declare my cause and mind, though I were to be hanged at the gate for my speaking. And he caused proclamation to be made upon the pillory, for bringing to him the Books: so then he commanded me to be gagged, and if I spake any more, that then I should be whipt again upon the pillory.—So I remained about an hour and a half gagged, being intercepted of much matter, which by God's assistance I intended to have spoken; but yet with their cruelty I was nothing at all daunted, for I was full of comfort and courage, being mightily strengthened with the power of the Almighty, which made me with chearfulness triumph over all my sufferings, not shewing one sad countenance or discontented heart.

And when I was to come down, having taken out my head out of the Pillory, I looked about me upon the people, and said, 'I am more than 'a conqueror through him that hath loved me.' '*Vivat Rex*,' Let the king live for ever; and so I came down and was had back again to the Tavern, where I, together with Mr. Wharton, staid a while, till one went to the Warden to know what should be done with me, who gave order we should be carried back again to the Fleet.—After I came back to the prison, none were suffered to come to me, but the surgeon to dress me.—[Here Lilburn gives an account of his cruel whipping, &c. but as it is afterwards mentioned in the depositions before the lords, it is here omitted.]—The rest that I intended by the strength of my God to have spoken (if I had not been prevented by the gag), I now forbear to set down, in regard I hear I am to come into the field again to fight a second

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battle, unto which time I reserve it: if the Lord so order it that I may have liberty to speak, I doubt not but by the might and power of my God, in whom I rest and trust, valiantly to display the weapons of a good soldier of Jesus Christ, come life, come death: and in the mean time, to what I have here said and written, I set-to my name, by me, John Lilburn, being written with part of mine own blood.

JOHN LILBURN.

At the Inner Star-Chamber, the 18th of April, A. D. 1638.

PRESENT; Lord Archbishop of Canterbury, Lord-Keeper, Lord-Treasurer, Lord-Privy-Seal, Earl-Marshal, Earl of Salisbury, Lord Cottington, Lord Newburgh, Mr. Secretary Cooke, Mr. Secretary Windebank.

'Whereas John Lilburn, prisoner in the 'Fleet, by sentence in the Star-Chamber, did 'this day suffer condign punishment for his 'several Offences, by whipping at a cart, and 'standing in the pillory; and as their lordships 'were this day informed, during the time that 'his body was under the said execution, au-'daciously and wickedly did not only utter sun-'dry scandalous speeches, but likewise scat-'tered divers copies of seditious Books among 'the people, that beheld the said execution; 'for which very thing, among other offences of 'like nature, he hath been censured in the said 'Court by the aforesaid Sentence: It is there-'fore, by their lordships ordered, That the said 'John Lilburn should be laid alone, with irons 'on his hands and legs, in the Wards of the 'Fleet, where the basest and meanest sort of 'prisoners are used to be put; and that the 'Warden of the Fleet take special care to 'hinder the resort of any persons whatsoever 'unto him. And particularly, that he be not 'supplied with money from any friend, and 'that he take special notice of all letters, writ-'ings, and books brought unto him, and seize 'and deliver the same unto their lordships; 'and take notice from time to time, who they 'be that resort unto the said prison to visit the 'said Lilburn, or to speak with him, and in-'form the Board thereof. And it was lastly 'ordered, that all persons that shall be here-'after produced to receive corporal punishment 'according to sentence of that court, or by 'order of the Board, shall have their garments 'searched before they be brought forth, and 'neither writing, nor other thing suffered to 'be about them; and their hands likewise to 'be bound, during the time they are under 'punishment. Whereof, together with the 'other premises, the said Warden of the Fleet 'is hereby required to take notice, and to have 'special care, that this their lordships order be 'accordingly observed.

Examined per DUDLEY CARLETON."

And on the said 18th of April, it was further ordered by the said Court of Star-Chamber,

'That his majesty's Attorney and Solicitor-'General should be hereby prayed and re-'quired, to take strict examination of John 'Lilburn prisoner in the Fleet, touching the 'Demeanour and Speeches of him the said Lil-'burn, during the time of his whipping and 'standing in the Pillory this day, according to 'the Sentence of his majesty's Court of Star-'Chamber; particularly, whether the said 'Lilburn did at that time utter any speeches 'tending to Sedition, or to the dishonour of the 'said Court of Star-Chamber, or any member 'of the said Court? and whether he did throw 'about and disperse at the same time any 'seditious Pamphlets and Books, either of that 'sort for which he was formerly censured, or 'any other of like nature? What the Speeches 'were, and who heard them? What the said 'Books were, and whence and of whom the 'said Lilburn had them? And what other ma-'terial circumstances they should think fit to 'examine, either the said Lilburn upon, or any 'other person by whom they shall think good 'to inform themselves for the better finding 'out the truth: and thereupon to make certi-'ficate to the board what they find, together 'with their opinions.'

The 3rd of November, 1640, being the first day the late dissolved parliament sate, I according to law and justice preferred my Petition and Complaint to them; who upon the reading of my Petition, immediately ordered me my liberty [being, as I remember, the first prisoner in England set at liberty by them] to follow my Petition, and according to the legal custom of parliaments make it good by proof, before a select Committee appointed by them to that purpose, Mr. Francis Rouse having the Chair; before whom many particular days one after another I appeared with my Counsel and my Witnesses, and fully proved all my Petition. Upon the report of all which by Mr. Rouse the Chairman, the House of Commons upon the 4th of May, 1641, [being the very same day that the king himself caused me to be arraigned for High Treason at the bar of the house of peers] voted and resolved upon the question,

"That the Sentence of the Star-Chamber given against John Lilburn is illegal, and against the Liberty of the subject; and also bloody, cruel, wicked, barbarous, and tyrannical.

"Resolved upon the question, That reparation ought to be given to Mr. Lilburn for his imprisonment, sufferings, and losses sustained by that illegal sentence."

"Ordered, That the committee shall prepare this case of Mr. Lilburn's to be transmitted to the lords, with those other of Dr. Bastwick, Dr. Leighton, Mr. Burton, and Mr. Prynne.

"(Signed) H. ELSINGE, *Cl. Parl. Dom. Com.*"

After which Votes (being in a full, free, unravished, or unforced, legal, and unquestionable Parliament, after a full, open, free, and fair hearing, and examining of all my aforesaid sufferings and complaints) troubles and

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the wars came on, and being in my own conscience fully satisfied of the justness of the Parliament's* then cause, in the height of zeal, accompanied with judgment and conscience, 'upon the principles I have largely laid down 'in the 26, 27, 75, 76th pages of my book of 'the 8th of June, 1649, intitled England's 'legal, fundamental, &c.' I took up arms for them, and fought heartily and faithfully in their quarrel, (for maintaining of which I had like to have been hanged at Oxford, while during my imprisonment there, I lost 5 or 600*l.* out of my estate at London,) till the present earl of Manchester had like to have hanged me, for being a little too quick in taking in Tickell Castle which spoiled a soldier of me ever since. After which, in the year 1645, I followed the House of Commons close, to transmit my foresaid Votes to the Lords, as appears by the following Petition:

"To the Honourable the House of Commons now assembled in the High-Court of Parliament. The humble PETITION of JOHN LILBURN, Lieut. Col."

"In all humility sheweth; That your Petitioner having suffered abundance of inhuman, barbarous cruelty, by virtue of an illegal Decree made against him, in the Star-Chamber, 1637, as by the copy of his Petition hereunto annexed, formerly presented to this honourable house, and by your own Votes made the 4th of May, 1641, (upon the examination of the Petition) will appear: Which Votes are as followeth; First, That the Sentence of the Star-Chamber given against him is illegal, against the Liberty of the Subject, and also bloody, wicked, cruel, barbarous, and tyrannical. Secondly, That reparation ought to be given to him for his imprisonment, sufferings and losses, sustained by that illegal Sentence. And then also it was ordered, That care should be taken to draw up his Case, and transmit it to the lords: but by reason of multitude of business in this honourable house, there hath been no further proceedings in it since. And these distractions coming on, your Petitioner took command under the right hon. Robert lord Brook, with whose regiment he adventured his life freely and resolutely, both at Kenton Field, and Brentford, where he was taken prisoner and carried away to Oxford: where, within a short time after his coming, the king sent to the Castle to your petitioner, the now earl of Kingston, the lord Dunsmore, the lord Maltrevers, and the lord Andover, to woo your Petitioner with large proffers of the honour and glory of court-preferment, to forsake the Parliament's party, and to engage on his party. Upon the slighting and contemning of which, your petitioner was within few days after laid in irons, and kept an exceeding close prisoner, and forced several times to march into Oxford in irons, to Judge Heath, before whom he was arraigned for High-Treason, for drawing his sword in the cause of the Commonwealth, and suffered multitude of miseries, in his almost twelve-months captivity there: in which time he lost above 600*l.* in his estate that he left behind him at London, (as he is clearly able to make appear). And immediately after his coming from thence, he took command in the earl of Manchester's army, his commission as Major of foot bearing date the 7th Oct. 1643, which lasted till the 16th May, 1644, at which time he was authorised by commission as lieut.col. to command a Regiment of Dragoons; in which services having been in many engagements, he hopes it will easily appear, that he hath not only behaved himself honestly and faithfully, but also valiantly and stoutly, in the midst of many discouragements, God crowning some of his endeavours with success; and especially at the taking of Tickell-Castle, and sir Francis Worthley's garrison, at which place your petitioner was shot through his arm. The premises considered, he humbly beseecheth this Honourable Assembly to perfect that justice, which you so happily began for your petitioner, and to give him reparation for his large and tedious imprisonment, and heavy sufferings by the Star-Chamber Decree; he having waited four years with patience for that end, though he lost by his imprisonment all that he had, and was deprived of a profitable calling, being then in the way of a factor in the Low Countries; and also to take off the king's fine, and to consider his service with the earl of Manchester, wherein he faithfully adventured his life, spent a great deal of his own money, and lost at Newark, when prince Rupert raised the siege, almost 100*l.* being stripped from the crown of the head to the sole of the foot, besides his former losses at Kenton and Brentford: and that you will be pleased, for his present subsistence, to

* Where, (I very well remember,) sir Arthur Haslerig was one of my zealous and forward Judges; and when Warden James Ingram came to the bar of the Court of Wards, and brought Mr. Herne the counsellor to plead for the Lords, and in excuse of himself, who stiffly insisted in a high manner upon the orders and decrees of Star-Chamber, upon which I very well remember sir Arthur, with a great deal of indignation, said unto Herne, 'I value not 'a Decree of the lords in Star-Chamber a rush, 'if it be not expressly according to the tenor of 'their Commission, the law: and I further tell 'you, it is a ridiculous thing, Sir, to summon 'Parliaments to meet together to make laws, 'if the lords Decrees in Star-Chamber against 'law should be binding. And therefore, although you have proved for your client Mr. 'Ingram, that the lords in open court (the 'court sitting) commanded him on the pillory 'to gag Mr. Lilburn, for speaking against them, 'yet I tell you by law that Order ought to 'have been in writing according to the custom 'of the court, which you confess it was not, 'and therefore Mr. Ingram must smart for his 'executing of orders on Mr. Lilburn made 'illegally.'

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appoint the payment of so much of his present arrears, as you in your great wisdoms shall think fit, to supply his urgent and pressing necessities, there being now due to them 600*l.* and upwards. And that Col. King may be commanded to account with the petitioner, which formerly he hath refused to do (though commanded by his general), and to give him debentures for what is due by the state in his service, and to pay him what he hath received for the petitioner, and detained from him. And he shall pray, &c. JOHN LILBURN."

The annexed PETITION thus followeth:

"To the House of Commons now assembled in the High Court of Parliament; The humble Petition of JOHN LILBURN, prisoner in the Fleet:

"In all humility sheweth; That in December next will be three years, your Petitioner, upon supposal of sending over certain Books of Dr. Bastwick's, from Holland into England, was by Dr. Lamb's warrant without any Examination at all sent to the Gatehouse prison, and from thence within three days removed to the Fleet, where he abiding prisoner, in Candlemas-Term following, was proceeded against in the honourable court of Star-Chamber: where your Petitioner appearing (and entering of his name, for want of money his name was struck out again), and he refusing to take an Oath to answer to all things that should be demanded of him (for that your petitioner conceived that oath to be dangerous and illegal) without any interrogatory tendered him, for his refusing the said oath, he was prosecuted and censured in the said court most heavily, being fined 500*l.* to the king, and sent prisoner to the Fleet. And in Easter Term following, was whipped from the Fleet to Westminster, with a three-fold knotted cord, receiving at least 200 stripes; and then at Westminster, he was set on the pillory the space of two hours, and (over and above the censure of the court) at the warden of the Fleet's command, was gagged about an hour and a half; after which most cruel sufferings, was again returned to the Fleet close prisoner. When through his said sufferings, the next morning he being sick of an extreme fever, could not have admittance for his surgeon to let him blood, or dress his sores, till the afternoon of the said day; though the surgeon, in pity to the prisoner, went to Westminster to the warden himself; and your petitioner hath been close prisoner in the Fleet ever since, where in a most cruel manner he hath been put into iron fetters, both hands and legs, which caused a most dangerous sickness that continued six months; and after some small recovery, was again laid in irons, which caused at least five months sickness, more dangerous than the former. During which time of sickness, they most inhumanly denied his friends to come and see him, until they would give them money for their admittance, and they have denied many to come at all; and have beaten and kicked, and otherwise most shamefully abused, such his friends as came to see him in his great distress, and to bring him food and necessaries to sustain his life, and also have kept his servant from him, and his food. So that if he had not been relieved by stealth of his fellow prisoners, he had been kept from any food at all, for above the space of 10 days together; and the prisoners that out of pity have relieved him, have been most cruelly punished, and the keepers have not forborn to confess themselves, that they should have starved him long ago, had not the prisoners relieved him. And besides all this, they have most cruelly beaten and wounded him, to the hazard of his limbs, and danger of his life, had he not been rescued and saved by the prisoners of the same house. In which most miserable condition, your poor petitioner hath continued a prisoner for the space of about two years and a half, and is like still to continue in the same, under the merciless hands of the warden of the Fleet, who hath denied lawful liberty to his prisoner, for that he hath said, he must observe the man that has so great a sway in the kingdom, intimating the Archbishop.—All which his deplored condition and lamentable miseries, he most humbly presenteth to this most Honourable Assembly, beseeching them to be pleased to cast an eye of compassion towards him, and to afford him such relief from the Censure and hard imprisonment, as may seem good to your wisdoms, who otherwise is like to perish under the hands of merciless men. And your Petitioner shall ever pray, as in duty he is bound, to the Lord to bless and prosper this Honourable Assembly. JOHN LILBURN."

At the debate of which, there was not a little opposition by some, who, as I conceive, thought I was not capable of enjoying justice, although to my knowledge I never did an act in all my life that put me out of the protection of the law, or that tended to the disfranchising me of being a denizen and a freeman of England; and therefore ought to enjoy as great a privilege in the enjoyment of the benefit of the law of England, as any free denizen of England whatsoever, by what name or title soever he be called. The issue of which debate, so much as I have under the Clerk's hand, thus followeth:

"Die Lunæ, 10 Nov. 1645.

"Ordered, &c. That the Vote formerly passed in this house, concerning the proceedings against lieut. col. Lilburn in the Star-Chamber, be forthwith transmitted to the lords."

"Ordered, &c. That it be referred to the Committee of Accounts to cast up and state the accounts of lieut. col. Lilburn, and to certify what is due to him, to this house.

"H. ELSYNGE, *Cler. Parl. D. Com.*"

After passing these Votes I found quick dispatch to the Lords; and upon the 1st of Dec. 1645, by special decree, they took off the Fine set upon me by the Star-Chamber; and afterwards at their open bar judicially, upon the 18th of Feb. 1645, appointed me a solemn hearing *de novo* of the whole matter; and as-

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signed Mr. John Bradshaw and Mr. John Cook for my counsel.

Lieut. Col. JOHN LILBURN's Sufferings, as they were represented and proved before the right honourable the House of Peers, in Parliament assembled, the 13th day of February, 1645.

Mr. Bradshaw and Mr. Crook being assigned for Counsel with the said Mr. Lilburn; Mr. Bradshaw having succinctly, and so truly opened the Case, as if he had been an eye-witness of his client's sufferings, acquainted their lordships, that the same had received a full and solemn hearing before a committee of the honourable house of commons: upon whose report it was by that honourable house, May 4, 1641, resolved upon the question, 'That the 'Sentence of the Star-Chamber given against 'John Lilburn is illegal, and against the Liberty 'of the Subject; and also bloody, wicked, cruel, 'barbarous, and tyrannical;' and likewise further resolved upon the question, 'That reparation ought to be given to Mr. Lilburn, for 'his imprisonment, sufferings and losses, sustained by that illegal Sentence.' And now, my lords, they have transmitted them to your lordships, by whose noble favour and justice we are now before your honours to lay open the illegality of that Sentence, and all the proceedings thereupon, and to crave your lordships justice for reparations, proportionable to our client's sufferings.

And in the first place he presented an Order, whereby Mr. Lilburn was first illegally attached, and committed to the prison of the Gate-house, which was read in these words:

'Sexto Dec. A. D. 1637. Emanavit attach' 'direct. Wragge, et Flamsteed, pro corporis, 'capt. Johannis Lilburn de civitate London, ad 'immediate admittend, &c. Signat. per Lambe, 'Gwynn, et Aylett. Ex directione Baker cler. 'cappellani Lond. Exam. Edwardus Latham, 'Reg. Regi Deput.'

The English of which thus followeth:

'The 6th Dec. 1637. There issued an attachment directed to Wragge and Flamsteed, 'for the taking of the body of John Lilburn, of 'the city of London, and to bring immediately, '&c. Signed by Lambe, Gwynn, and Aylett. 'By direction of the court, Baker, clerk chaplain. Examined by Edward Latham, Deputy 'of the Register.'

Which Order being read, Mr. Bradshaw observed, that the original imprisonment itself was illegal, because they never convented Mr. Lilburn to speak for himself, nor examined him upon any crime. But, my lords, it is no marvel that such kind of injustice as this proceeded from those high commissioners, because it was their usual practice to be attachers, judges, gaolers and executioners themselves, without regard of any legal way of proceedings. He then desired their lordships, that the Sentence against Mr. Lilburn in the Star-Chamber might also be read, which was accordingly done, viz.

'In Cam. Stel. coram Canc. ibidem 13 die Feb. 'anno decimo tertio Car. reg. Lord Coven-'try, Lord-Keeper, &c.

'Whereas upon information to this Court, 'the 9th of Feb., by sir John Banks knt. his 'majesty's Attorney-General, that John Lilburn and John Wharton, then present at the 'bar, were the 24th of Jan. last, ordered to be 'examined upon interrogatories, touching their 'unlawful printing, importing, publishing and 'dispersing of libellous and seditious Books, 'contrary to the decree of this court, which was 'verified by Affidavit; and being brought up to 'the office to appear and be examined, the said 'Lilburn refused to * appear; and both of 'them denied to take an Oath to make true 'answer to Interrogatories, as appeared by the 'Certificate of Mr. Goad, deputy-clerk of this 'court: the court did on that day order, That 'their appearances should then be recorded, 'they being present in court as aforesaid; and 'that in respect the said delinquents did then 'again contemptuously refuse to take their 'oaths, tendered unto them in open court, they 'should be remanded to the prison of the Fleet, 'there to remain close prisoners, until they conform themselves in obedience to take their 'oaths, and be examined; and that unless they 'did take their oaths, and yield to be examined 'by Monday night then next following, and 'now last past, their lordships would on this 'sitting day proceed to a Censure against them 'for their contempts therein.

'Now this day the said Lilburn and Wharton 'being again brought unto the bar, his majesty's 'said Attorney informed this Honourable Court, 'that they still continued in their former obstinacy, and contemptuously refused to take 'their Oaths, to make true answer to the † Interrogatories, although they had been sent for, 'and their Oaths offered to be given unto them 'by Mr. Goad, deputy-clerk of this court, who 'now certified the same in court. And therefore his majesty's said Attorney humbly prayed 'on his majesty's behalf, That their lordships 'would now proceed to Censure against the 'said delinquents for their great contempts and 'disobedience therein. Whereupon their lordships endeavoured by fair persuasions to draw 'them to conformity and obedience; and withal 'offered, that if yet they would submit and take 'their Oaths, their lordships would accept thereof, and not proceed to censure against them. 'But such was the insufferable disobedience and 'contempt of the said delinquents, that they 'still persisted in their former obstinacy, and 'wilfully refused to take their oaths. In respect whereof the whole Court did, with an 'unanimous consent, declare and adjudge the 'said Lilburn and Wharton guilty of a very high

* Lilburn did enter his name, but refusing to give them money they put out his name again.

† They never shewed the Interrogatories to Lilburn, though he desired the sight of them, that so he might know what he did swear to.

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'contempt, and offence of dangerous consequence and evil example, and worthy to undergo a very sharp, exemplary and severe Censure, which may deter others from the like presumptuous boldness, in refusing to take a legal Oath;* without which, many great and exorbitant offences to the prejudice and danger of his majesty, his kingdoms, and loving subjects, might go away undiscovered and unpunished. And therefore their lordships have now ordered, adjudged and decreed, that the said Lilburn and Wharton shall be remanded to the Fleet, there to remain until they conform themselves in obedience to the orders of this court, and that they shall pay 500*l.* a-piece for their several fines to his majesty's use; and before their enlargements out of the Fleet, become bound with good sureties for their good behaviour. And to the end that others may be more deterred from daring to offend in the like kind hereafter, the court hath further ordered and decreed, That the said John Lilburn shall be whipped through the street, from the prison of the Fleet unto the pillory, to be erected at such time and in such place as this court shall hold fit and direct; and that both he and the said Wharton shall be both then set in the said pillory, and from thence be returned to the Fleet, there to remain according to this decree.

'JOHN ARTHUR, Dep.'

At the concluding of which, Mr. Bradshaw observed, that this Sentence was *filo de se*, guilty of its own death; the ground whereof being, because Mr. Lilburn refused to take an Oath, to answer all such questions as should be demanded of him, it being contrary to the laws of God, nature, and the kingdom, for any man to be his own accuser: the execution of which cruel and bloody Sentence was proved by several Witnesses of quality and good repute upon oath at their lordships bar, the substance of whose testimony was:

In the first place, Mr. *Thomas Smith*, merchant, upon his oath declared to their lordships, That he saw Mr. Lilburn tied to a cart at Fleet-bridge, being stripped from the waist upward, and whipped from thence to Westminster; and that so near as he was able to judge, every two, three or four steps he had a lash, with a whip that he was sure had two or three cords tied full of knots; and for the number he did not judge them so few as 500, and he thought that if he should say 500 and 500, he should not say amiss: but 500 he was confident was the least. And that he saw him set upon the pillory, &c. the officers being very cruel towards him, or any that spoke unto him.

The next witness was Mrs. *Mary Dorman*; the substance of whose testimony upon oath was, that she saw Mr. Lilburn whipped from Fleet-bridge to Westminster, in such a barbarous and cruel manner, that she was not able to express it, and that she did believe that both his shoulders were swelled almost as big as a penny-loaf, with the bruises of the knotted cords; and that she did see him set upon the pillory immediately, above the space of two hours, bare-headed, the sun shining very hot, and he took occasion to declare the unjustness of his Sentence, upon which the warden of the Fleet caused him to be gagged above an hour, and did it with such cruelty, that he made his mouth to bleed.

Mr. *Higgs*, his surgeon, testified upon oath to this effect; That he did not see his patient Mr. Lilburn whipped, but being desired to perform the office of a surgeon to him, he that day drest his back, which was one of the miserablest that ever he did see; for the wales in his back, made by his cruel whipping, were bigger than tobacco-pipes, and that he saw him set in the pillory, and gagged.

And Mr. *Thomas Hawes* upon oath testified to this effect; That he did see Mr. Lilburn set upon the pillory, above (as he judged) the space of two hours, the sun shining very hot, and they would not suffer him to have any cover upon his head: and he taking occasion to speak of the bishops cruelty towards him, and how unjustly they had caused him to be dealt with, the warden of the Fleet caused him to be gagged in such a cruel manner, as if he would have torn his jaws in pieces, insomuch that the blood came out of his mouth.

In the next place, a second Sentence made in the Inner Star-Chamber was read, which thus followeth:

'At the Inner Star-Chamber, the 18th of April, A. D. 1638.

'Present Lord Archbishop of Canterbury, Lord-Keeper, Lord-Treasurer, &c.

'Whereas John Lilburn, prisoner in the Fleet 'by Sentence in the Star-Chamber, did this 'day suffer condign punishment for his several 'offences, by whipping at a cart, and standing 'in the pillory; and as their lordships were 'this day informed, during the time that his 'body was under the said execution, audaciously and wickedly did not only utter sundry 'scandalous Speeches, but likewise scattered 'divers copies of seditious Books amongst the 'people that beheld the said execution; for 'which very thing, amongst other offences of 'like nature, he hath been censured in the said 'court, by the aforesaid Sentence: it is therefore by their lordships ordered, that the said 'John Lilburn should be laid alone with 'irons on his hands and legs, in the wards of 'the Fleet, where the basest and meanest sort 'of prisoners are used to be put; and that the 'warden of the Fleet take special care to hinder the resort of any persons whatsoever unto 'him; and particularly, that he be not supplied with money from any friend; and that 'he take special notice of all letters, writings, 'and books brought unto him, and seize and

* The sum of which was, 'You shall swear to make true answer to all things that are asked you, so help you God.'

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'deliver the same unto their lordships, and take 'notice from time to time who they be that re-'sort unto the said prison, to visit the said Lil-'burn, or to speak with him, and inform the 'board thereof. And it was lastly ordered, 'that all persons that shall be hereafter pro-'duced to receive corporal punishment, accord-'ing to sentence of that court, or by order of 'the board, shall have their garments searched 'before they be brought forth, and neither 'writing nor other thing suffered to be about 'them; and their hands likewise to be bound 'during the time they are under punishment. 'Whereof, together with the other premises, 'the said warden of the Fleet is hereby required 'to take notice, and to have especial care, 'that this their lordships order be accordingly 'observed

'*Examined per* DUDLEY CARLETON.'

And the execution of this latter Sentence in a most barbarous and inhuman manner, was punctually proved by sufficient witnesses, as followeth; viz. Mr. *Higgs* his surgeon again testified, That that night Mr. Lilburn suffered, he was had back to the Fleet, and he repairing to Dr. Grant, to crave his advice, he advised him to let his patient blood, to prevent a fever; and he accordingly came the next morning to the Fleet to let his patient blood, and dress his sores, but he found him locked up close in a room, and was by the officers of the Fleet denied access unto him. Whereupon he immediately went to the warden, being then at Westminster, who denied him access to the said Mr. Lilburn, till the afternoon that he came home: which was a great act of cruelty, and much to the danger of Mr. Lilburn's health, and welfare: and the next day they removed him down to the common gaol, where they laid him in irons, and several times wounded him, to the extreme hazard of his life, and several times denied me access to him in his extremity.

Dr. *Hubbard*, Justice of the Peace, made oath to this effect: That when Mr. Lilburn was prisoner in the Fleet, he was desired as a physician to visit him: and going so to do, he was again and again denied access to him: but upon much importunity to the warden, he was admitted to him, whom he found in an extreme violent fever, lying in irons upon both hands and legs, to the extreme hazard of his life.

Mrs. *Mary Dorman* further declared, That after Mr. Lilburn had suffered, she went often to visit him, who was laid in irons, and his friends denied access to him; and that the Officers of the Fleet strongly endeavoured to starve him: so that many times his friends were forced to bring his meat to the poor men's bag, and give them money to convey it to him through a hole in a wall betwixt them and him. Mr. Thomas Hawes further declared, that after Mr. Lilburn suffered, he often went to visit him, and was beat by the Gaolers, and was in danger to have lost his life for so doing; and that they so strongly laboured to starve Mr. Lilburn, that they were forced to convey his diet to him by the poor men that begged at the grate: but the Gaolers finding out that Mr. Lilburn got his diet that way, they dealt so cruelly with the poor men, that Mr. Lilburn was deprived of that way of relief, and then his friends got the son of one Archer that was prisoner in the next room to him, for accusing the deputy of Ireland for murdering one Esmond, to convey his victuals to him: which was done by stealth, through a hole where a board was pulled up in his floor, when the rest of the prisoners were at the chapel at service; and, my lords, divers times the conveying of his meat to him, cost him and his friends, upon the prisoners, &c. more than the meat itself.

Robert Ellis, some time a fellow-prisoner with Mr. Lilburn in the Fleet, upon oath declared before their lordships, that the officers of the Fleet, after they brought Mr. Lilburn into the common wards, used him very barbarously and cruelly, laying him for a long time in irons, keeping his friends from him, and his victuals, and several times had like to have slain, and murdered him, and he verily believes had effected it, if he had not helped him; for which they took his bed from him, and put him off the charity, and kept him five weeks in a dungeon, and had like to have murdered him, and afterwards removed him to the King's-Bench, that so they might the more easily have their wills of Mr. Lilburn, &c.

Their Lordships being satisfied of the injustice and illegality of the proceedings, Mr. *Bradshaw* said, That he conceived no man's sufferings in the kingdom had been so great as his client's were: for a gentleman to be so cruelly tortured and whipped, pilloried, gagged, close imprisoned, ironed, beat and wounded, and that contrary to law, is a cruelty unheard of, and therefore hoped that for such unparalleled sufferings, and oppressions, the fair hand of their lordships honourable justice would give and reach him forth unparalleled damages; and though many of his Judges that did him injustice be dead, yet he hoped the hand of justice of their honours, joined with the honourable house of commons, will be so long, as to reach their living and surviving estates, and out of them, &c. make him speedy, large and unparalleled reparations.

Mr. *Cook* then spoke in the behalf of Mr. Lilburn (and afterwards printed his Argument), and said the punishment inflicted upon him may be reduced to four heads:

(1.) Imprisonment, whereby a man is buried alive, loses the comfort and benefit of his five senses, and is made 'Corpus immobile legis,' the unmoveable subject of the law, or as a dead carcase. It is true, that in itself it is the easiest of all corporal punishments: but the continuance of it, makes it such a lingering consumption, that it is better to be upon the rack an hour, than to be imprisoned a year: as it is better to be once wet to the skin, than to be subject to a perpetual dropping: especially to an active spirit, there is no such torment as to

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deprive him of liberty; for active Theseus was condemned only to sit still: there is no end of such a misery, as the heathen persecuting tyrant said, 'Nondum tibi redii in gratiam;' to put a man out of his pain, was always counted a favour. But Mr. Lilburn's imprisonment was aggravated by three steps or gradations. 1. A close Imprisonment, not the dearest friend to come to him; we do not find that any of the primitive Christians were used so by the tyrants, for then that heavy charge might be answered in the scripture, 'I was in prison and ye visited 'me not;' extraordinary matters of state and high concernments always excepted; but the surgeon was not permitted some time to come to Mr. Lilburn to dress him, nor the physician when he was in a fever; a cruelty unheard of amongst the Turks: for they are careful of their slaves in their sickness, and fatten them, that they may endure their blows; but it is too probable that those which were Mr. Lilburn's malicious enemies, did too much thirst after his blood. 2. The keepers were ordered to take care that no money be conveyed to him, which argues that they had a desire to starve him: the Prophet saith, 'It is better to die by the sword, 'than famine,' which is the greatest of all torments; for all punishments may be undergone by patience, but only hunger: which the more any man thinks by patience to overcome, the more violent it is. Undoubtedly, had it not been for the pity of some poor resolute fellow-prisoners, Mr. Lilburn had been starved to death; far worse than any of the four Roman punishments, which were *lapidatio, combustio, decollatio, strangulatio,* stoning, burning, beheading, and strangling. How severely, yet most justly, did the same judges several times punish the intent to poison or destroy another man? The going about to murder, nay, the giving of the lye, because it is preparatory to murder, by provoking quarrels, was censurable in that court; *à multo fortiori,* much more from the stronger, then in this case used, where there was so much cruelty inflicted, that death might probably have ensued, had not God by his extraordinary mercy supported him in those sad afflictions, those unjust judges for transgressing not only the bonds of humanity, but all the rules of their own ordinary justice, ought to make Mr. Lilburn answerable satisfaction. 3. This Imprisonment was for about three years, until he petitioned the parliament. Many times the first motions of anger are not in a man's own power; because he would not accuse himself as they desired, they might have in a passion committed him, and the sun might have gone down upon their wrath; nay, the moon might have made her peragration, or the summer season might have melted their frozen consciences, or the winter cold have allayed the heat of their malice, or the sun might have made his revolution, but their malice continued three years, and had not he been delivered by the justice of the parliament, in probability might have continued for ever.

(2.) Whipping, a most painful and shameful punishment; flagellations and scourgings being for slaves and incorrigible rogues, and hedge-robbers. In 11 Elizabeth one Cartwright brought a slave from Russia, and would scourge him cruelly, for which he was questioned; and it was resolved, that England was too pure an air for slaves to breathe in; and it was often resolved in the Star-Chamber, that no gentleman was to be whipped for any offence whatsoever: it being well known that John Lilburn's ancestors have been ancient gentlemen, and that which these Judges could not be ignorant of, especially the Earl-Marshal, who is presumed to know all the ancient gentry in the kingdom. But the like whipping was never read of amongst the Assyrians, Persians, Grecians, or Romans. For, 1. It was from the Fleet to Westminster (above a mile distance) a great concourse and confluence of people looking upon him, as if he had been some miserable slave. 2. He received every two or three steps a blow, 500 strokes at the least; for one Mr. Smith, a merchant, that went along with him, testified that so far as he was able to judge, he received 500 or 1000, but of the first he was most certain; and this was with a treble-corded whip, with at least twenty knots upon it.

Amongst the Romans no malefactor had ever above 40 stripes, and every stroke stood for three stripes, for the whip was of three thongs: and but one knot at the end of every thong. St. Paul received thirty-nine stripes, which was but thirteen blows. Not long since in Orleans, a priest was sentenced to be whipped for fornication, having abused a poor maid, telling her that their popish St. Francis would come and lie with her such a night, at which time he personated and feigned himself to be St. Francis, and was taken in bed with her; and it was earnestly pressed by the king's Advocates, that he might receive 14 blows with a three-corded whip, which is constantly used for such castigations, because it was an abominable wickedness: but the Judges would not suffer him to have above 13 blows, because *ampliandi sunt favores,* favours are to be inlarged. And in doubtful matters it must always be presumed for clemency and gentleness; according to which account, Mr. Lilburn received 10,000 stripes: for in every blow there was 20 stripes, by reason of the 20 knots, which being multiplied is 10,000, and in every stripe there was shame and pain, compression of the flesh, bruisings and effusion of blood.

(3.) The Pillory, a punishment something painful, but exceeding shameful, and most terrible to a generous nature, to stand two hours in open view of all men, as if he had been unworthy to tread upon the earth, the sun shining very hot upon him, and not suffered to keep on his hat; and this immediately after his cruel whipping, that so they might put him to all the torture and pain that they could, argues abundance of wrath and malice. This punishment of standing upon the pillory, was first invented for Mountebanks and Cheats, that having

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gotten upon banks and forms, to wrong and abuse the people, were exalted in the same kind, to stand conspicuous to the view and open shame of the people; but for a gentleman to be so served, was never heard of, unless by that cruel court.

(4.) Gagging, an unmanly and barbarous cruelty, to be exercised upon beasts, not men, for man differs from brutes both *ratione et oratione*, in reason and speech; a punishment never heard of in any age; cutting out of tongues, and perforation, in cases of blasphemy have been heard of, but never in a matter of such a nature; and this to continue for above an hour, till the blood gushed out of his mouth, as if they would have plucked his jaws in pieces, and all this for nothing; O insufferable torments!

So that by his Imprisonment he was made a stock, a dead trunk, or picture of a man, that hath eyes and sees not, hands and handles not, &c. By Whipping they endeavoured to make him a rogue, or a slave; by the third punishment of the Pillory, to make him a cheater, guilty of forgery and perjury; and by Gagging, to make him a beast, and so upon the whole matter to deprive him of his reasonable soul, such cruelties that were never invented but by tygers and wolves in human shapes 'ferocitas 'luporum, in humana figura.' But then the persons that were so cruel and tyrannical aggravates the offence. 1. This cruelty was commanded to be executed by an eminent court of justice, professing christianity, 'Pes-'sima est injustitia quæ fit sub colore justitiæ: it is the greatest injustice to oppress and do injury, under a pretence of justice. How often was it resolved in that court, that for a justice of peace or constable to commit a riot, was ten times more severely punishable than in a common person, because it is to use, or rather abuse that sword of authority, to commit or countenance an unlawful action, which was ordained and put into their hands to suppress it.

2. The eminency of the persons augments the offence, 'qualitas personæ auget peccatum;' for a gentleman to act against the rule of the law and gentility, is more reprehensible than in vulgar persons. It was called the Court of Star-Chamber, from the eminency of the persons, which were Judges: stars of the greater magnitudes, as being the highest court of ordinary justice; but Mr. Lilburn's Judges, instead of putting on the garment of justice, were cloathed from head to feet, and their conscience oiled and moistened, with cruelty and injustice mixed with the most poisoned malice that ever entered into the hearts of any judges. And though some of them be dead, yet Justice lives though the party be dead: whatsoever becomes of them, their estates ought to make satisfaction according to their own rules, 'qui 'non luet in corpore, solvit in bursa;' he that suffers not in his body, must suffer in his purse.

A principal actor in this bloody tragedy, was the Lord-Keeper Coventry, not less eminent in cruelty than in place, judge of the highest seat of mercy, the Chancery, which abated the edge of the law, when it is too keen; for the chief Judge of mercy to degenerate into a savage cruelty, not heard of amongst the Barbarians, how heinous is it? Not to speak any thing of the decapitated archbishop, that monster of cruelty, and subtlety, whose estate we fear is dead with him, and therefore little can be expected from it.

The bishop of London, then Lord-Treasurer, was a principal sentencer of Mr. Lilburn: by their own canons, no bishop ought to have a hand in blood, because they pretend to be mild shepherds, but cruelty was their genius.

The earl of Arundel was of an imbittered spirit against Mr. Lilburn, nothing but corporal punishment would allay the heat of his malice; who being Earl-Marshal, could not be ignorant that John Lilburn was a gentleman: for him that by his place was to protect all gentlemen from injuries, and should scorn to be active in the inflicting such corporal, ignominious, cruel punishments upon a gentleman, is a transcendent trangression against the laws of state and honour. It hath been censurable in that court, to speak contemptuous words of a gentleman; and how often had he ordered satisfaction, for saying such a one is no gentleman? And yet the same court and persons not only to say a gentleman is a rogue, but so to use him, as Mr. Lilburn was, is the greatest scandal to the public justice of the kingdom, that hath been heard of.

The Judges assistants, that are called the 'Fathers of the Law,' and are said to carry law in their breasts, for them to begin and promote such an unjust and illegal Sentence, for them that are set as centinels to watch over and preserve the people's liberties, to betray a poor gentleman into the hands of merciless men, was an offence of an exceeding high nature: for had they declared the illegality of those proceedings, and protested against it, as by virtue of their places (in duty) they ought to have done, it might have prevented the sentence. If the proceeding had been regular by Informations, and Examinations, or *ore tenus*, as it was not, unless there had been some direct proof or speaking circumstance of very probable presumption, that Mr. Lilburn had been guilty of some high crime; it had been a grievous thing in them to have assisted in so cruel punishments. But when the pretence was no other, but concerning some of Dr. Bastwick's, Mr. Burton's or Mr. Prynne's Books, which they knew could not be any breach of the peace, and that in the Star-Chamber, where there was no information, as in Mr. Lilburn's case, to administer an Oath, was all one with the High-Commission, and directly contrary to the Petition of Right, in 3 Car. and justice Jones had no reason for inflicting the corporal punishment.

But because Mr. Lilburn was a young man, therefore it was fit he should be punished: Is not this to turn Justice into wormwood? Such judges have ever been the most dangerous pests to a state and kingdom, and in former times,

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for less offence, most severely punished in their persons and estates. The lord Cottington thirsted exceedingly after the blood of this poor gentleman, and the high-commissioners had their hands as deep as any of the rest, in regard that by their warrant he was first committed: the most unjust and tyrannical that ever was heard of, to command a poor gentleman to be sent to prison, without conventing him before them, or asking him whether he was guilty of any misdemeanor: a mere usurpation of authority, taking the sword of justice into their own hands, not caring to destroy a poor gentleman, so as they might curry favour with the prelates their grand patrons; those high-commissioners making themselves judges, gaolers, and executioners, and what not, to destroy the innocent.

It is considerable what punishment the Gaolers and Executioners of this cruel Sentence have deserved: for however if a writ be directed to a sheriff, commanding him to take the body of one who is a peer of the realm, or a privileged person, the officer is excused by his warrant; yet when punishments are clearly against the law of God, nature, and nations, which prohibit all such cruelties and inhumanities; to make them bleed for the blood of Mr. Lilburn, would be an honourable piece of justice, and a precedent of much safety to the subjects in after-times, and officers would not dare to be so unmercifully cruel; as the sheriffs smarted for the Ship-Money, though they had process from the Exchequer.

Mr. Lilburn's sufferings are beyond expression, and no honest heart but is feelingly sensible of every blow that was given him; in his Imprisonment, Whipping, Pillory, Gagging, Beatings, Hunger-bitings, and the Irons laid upon him, every true-hearted Englishman, that stands for the laws and liberties of the subject, was so used, and abused; for it might have been any such man's case, as well as his. His estate quite exhausted by their cruelties, his trade lost, whereby he gained his livelihood, being before that time in a hopeful way of a merchant, and well known to be very industrious in his calling; a man active for the public, and by his merits hath procured the title of lieutenant-colonel in the present wars: what damages the parliament will be pleased to adjudge and order him, he humbly submits to their great wisdoms and honourable justice: certainly not any of them would have suffered so much for ten thousand pounds.

It is the Lord's great mercy that he is yet alive, having conflicted with, and gone through such a sea of punishments and miseries. True it is, that in point of reparations, there is no proportion between money and such corporal punishments, to a generous spirit: yet as there was never more indignity and a greater dishonour to the justice of the kingdom, than by this wicked Sentence, and the cruel execution thereof; thereby proclaiming it to all the world that an English gentleman must be made a slave, to satisfy the malicious and virulent humours of a tyrannical court of justice:

So it will be a very great honour and reparation to the Public Justice of this land, to give and adjudge Mr. Lilburn exemplary and proportionable damages, to be levied out of the estates of his unjust and malicious Judges, through whose injustice he not only suffered such cruelties for three years, that not one of them would have suffered the like, nor received one of his stripes for many thousands; but lost his trade and livelihood.

The judicial law was blood for blood, an eye for an eye, tooth for tooth, &c. Daniel's accusers were cast into the den of lions, with their wives and children, though Daniel had no hurt by a miracle of mercy; by the equity and morality whereof, Mr. Lilburn ought to have good and proportionable reparation out of the estates of his unjust judges and tormentors, who sought for his blood: but that God preserved him by his extraordinary love and favour.

That all drooping spirits may chear up and be encouraged, that Justice will run down like a mighty stream, when it shall be executed upon the greatest offenders: as now there is good hopes that Mr. Lilburn shall by ordinance of parliament have speedily good damages, answerable to his great sufferings, ordered and adjudged him, to be raised out of the estates of his unjust judges, that may be paid unto him without further expence, who hath been at such extraordinary charges about the same, that so his reparation may be not only just, but seasonable, by which he shall be obliged to venture his life, and all that is dear to him, as formerly he hath done, for his honourable judges in parliament assembled.

Whereupon the Lords made the following Order:

'Die Veneris, 13 Feb. 1645.

'Whereas the cause of John Lilburn, gent. 'came this day to a hearing at the bar by his 'counsel, being transmitted from the house of 'commons, concerning a Sentence pronounced 'against him in the Star-Chamber, 18 Feb. 'anno 13 Car. reg. and after an examination 'of the whole proceedings, and a due consi- 'deration of the said Sentence; it is this day 'adjudged, ordered, and determined by the 'lords in parliament assembled, That the said 'Sentence, and all proceedings thereupon, shall 'forthwith be for ever totally vacated, obliter- 'ated, and taken off the file in all courts 'where they are yet remaining, as illegal, and 'most unjust, against the liberty of the sub- 'ject, and law of the land, and Magna Charta, 'and unfit to continue upon record: And 'that the said Lilburn shall be for ever ab- 'solutely freed, and totally discharged from 'the said Sentence, and all proceedings there- 'upon, as fully and amply, as though never any 'such thing had been. And that all estreat 'and process in the court of Exchequer, for 'levying of any Fine, (if any such be) shall be

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'wholly cancelled and made void; any thing 'to the contrary in any wise notwithstanding.

'JOH. BROWNE, *Cl. Parl.*'

But not assigning me any reparations in that Decree (the doing of which the house of commons left unto them, and the lords according to former custom looked upon to be their right in law to do), I prayed their assiguing me particular reparations according to law and justice, out of the estates of my unjust judges, that had done me so much wrong; upon which new address to them, they did upon the 5th of March, 1645, order and decree, and assigned to be paid unto the said John Lilburn, the sum of 2,000*l.* for his reparations, which for many reasons (as their being aiding in the wars to the king, &c.), they fixed upon the estates real and personal of Francis lord Cottington, sir Francis Windebank, and James Ingram, late Deputy-Warden of the Fleet; and afterwards by another Decree for the present levying thereof, out of their lands, at eight years purchase (as they were before the wars), with the allowance of interest at 8*l.* per cent. per ann. in case of obstruction; for all or any part of it: and to this purpose caused an Ordinance to be drawn up, which fully passed their house the 15, 20, and 27th of April, 1646, and afterwards transmitted it to the house of commons, where by reason of my bloody adversary old sir Henry Vane's interests, and of my imprisonment by Manchester's means in the Tower of London, it lay asleep till the 1st of August, 1648, at which time 7 or 8,000 of my true friends in London, signed and caused to be delivered a Petition to the House of Commons for my liberty, and the passing of the said Ordinance. Whereupon the house made this Order:

'Die Martis, 1 Augusti 1648. Sir John Maynard, sir Peter Wentworth, lord Carre, col. 'Boswel, col. Ludlow, Mr. Holland, Mr. 'Copley.

'It is referred to this committee, or any 'five of them, to consider how colonel John 'Lilburn may have such satisfaction and allow-'ance for his sufferings and losses, as was for-'merly intended him by this house.

'HENRY ELSYNGE, Cl. Parl. Dom. Com.'

Upon which Order I got the Committee to meet, and preferred a Petition to them. Upon which Petition, the Parliament having disposed of all that part of the lord Cottington's Estate that I should have had, unto the lord Say, and also compounded with sir Francis Windebank's heir; the said committee were pleased to fix it entirely upon the Lord-Keeper's estate, as the principal guilty man; of which, when the young lord Coventry his son and heir, heard thereof in France, he came posting to England as in amaze, fearing what such a precedent might bring upon him, if his father's Estate (then dead) should be compelled to make me satisfaction; he being so capital in injustice, that if that course should be taken, his estate left him by his father (if it were trebled) would not satisfy for his father's palpable injustice committed in his life-time. And Manchester bear in the said Bryers with his father, being as unjust as the other, and having a brother, viz. George Montague, and other considerable interests in the house of commons, so plied their friends there, that they put a stop to the second reading of the aforesaid Ordinance. Which I first fully understood by the Speaker's means, then my great pretended friend, who one day began to reason with a member of the house (and my special friend) about the unreasonableness to fix my reparations upon the Estate of the deceased lord Coventry; nay, or to give me any reparations at all out of the estates of those persons that did me wrong, for fear the precedents in time might reach to themselves. 'For sir,' said the Speaker, as the member told me, 'if my son and heir should be liable 'in law, to make satisfaction to all those men '(out of that estate I should leave him) that I 'have in the eye of the law wronged (by signing 'Warrants, Orders, and Decrees, by the com-'mand of my superiors) he would soon be a 'beggar, although I should leave him 5 or '6,000*l.* per annum;' and therefore desired the said member's concurrence with him. And for the clamorous importunity (as they called it) of me and my friends, to give me reparations; but yet to do it in such a way, that the precedent might not in future make themselves smart for their injustice to particular men. Of which when the said member told me, he said, they were resolved to make the commonwealth my pay-master out of the public Treasury, and colour over the justness of it with this pretence, 'That Cottington's estate, &c. formerly 'assigned me, they had since disposed of for 'the commonwealth's use to the lord Say; and 'therefore now it would be no injustice to the 'commonwealth (although in the Star-Cham-'ber it never wronged me) to pay me my repa-'ration.' And so finding I was like to be baffled, I delivered the under-written to every individual member of the honourable house of commons.

"The Humble REMEMBRANCE of Lieutenant "Colonel John Lilburn, Sept. 4, 1648.

"Honoured sir; Vouchsafe to take notice, and seriously to consider, That the first week this present parliament sat, which is now almost full 8 years ago, I presented an humble Petition to the house of commons, for justice and right against the cruel Judges of the High-Commission-Court, and the Star-Chamber; and I had the honour (the same day it was presented) to be one of the first prisoners in England that was set at liberty by this parliament, and also received a speedy, full, fair, and candid proceeding, in the hearing and examining my tyrannical sufferings: But by reason of multiplicity of public business, and other great obstructions, I have not as yet been able to attain to the full end of my legal and just expectation and right, viz. reparations for my long, sad, and tormenting sufferings, by the foresaid unjust and unrighteous Judges.—Be pleased

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also favourably to take notice, That upon the 1st August last, there was an humble Petition presented to the honourable house of commons, subscribed by many thousands of honest citizens, &c. humbly to desire you to put me in full possession of all your by-past just Votes about my foresaid sufferings. Upon reading and debating of which Petition, as in answer to that particular of it, your house were pleased to make this ensuing order:

'Die Martis, 1 Augusti, 1648. Lord Carre,
'Sir John Maynard, Sir Peter Wentworth,
'Col. Boswel, Col. Ludlow, Mr. Copley,
'Mr. Holland.

'It is referred to this Committee, or any five 'of them, to consider how Colonel John Lil-'burn may have satisfaction and allowance for 'his sufferings and losses, as was formerly in-'tended him by his house.

'HENRY ELSYNGE, *Cler. Dom. Com.*'

Unto which said Committee at their first sitting, I presented a Petition; the Copy of which thus followeth:

'To the Honourable the Committee of the
'House of Commons, appointed to consider
'of Lieut. Col. Lilburn's Business, in refer-
'ence to the Star-Chamber; The Humble
'PETITION of Lieut. Col. JOHN LILBURN.

'Sheweth; That besides your Petitioner's 'sufferings by reason of his banishment into the 'Low-Countries, he was first committed by 'Dr. Lamb, Gwyn, Aylet, 1637, and afterwards 'had three years imprisonment, in the common 'gaol of the Fleet, being whipped from Fleet-'Bridge to Westminster, and enduring the 'cruel torment of above 500 stripes with knot-'ted cords. Afterwards being set in the pil-'lory for the space of two hours, and by James 'Ingram, deputy-warden of the Fleet, gagged, 'tearing his jaws almost in pieces, without or-'der; which Sentence was given by lord-'keeper Coventry, earl of Manchester, lord-'privy-seal, lord Newburgh, sir Henry Vane, 'sen. lord chief-justice Bramston, and judge 'Jones. And after the barbarous execution 'of this Sentence, being April 18, 1638, the 'said lord Coventry, archbishop of Canterbury, 'bishop of London, earl of Manchester, earl 'of Arundel, earl of Salisbury, lord Cottington, 'lord Newburgh, secretary Cook, and Winde-'bank, passed another Sentence, in effect for 'the starving of your petitioner, and for the tor-'menting of him with irons upon hands and 'legs both night and day; and by keeping him 'close in the common gaol of the Fleet, from the 'speech of any of his friends: All which was ex-'ecuted with the greatest cruelty that could be 'for the space of almost 3 years together, to the 'apparent hazard of his life, both by starving 'him (which was with all art and industry seve-'ral ways attempted); and also by several as-'saults made upon him by the said Warden's 'man (instigated thereunto by the said De-'puty-Warden, to the maiming and wounding 'him, whereby to this day he is totally depriv-'ed of the use of two of his fingers): All which, 'with much more, too tedious to be here in-'serted, was fully proved by sufficient Witnesses, 'before a Committee of your house, whereof 'Mr. Francis Rouse had the chair; upon 'whose Report made, May 4, 1641, your house 'voted, 'that the Sentence in the Star-Cham-''ber given against the said John Lilburn, and ''all the proceedings thereupon, was illegal, ''and against the Liberty of the subject, and ''also, bloody, wicked, cruel, barbarous, and ''tyrannical; and that he ought to have good ''reparations therefore.' Which Votes, by 'reason of multiplicity of business in your 'house, cost your Petitioner some years of im-'portunate and chargeable attendance to get 'them transmitted to the Lords; which was 'obtained in February, 1645, the 13th day of 'which month, your Petitioner's whole cause 'was effectually opened at the lords bar, by his 'learned counsel, Mr. John Bradshaw and Mr. 'John Cook; and there every particular again 'proved upon oath, by testimony of people of 'very good quality, whereupon they concurred 'in all things with the house of commons, sav-'ing in the matter of Reparation; but upon 'the delivery of a true Narrative, (which your 'petitioner with his own hands in the same 'month delivered unto every individual lord) 'they made a further Decree, that your Peti-'tioner should have 2,000*l.* reparations out of 'the estates of the said lord Cottington, sir 'Francis Windebank, and James Ingram, for 'the reasons alledged in an Ordinance which 'they passed in April, 1646, and transmitted 'to your house; where it hath lain dormant 'ever since, and is now referred to the consi-'deration of this honourable Committee.

'Now, forasmuch as by the judicial laws of 'God, which are the pure laws of right reason, 'he that wilfully hurteth his neighbour is bound 'to the performance of these five things: 1. ''If it be a blemish or wound, like for like, or ''to redeem it with money, thereby to satisfy ''him for his wound. 2. For his pain and ''torment. 3. For the healing. 4. For his ''loss of time in his calling. 5. For the shame ''and disgrace:' All which are to be consi-'dered according to the quality of the person 'damnified: Which reparations are to be paid 'out of the best of the goods of him that dam-'nified him, and that without delay.

'And as the law of God, so the laws of this 'nation do abhor, and have severely punished, 'above all persons, Judges, many times with the 'loss of their lives and estates, who under 'colour of law have violated their oaths, and 'destroyed the lives, liberties and properties of 'the people, whom by law they should have 'preserved: as may be instanced by the 44 'Judges and Justices hanged in one year by 'king Alfred; divers of them for less crimes 'than hath been done in the case of your Peti-'tioner; as may be read in the Law-Book 'called, 'The Mirror of Justice,' p. 239, 240, '241, &c. translated and reprinted this very 'parliament: And by Justice Thorp, in Edw.

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'S's time, who was condemned to death for the 'violation of his oath, for taking small sums of 'money in causes depending before him; as 'appears in the third Part of Coke's Institutes, 'fol. 155, 156. And by the Lord Chief Justice 'Tresilian, &c. who in full parliament in Rich '2's time, was attached as a Traitor in the 'foreno on, and had his throat cut at Tyburn in 'the afternoon, 'because he had given it under 'his hand, that the king might create unto him-'self, at his pleasure, an the rule to walk by, 'than the law of the land prescribes him;' as 'appears by the Parliament Records in the 'Tower, by many of your own Declarations, 'and also by the Chronicles of England.

'Now, for as much as your Petitioner' sufferings have been unparalleled, and his 'prejudice sustained thereby altogether unre-'parable, having lost his limbs, &c. And for-'asmuch as by the law of God, nature, and 'nations, reparations for hurts and damages 'received, ought to be satisfied as far as may 'be in all persons, though done by accident, 'and not intentionally, and though through ig-'norance: much more when the persons of-'fending did it knowingly, and on purpose, in 'the face, nay, in spite of the fundamental 'laws of the land, which they were sworn to 'preserve: And for that the reparations in the 'said ordinance assigned do scarce amount to 'what your Petitioner spent in his three years 'sad captivity, and his now almost eight years 'chargeable attendance, in suing for it, besides 'the loss of a rich and profitable trade for ele-'ven years together, and his wounds, torments, 'smart and disgrace, sustained by his said ty-'rannical sentences.

'He therefore humbly prayeth the favour 'and justice of this honourable Committee for 'some considerable augmentation of his said 'Reparations; and the rather, because his fel-'low-sufferer, Dr. Bastwick, had 4,000*l.* Re-'parations allotted him, whose sufferings, he 'submissively conceiveth, was nothing nigh so 'great, in torment, pain, and shame, as your 'Petitioner's. And forasmuch as the now lord 'Coventry, son and heir to the aforesaid lord 'Coventry, hath walked in his father's steps, in 'enmity to the laws, liberties, and freedom of 'the nation: By being in arms at the beginning 'of the wars against the parliament, and made 'his peace with the earl of Essex for a small 'matter, and hath since deserted the kingdom, 'living in France privately, receiving the pro-'fits of a vast estate which his father left him: 'And forasmuch as his said father (the late 'lord Coventry) was the activest man in infring-'ing the laws and liberties of the nation; al-'though a lawyer and judge, sitting on the su-'preme seat of justice; and a person, as is 'groundedly conceived, who got a great estate 'by corruption, and particularly a man that 'principally passed, as chief judge of the court, 'both the aforesaid sentences against your Pe-'titioner: And in regard the estates of the 'said lord Cottington, and sir Francis Winde-'bank, by subsequent orders of both houses 'upon urgent occasions, are much entangled 'and altered from the condition they were in 'in 1646, when the lords ordered your Peti-'tioner 2,000 marks out of them; and for that 'the estate of James Ingram cannot be found, 'nor at present come by: Your Petitioner, 'therefore, most humbly prayeth, that the 'greatest part, if not all your Petitioner's Re-'parations, may be fixed upon the said now 'lord Coventry's estate, to be immediately 'paid your Petitioner; or else that his rents, 'and the profits of his woods and goods, may be 'seized in the respective counties where they 'lie, for the satisfying thereof; that your Peti-'tioner may no longer run the hazard of ruin 'to him and his, by tedious delays, having al-'ready contracted the debts of many hundred 'pounds, occasioned by the chargeable prose-'cution hereof. And that if you shall think fit 'to conjoin any other with him, that it may be 'principally the judges of the law; who ought 'to have been pilots and guides unto the rest 'of the judges of that court, who were lords, 'and persons not knowing the law. And your 'Petitioner shall ever pray, &c.

JOHN LILBURN."

"After the reading of which, they entered into a serious debate of the whole business, and thereupon passed several Votes to be heads of an Ordinance, to be drawn up and reported to the house, by the right hon. the lord Carr, chairman to the said committee; who accordingly reported the Proceedings and Votes of the said committee to your house, who approved of the said Votes, and ordered an Ordinance to be presented to the house consonant thereunto, which was accordingly done by the lord Carr; which Ordinance hath been once read in your house: The copy of which thus follows:

'An Ordinance of the Lords and Commons as-'sembled in parliament, for the raising of '3,000*l.* out of the real estate of the late 'Thomas lord Coventry, late Lord Keeper 'of the Great Seal of England, for and to-'wards the reparation and damages of John 'Lilburn, gent. which he sustained by virtue 'and colour of two Sentences given and 'made against him, in the late Court of Star-'Chamber, the one the 13th Feb. 1637, the 'other the 18th April, 1638.

'Whereas the cause of John Lilburn gent. 'concerning two Sentences pronounced against 'him in the late court of Star-Chamber, 13th 'of February, 13 Car. regis, and 18th of April, '14 Car. regis, were voted the 4th of May '1641, by the house of commons, to be illegal, 'and against the liberty of the subject, and 'also bloody, wicked, cruel, barbarous, and 'tyrannical, which were transmitted from the 'said house of commons unto the house of 'lords; who thereupon, by an order or decree, 'by them made 13th of Feb. 1645, adjudged 'and declared the said proceedings of the said 'Star-Chamber, against the said John Lilburn, 'to be illegal and most unjust, and against the

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'liberty of the subject, and Magna Charta, 'and unfit to continue upon record, &c. And 'by another order or decree, made by them 'the said lords the 5th of March 1645, they as- 'signed to be paid unto the said John Lilburn 'the sum of 2,000*l.* for his reparations; and 'the said house of peers then fixed that sum 'upon the estates real and personal of Francis 'lord Cottington, sir Francis Windebank, and 'James Ingram*, late deputy-warden of the 'Fleet: and afterwards for the present levying 'thereof, with allowance of interest, in case of 'obstructions, while the same should be in 'levying, and of such parts as should not be 'forthwith levied; the said house of peers did 'cause an ordinance to be drawn up, and pass- 'ed the same in their house, the 27th of April '1646, and afterwards transmitted the same to 'the house of commons for their concurrence; 'with whom it yet dependeth. And forasmuch 'as since that transmission, all, or the greatest, 'of the estates of the said lord Cottington, and 'sir Francis Windebank, is since by both 'houses disposed of to other uses; and the 'estate of the said James Ingram is so small 'and weak, and so entangled with former in- 'cumbrances, that it can afford little or no 'part unto the said John Lilburn of the said 'reparations: And for that the said late lord 'Coventry was the principal judge, and chief 'actor, in giving of both the said illegal Sentences 'in the said court of Star-Chamber; and for 'the barbarous inflicting of punishments there- 'upon. Therefore, and for satisfaction of the said '2,000*l.* and for the increase of reparation unto 'the said John Lilburn for his extraordinary 'wrongs, sufferings, and losses thereby sustain- 'ed, and the long time hitherto elapsed without 'any satisfaction; the lords and commons 'assembled in parliament do ordain, and be 'it hereby ordained by the said lords and 'commons, and by authority of the same; That 'the said John Lilburn shall receive the sum of '3,000*l.* out of all, or any the manors, mes- 'suages, lands, tenements, and hereditaments, 'whereof he, the said late Thomas lord Coven- 'try, or any other person or persons to or for 'his use, or in trust for him, was or were seized 'in fee-simple, or fee-tail, or otherwise, at the 'time of the said sentences or decrees, or of 'either of them, in the said late court of Star- 'Chamber, or since within the kingdom of Eng- 'land, or dominion of Wales, any order or or- 'dinance heretofore made by either or both 'houses of parliament for the employment of 'the estate of the said late Thomas lord Coven- 'try to the contrary hereof, in any wise not- 'withstanding. And for the more speedy levy- 'ing of the said sum of 3,000*l.* it is further or- 'dered and ordained, that the several and re- 'spective sheriffs, of the several and respective 'counties within England and Wales, wherein 'any of the said lands, tenements, or hereditа- 'ments do lie, shall forthwith upon sight, and 'by virtue of this ordinance, cause an inquisi- 'tion to be made and taken, by the oaths of '12 or more lawful men, where the same lands 'do lie, and what the same are and do contain, 'and of the clear yearly value thereof, over and 'above all charges and reprises: and after such 'inquisition so made and taken, the several and 'respective sheriffs shall deliver unto the said 'John Lilburn true copies in parchment of the 'same inquisitions by them taken, and shall 'then also deliver unto the said John Lilburn 'the said lands, tenements, and hereditaments, 'which shall be so comprised or mentioned in 'the said inquisitions, to have and to hold, to 'him the said John Lilburn, and his assigns, 'without impeachment of waste: and until he 'shall have received out of the issues and pro- 'fits thereof (to be estimated according to the 'yearly values contained in the said inquisi- 'tions) the said sum of 3,000*l.*; together with 'all reasonable charges and expences to be sus- 'tained from henceforth for obtaining the said 'sum of 3,000*l.* And all and every the said 'several and respective sheriffs, and all other 'person and persons whatsoever, that shall any 'ways act or assist in obedience to this ordi- 'nance, according to the true intent and mean- 'ing thereof, shall be therefore defended and 'kept harmless, by the authority of both houses 'of parliament.'

Be pleased to take further notice that after the foresaid Ordinance was once read, it came to a debate in your house for to be read the second time, which was carried in the negative by a majority of voices; and I cannot but apprehend that there were divers in the house unsatisfied in the ordinance itself, in regard the house was divided upon the debate and vote, which I cannot but apprehend must flow from one of these two considerations: First, either because that the whole reparations is fixed upon the lord Coventry's estate singly, who had many co-partners in the sentences, and who also it may be supposed hath expiated his crime by his death. Or else, secondly, because in some men's thoughts, some of my late actions are, or have been so evil in themselves, that they may seem to them to over-balance the merits of all my ancient sufferings.

However, on my presenting my Reasons to the house for reading it, my Ordinance was called for to be read the second time, which Elsynge the clerk pretended he had laid ready upon the table before him; but what betwixt his knavery, old Henry Vane's, the Speaker's, and young Montague's, my Ordinance was stolen, and could never after be found: so that I was sent to out of the house to get another fair copy writ over presently; which being long in doing, my friends went away, not expecting it

* 'But the lord Roberts, the lord Wharton, '&c. told me several times, if their estates had 'not been under sequestration by ordinance of 'parliament, they would never have gone 'about to fix my reparations by ordinance, '(which they must needs then do, to take off 'the sequestration) but have issued out a de- 'cree and extent under the Great Seal, immedi- 'ately to have put me in present possession of 'my 2,000*l.* which they said was their right by 'law to do.'

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would any more be rendered with that day, so that which most [them] were done, my adversaries took the advantage to call for it, and in a full house read it the second time, and upon debate threw it out of doors; and at present to stop my mouth, voted me 300*l.* ready money (as they pretended, out of sir Charles Kemyse's Composition, to enable me for present subsistence, and to look w my business; and also made this further Order:

'Die Martis, Sept. 5, 1643. Ordered by the 'commons assembled in parliament, that the 'sum of 3,000*l.* be allowed and paid unto lieut. 'col. John Lilburn, for reparation of his damages sustained by colour of the Sentences 'given against him in the late court of Star-'Chamber, where lord Carr had the chair, with 'the addition of sir John Danvers, and colonel 'Rigby, to consider of, and present to this house 'an Ordinance for settling of lands to him and 'his heirs, to the value of 3,000*l.* at 12 years 'purchase, out of the estates of new delinquents 'in the insurrections, not yet sequestered.

'H. Elsynge, *Cler. Parl. Com. Dom.*'

Of which when I fully understood, I was troubled, but knew not how to help myself; and having already met with so many difficulties, and received so many bailes as I had done, I thought it was better (being almost wearied out with struggling) to take half a loaf, than to go away without any bread at all. So after many petitions and letters to the sequestrators, &c. the committee caused an Ordinance to be drawn up.

But when my Ordinance came to the lords, they disabled me to cut down any more timber trees than what were already felled, which I judged fitter for me to content myself with, than to struggle any longer to get it pass, as the house of commons had sent it up. So the lords in two or three days dispatched it, and sent it down to the house of commons for their concurrence, according to those abridgments they had made in it: and taking my opportunity to speak to those in the house of commons I had interest in, I intreated them to dispute it no more, but pass it as the lords had gelded it; and accordingly they did; the Copy of which thus followeth:

'Die Jovis, 21 Dec. 1648. An Ordinance 'of the lords and commons assembled in parliament, for raising of 3,000*l.* out of the sequestered estates and compositions of sir 'Henry Gibb, knight; and sir Henry Bellingham, knight and baronet; and Thomas Bowes, 'esq., lying and being within the county of 'Durham; to be paid unto lieut. col. John Lilburn, by the Committee of Sequestrations of 'the said county, for and towards the Reparation and Damages of the said John Lilburn, 'which he sustained by virtue and colour of two 'unjust Sentences, or Decrees, given and 'made against him in the late Court of Star-'Chamber, the one the 13th Feb. 1637, the 'other the 18th April, 1638.

'Whereas the cause of lieut. col. John Lilburn, concerning two Sentences pronounced 'against him in the late court of Star-Chamber, 'the 13th Feb. decimo 13 Car. regis, and 'the 16th April, 14 Car. regis, (which were 'voted the 4th of May, 1641, by the house of 'commons, to be illegal, and against the liberty 'of the subject, and also bloody, wicked, cruel, 'barbarous and tyrannical) were transmitted 'from the said house of commons unto the 'house of lords; in which the house of peers 'concurred in judgment; and the 15th Feb. '1645, declared the said proceedings of the 'said Star-Chamber, against the said John 'Lilburn, to be illegal, most unjust, and against 'the liberty of the subject, and law of the land, 'and Magna Charta, and unfit to continue 'upon record, &c. The said lords and commons taking into their serious consideration, 'the extraordinary sufferings and barbarous 'tyranny, that by colour of the said unjust 'decrees were inflicted upon the said lieut. col. 'John Lilburn; and the long time hitherto 'elapsed without any satisfaction, do conceive 'it most just, equitable and reasonable, to repair him in some considerable manner: and 'therefore, in pursuance of two orders of the 'house of commons, one of the 22d Aug. '1643, and the other of the 5th Sept. 1643, 'have ordained; and be it hereby ordained by 'the lords and commons assembled in parliament, and by the authority of the same; 'That the said John Lilburn shall have and 'receive the sum of 3,000*l.* to be paid unto 'him or his assigns, by the committee of sequestrations for the county of Durham, out of 'the first profits of the sequestered estates, 'both lands and goods of sir Henry Gibb, 'knt.; sir Henry Bellingham, knight and baronet; and Thomas Bowes, esq. lying and 'being in the county of Durham, having all 'been active in the late Northern insurrections, 'and aiding and assisting to the most wicked 'invasion of duke Hamilton. And the said 'committee are hereby authorized to fell all 'such woods (except timber-trees now standing) as may conveniently be spared, and now 'standing upon the said lands (or already felled), 'or any of them. And if the said sir Henry 'Gibb, sir Henry Bellingham, and Thomas 'Bowes, or any of them shall compound for 'their estate, so much of the said 3,000*l.* as 'then shall remain unsatisfied shall be paid 'unto the said John Lilburn, or his assignees, 'out of their, or the first of their compositions. 'And this ordinance or copy thereof, attested 'under the hand or hands of the clerk, or clerks, 'of one or both houses of parliament, shall be 'a sufficient warrant to the said committee of 'sequestrations in the said county of Durham 'to pay the said 3,000*l.* as is before expressed, 'unto the said John Lilburn or his assigns; 'and likewise to indemnity and save harmless, 'all and every person or persons, that shall 'any way act in the performance of the true 'intent and meaning of this Ordinance.

'Jon. Brown, *Cler. Parliamentor.*

'H. Elsynge *Cler. Parl. Dom. Com.*'

However, lieut. col. Lilburne, after great trouble and much expence, got but little of the money ordered him.

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149. The Trial of THOMAS HARRISON, Clerk,* at the King's-Bench, for a Misdemeanor in speaking reflecting Words of Judge Hutton: 14 CHARLES I. A. D. 1638. [Cro. Car. 503. Hutt. 131. 3 Rushw. Appendix, 268. Tanner's MSS. in Bib. Bod.]

'Middx' ss.

'BEFORE this time, that is to say, upon 'Thursday next after the Octaves of the Holy 'Trinity in the said term, before our sovereign 'lord the king at Westminster, upon the oath 'of twelve Jurors, it is presented, That whereas 'the court of our lord the king of Common 'Pleas is, and from the time to the contrary of 'which there is no memory of man, hath been 'an antient court of record of our said now 'lord the king and his progenitors and ances-'tors, kings and queens of England, for the ad-'ministration of justice to the subjects of this 'kingdom of England, and others in Common 'Pleas, moved and arising through all the 'kingdom of England: And whereas it is 'against the crown and dignity of the king's 'majesty, and against the law and custom of 'this kingdom of England, for any person or 'persons to disturb the court aforesaid, or any 'Justices of the said court, the said court 'being open, and the Judges of the said court 'being present, and judicially sitting: And 'whereas Richard Hutton knight is, and for 'divers years now last past hath been, and yet 'is one of the Justices of our said now lord the 'king of this court: nevertheless one Thomas 'Harrison of Creeke in the county of North-'ampton, clerk, not having God before his 'eyes, but by the instigation of the Devil 'moved and seduced, maliciously with himself 'imagining, and in his mind compassing by 'what means he might, the aforesaid Richard 'Hutton knight, there and then, and yet being 'one of the Justices of our said now lord the 'king of the Common Pleas aforesaid, many 'ways to defame and scandalize, and contriv-'ing and maliciously intending, as much as was 'in his power, to bring the said Richard Hutton 'into scandal, ignominy, contempt, and vile 'character, and the said Richard Hutton of his 'life and goods and chattels, lands and tene-'ments, wickedly and maliciously to deprive; 'as also the displeasure and indignation of our 'said now lord the king against the said Richard 'Hutton to stir up and provoke, and using his 'utmost endeavour to make the said Richard 'Hutton be held and esteemed a Traitor as 'well by our said lord the king and the peers 'of this kingdom of England, as by all the loyal 'subjects of our said lord the king. And the 'aforesaid court of our said now lord the king 'of Common Pleas, and the justices of our said 'lord the king of the said court in the said 'court being present, and judicially sitting to 'disturb, and the administration of justice in 'the said court to hinder, the 4th day of May, 'in the 14th year of the reign of our lord 'Charles by the Grace of God, of England, 'Scotland, France, and Ireland, king, defender 'of the faith, &c. at the city of Westminster in 'the county of Middx', viz. in the great hall of 'Pleas there, the court of our said lord the 'king, that is to say, the court of our said lord 'the king before him the king, the court of 'Chancery, and the court of our said lord the 'king of Common Pleas, in the aforesaid great 'Hall of Pleas aforesaid open, and the Justices 'of our said lord the king in the court aforesaid 'then there present, and judicially sitting, in 'assiduously attending and hearing the matters 'and causes of our said lord the king, his peo-'ple and kingdom of England, and in minis-'tering the laws of the kingdom aforesaid to 'the subjects of our said lord the king; the 'aforesaid Thomas Harrison to the bar of the 'aforesaid court of our said lord the king of 'the Common Pleas, then and there violently 'and by force and arms, &c. came, the said 'court of Common Pleas then and there in the 'aforesaid great Hall being open as aforesaid, 'and the aforesaid Richard Hutton knight, and 'the other Justices of our said lord the king of 'the court of Common Pleas aforesaid in that 'court, then there as aforesaid being present, 'and judicially sitting; and the aforesaid Tho-'mas Harrison, then and there out of his mere 'malice, evil mind, and wicked intention, in 'the presence and hearing of the aforesaid jus-'tices of the aforesaid court of Common Pleas, 'and divers serjeants at law, and many vene-'rable men, and other faithful subjects of our 'said now lord the king, falsely, wickedly, and 'maliciously accused the aforesaid Richard 'Hutton knight, of high treason, and then and 'there falsely, wickedly, and maliciously, these 'scandalous, venomous, defamatory English 'words, openly, publicly, and with a loud voice 'said, published and spoke, viz. 'I (him the ''said Thomas Harrison meaning) do accuse ''Mr. Justice Hutton (the aforesaid Richard ''Hutton knight, one of the justices of our said ''lord the king of the Common Pleas, meaning) ''of high treason:' to the great hurt and dero-'gation of the crown and dignity of our said 'lord the king, and of his royal power, and the 'manifest contempt and scandal of his courts 'aforesaid, and of the justice and laws of our 'said lord the king, his kingdom aforesaid, and 'the court of Common Pleas aforesaid, and 'the justices of our said lord the king, and 'administration of justice in the said court, to 'the most evil example of all other offenders 'hereafter in the like case, and to the more

* He was Parson of Creeke in Northamptonshire.

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'grievous scandal, infamy, disgrace, and final 'destruction of the aforesaid Richard Hutton 'knight, and against the peace of our said now 'lord the king, his crown and dignity, &c.'*

To this the said Thomas Harrison hath pleaded Not Guilty, and hath put himself upon the country, and the king's Attorney of this court likewise. You are now to enquire whether the said Thomas Harrison be guilty of this crime, Yea or No.

Mr. Serjeant *Heath*. May it please your lordship, and you gentlemen of the jury do hear, that by reading of the record, that there is an Indictment preferred on the behalf of the king against Thomas Harrison who is now at the bar, and that it is for a notable and insolent Contempt in this hall against justice Hutton and the laws of this kingdom. The Indictment sets it out thus: That the court of Common Pleas is an ancient court, and that it is against the crown and dignity of the king, and the Courts of Justice, that when the said courts were sitting, they or any of the ministers of the said court shall be disturbed. It is further said, that Mr. Justice Hutton is, and for many years last past hath been one of the Judges of the Court of Common Pleas; and that the Defendant who is now at the bar (Mr. Harrison, a clerk) being moved with malice against the person of Mr. Justice Hutton, and intending to bring Mr. Justice Hutton into the king's high displeasure, and to hazard the losing of his life and his estate, and the forfeiture of his goods, and to disturb the peace of the king, and the court of justice sitting, did falsely and maliciously the 4th of May last in Westminster-hall in the city of Westminster, the court being sitting, this court and the court of Chancery, and the court of Common Pleas, this defendant, boldly, audaciously, and maliciously, did rush to the bar of the said court of Common Pleas, Mr. Justice Hutton and Mr. Justice Crawley then and there sitting, there attending to the service of the said court, there with a loud voice spake to Mr. Justice Hutton sitting as a judge: 'I do accuse Mr. Justice Hutton 'of high treason.' This offence being committed in this manner and in this place, and with such a boldness, is laid to be of a high nature, and to the contempt of the crown, and dignity of all the courts of justice, where the king is wholly interested. Whether this offence may be punished, that is the force and intent of this Indictment. My lords, to this the Defendant hath pleaded Not Guilty: we that be of the king's counsel shall make it appear, that

* The original Record is as follows:

REX *versus* HARRISON *for a Misdemeanour.*

Trin' 14 *Car'* 1. *B. R.*

'Middx' *ss.*

'Alias, scilicet die Jovis prox' post octab' 'sanctæ Trin' isto eod' termino, coram domino 'rege apud Westm', per sacrament xii. jur' 'extitit præsentat', quod cum cur' domini regis 'de communi banco est, et a tempore cujus 'contrar' memoria hominum non existit, fuit 'antiqua cur' de recordo dicti domini regis 'nunc, et progenitor' et antecessor' suor' reg' 'et reginar' Angliæ, pro administratione jus-'titiæ subdit' hujus regni Angliæ, et aliis in 'communibus pl'itis per tot' regnum Angliæ 'præd' motis et emergentibus. Cumque est 'contra coron' et dignitat' regiæ majestatis, 'necnon contra legem et consuetudinem hujus 'regni Angliæ, pro aliqua persona, vel aliqui-'bus personis cur' præd', seu aliquos justiciarios 'ejusd' cur', ead' cur' aperta existen', et jus-'ticiar' cur' illius in cur' ill' præsentibus, et 'judicialiter sedentibus, disturbare. Cumq' 'Ric' Hutton miles est, et per diversos annos 'jam ult' elapsos fuit, et adhuc est, unus jus-'ticiar' dict' domini regis nunc præd' cur' suæ; 'quidam tamen Thomas Harrison de Creek in 'com' Northampton clericus, Deum præ oculis 'suis non habens, sed instigatione diabolica 'mot' et seduct', secum malitiose imaginans, 'atque in animo compassas, quibus modis pos-'sit præd' Ricardum Hutton milit', et adtunc 'et adhuc un' justic' domini regis nunc de 'communi banco præd' existen', multipliciter 'defamare et scandalizare, machinansque et 'malitiose intendens, quantum in ipso fuit, 'ipsum Ricardum Hutton in scandalum, igno-'miniam, contempt', et vilipend' inducere, ip-'sumq' Ricardum Hutton de vita sua, ac de 'bonis et catallis, terris, et tenementis suis 'praviter et malitiose deprivare, necnon ad dis-'placentiam et indignationem dict' domini regis 'nunc erga præfat' Ricard' Hutton incitand' et 'provocand', ac ipsum Ricardum Hutton pro 'proditore tam apud dict' dominum regem, et 'magnates hujus regni Angliæ, quam apud om-'nes ligeos subditos ejusd' domini regis haberi et 'existimari satagens, ac ad præd' cur', dict' do-'mini nunc de communi banco, et justiciar' 'dict' domini regis, ejusd' cur,' in cur' ill' præ-'sent', existent' et judicialit' sedentibus, distur-'band', et administrationem justitiæ in cur' ill' 'impediend' quarto die Maii, anno regni domini 'nostri Caroli, Dei gratia Angliæ, Scotiæ, 'Franc', et Hibern' regis, fidei defensores, &c. 'decimo quarto, apud civitat' Westm' in com' 'Midd', viz. in magna aula pl'itorum ibidem, cur' 'ipsius domini regis coram ipso rege cur' cancel-'lar', et præd' cur' communi banco in præd' mag-'na aula pl'itorum præd' apert', ac justic' ejusd' 'domini regis in cur' præd' tunc ibidem præ-'sentibus, et judicialiter sedentibus, materias 'et causas domini regis, populi sui, ac regni sui 'Angliæ assidue attendent' et audient', legesq' 'regni præd' subdit' ipsius domini regis minis-'trant', præd' Thomas Harrison ad barram 'præd' cur' dicti domini regis de communi ban-'co, adtunc et ibidem violenter, vi et armis, &c. 'accessit præd' cur' de communi banco adtunc 'et ibidem in præd' magna aula, ut præfertur, 'aperta existen', ac Ricardo Hutton milit', et 'aliis justiciar' dicti domini regis cur' de com-'muni banco præd', in cui' illa tunc ibidem '(ut præfertur) præsentibus, et judicialit' se-'dentibus, et præd' Thomas Harrison adtunc

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this Defendant did do this, and in this manner as it is set forth.

Mr. *Attorney*. (Sir John Banks.) I desire that this Examination may be read; but let him see it, whether it be his hand, yea or no.

Harrison. It is my hand.

"The Examination of Thomas Harrison, of Creeke, in the county of Northampton, clerk; being examined before my lord chief justice Brampston, saith, that it is true, that whereas Mr. Justice Hutton and Mr. Justice Crawley sitting in the court of Common Pleas, he came to the bar, and there did publicly charge Mr. Justice Hutton with High-Treason. He charged him first with denying the king's Supremacy, next with moving the people to Sedition; and these be the points on which he charged him with High-Treason, as aforesaid. Farther, he was asked why he charged him with the first, and how he doth deny the king's Supremacy: He answers, For that by common fame upon Saturday last in the Exchequer-Chamber he did deliver his opinion, that the king had no lawful power to levy the Ship-Money. Being asked whether he heard the Argument; he answered, He heard it not, but received it from the common report of others. Being further asked why he charged him with stirring up the people to Sedition; he answered, That was because by the report of divers near to the place where this Examinant dwells, the people go on more and more in their stubbornness, refusing the paying of Ship-Money; the which is contrary to the opinion of all the Orthodox divines of this kingdom; and in that Mr. Justice Hutton riding that circuit, hath given the people such an encouragement to their disobedience. Being farther asked, whether any other person did know of this his intent; he answered, that there were two other persons with him, but they did not know any thing of his intentions, till they heard it spoken at the bar. Being asked why he made choice of this public way; the reason he saith was, because he delivered his opinion publicly, therefore he thought that to be the best way; and if it had been done in a private way, he thought it fit to acquaint him with it in a private way.

THOMAS HARRISON."

Mr. *Attorney*. May it please your lordship, and you of the jury, the prisoner at the bar, Mr. Harrison, stands indicted of a very foul and horrible offence, of a forged accusation framed and contrived out of his own brain. It should seem it was out of some rotten and inveterate malice, a thing for which there is no colour nor appearance of truth, and he confesseth it was upon the ground of common fame. Now you know what common fame is, a *mendax*: he charged this reverend judge, as you have heard, that he did deny the king's Supremacy; and the reason was, because he heard by common fame, that the Judge had delivered his opinion, that the king had no power to levy Ship-Money. Secondly, because he stirreth up the king's subjects to Sedition; and he giveth that for a reason, in that the people of Northampton do go on in the denial of the payment of Ship-Money.

My lord, it is a heavy thing to accuse any man of Treason, whereby he shall forfeit his lands and goods, and lose his life: and surely by the old law, this false Accuser should undergo the same punishment as he should, that is accused, if found guilty.

My lord, the place of a Judge is a place of great honour and trust: of Honour, for they be reckoned in the old statutes among the *magnates regni*, 2 Ric. 2, &c. And these people that be the authors and publishers of these

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'et ibidem, ex sua mera malitia, malo animo, et 'malevola intentione, in præsentia et audit' 'præfat' justiciar' præd' cur' de communi ban-'co, ac diversorum servien' ad legem, multor' 'viror' venerabilium, et alior' dicti domini regis 'fidelium subditor', falso, nequit', et malitiose 'præfat' Ricardum Hutton milit' de alta pro-'ditione accusavit, et adtunc et ibidem falso, 'nequit', et malitiose hæc scandalosa, venenosa, 'defamatori Anglicana verba, palam, publice, 'et alta voce dixit, 'I (ipsum præfat' Thomam '' Harrison innuendo) do accuse Mr. Justice '' Hutton (præfat' Ricardum Hutton milit', '' un' justiciar' dicti domini regis de communi '' banco præd' innuendo) of High Treason,' in 'dicti domini regis nunc, coron', dignitat', et 'regiæ potestatis suæ læsionem et deroga-'tionem, et cur' suæ præd' contempt', et scan-'dalum manifestum jurisque, et legum ipsius 'domini regis regni sui præd', ac cur' de com-'muni banco præd', et justiciar' dicti domini 'regis, cur' illius, et administration' justitiæ in 'ead' cur', in nequissimum exemplum omnium 'aliorum malefactorum tali casu delinquent', et 'ad gravissimum scandalum, infamiam, dede-'cus, et final' destructionem præd' Ricardi Hut-'ton milit', et contra pacem dicti domini regis 'nunc, coronam, et dignitates suas, &c. Cum 'per quod præcept' fuit vic', quod non omittat '&c. quin venire fac' eum ad respondend', &c. 'Cum et modo, scilicet die Veneris prox' post 'octabas sanctæ Trin' isto eod' termino, coram 'domino rege apud Westm' ven' præd' Thomas 'Harrison clericus, custod' Henrici Hopkins 'arm', guardian' prisonæ dicti regis de la Fleete, 'virtute brevis dicti regis de habend' corpus ad 'subjic', &c. ei inde direct', ad barr' hic duct' 'in propria persona sua, qui committ' præfat' 'marr', &c. Et statu' præmissis eo alloquunt' 'qualiter se inde acquietari, dicit, quod ipse 'non est inde culpabil', et de hoc ponit se super 'patriam. Et Johannes Keeling ar', cleric' 'coronæ, et attornat' domini regis in cur' ipsius 'regis, coram ipso rege, qui pro eod' domino 'rege in hac parte sequitur, similiter, &c. Jo' 'ven' inde jur' coram domino rege apud Westm' 'die Lunæ prox' post quindenam sanctæ Trin', 'et quia nec, &c. ad recogn', &c. quia tam, &c. 'Idem dies dat' est tam prætat' Johanni Keel-'ing, qui sequitur, &c. quam præd' Thomæ 'Harrison clerico, sub custod' præd' marr' in-'terim commisso salvo custodiend', quousq', '&c.'

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base Scandals, they are reckoned to be the sowers of discord, and are subverters of the peace of the commonwealth. And surely if Mr. Harrison had looked upon these Statutes, he would have been better advised: Of Trust, for he is trusted with the administration of equal justice between the king and his subjects, and the lives, fortunes, and estates of men. Therefore being a place of so great honour and trust, the scandal is the greater; and offences and crimes against them have been punished not with ordinary punishment.

25 Ed. 3, 1 pr. It is declared to be Treason to kill a Judge in execution of his office. Our books say, That if one draw a weapon upon a Judge sitting in judicature, though he strike him not, he shall be imprisoned during life, and forfeit his goods and lands, and lose his right hand.—Though the offence be not done to the Judge, yet being in the judges presence (the courts sitting), as if one strike a juror, or any other person in Westminster-hall, sitting in the courts, it hath been punished with the loss of hand, goods, and lands during life; this appeareth, 19 Ed. 3. Judgment, 174, 22 Ed. 3, 13 Mich. 6 Ed. 3. Coram rege, rot. 55. Stamford's Pleas of the Crown, 38.

The Offence of Mr. Harrison is not for accusing judge Hutton, or any other, of Treason, for God forbid but that should be lawful where there is just cause; but to do it without any colour of ground, and to forge a false accusation out of his own brain, and to act in such an insolent and mad way against a reverend judge, sitting in the seat of judgment, this is the offence.

37 Hen. 6, 3. If one call another Traitor, an appeal lieth before the constable and marshal; and if the appellant be killed in battle, it is justifiable.

30 lib. Ass. One called justice Seaton Traitor, and answered well in damages, as appeareth more at large in the Record than in the Printed Book.

Mich. 5 Car. in Banco Regis, Nich. Jeoffes was indicted and fined in the King's-Bench, for writing a Petition, wherein he said the lord chief justice Coke was a Traitor.

Treasons are declared by the statute 25 Ed. 3, and then this gentleman may expound a Text, he cannot expound Statutes, for this is proper for the judges of the realm. He is not to judge what is treason, and what not: 'Tractent fabrilia fabri;' let him keep himself within the compass of his own profession.

This Offence is 'contra Coronam et Dignitatem,' and the scandals against the king's Judges and Ministers trench upon the king himself; and therefore his royal majesty, detesting this odious and foul fact in the prisoner at the bar, hath commanded us his counsel to give Evidence. The person of the party accused is best known to your lordships to be a most grave, honest, learned, and reverend Judge, and I presume, free from any thought of Treason.

Mich' 33. 34 Ed. 1. In this court, rot. 75, there was Roger de Heigham gave Judgment against one De Bruce in the Exchequer-Chamber. This De Bruce was of a noble family: He asked this Roger, whether he would avow the Judgment, and he told him Yes. Now, says De Bruce, thou hast thy will, which of long time thou hast sought: The Judge asked him what was that? He said, My shame and loss, and this I will think on. For this offence, in a kind of implicit way taxing the Judge of injustice, he was indicted, and confessed the Indictment, as Mr. Harrison doth: The judgment was, That he should be committed, and there to remain during the king's pleasure, besides a great fine. The Record saith, 'Et quia sicut 'honor, et reverentia qui ministris domini regis 'ratione officii sui faciuntur, ipsi regi attribuuntur, sic dedecus et contemptus ministris suis 'fact. eidem domino regi inferuntur, considera'tum est quod prædictus Willielmus de Bruce 'districtus in corpore, capite nudo, toga depo'sita eat è Banco domini regis ubi placita te'nentur in Aula Westmonasterii per medium 'Aulæ prædictæ cum curia plena fuerit, usque 'ad Scac. ubi deliquit et ibidem veniam petat à 'præfato Rogero, &c. Et postea committatur 'Turri London. ibidem moretur ad voluntatem 'regis.'

My Lords, This Offence, which was offered to the person of a most reverend, learned, and honest Judge, by the rules of our Books, is a scandal done to the king himself, if there be no colour nor ground why he should take upon him to make this bold and impudent assertion. I doubt not but you will maintain the honour of a Judge, and punish this Delinquent according to his demerits. His offence contained in the Indictment, is confessed in his Examination, and by himself *ore tenus;* therefore you of the Jury need not depart from the bar.

Whereupon the Jury immediately gave in a Verdict, that he was guilty of the Indictment.

Mr. *Attorney General.* Now, my lord, I desire Judgment.

Upon which the Court pronounced the following Sentence: 'That he should pay a Fine 'to the king of 5000*l.* and be imprisoned dur'ing the king's pleasure, and should have a 'Paper upon his head, shewing his Offence, 'and go therewith to all the courts of West'minster, and make his Submission in every 'court in Westminster-Hall, and in the Exche'quer:' For it is an offence to every court.

Afterwards Justice Hutton brought an action for these Words against Harrison, in which he recovered 10,000*l.* Damages.

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Another Account of the above TRIAL *from* TANNER'S MSS. *in the* BODLEIAN LIBRARY.

The following Account of the above Case, in the hand-writing of Archbishop Sancroft, is taken from a volume among Tanner's MSS. in the Bodleian Library at Oxford.

PROCEEDINGS UPON THE INFORMATION AGAINST THOMAS HARRISON, CLERK, AT THE KING'S-BENCH BAR. 4 Junii, 1638.

Upon the Indictment it was declared, that the Common-Pleas is an antient court, that it is against the crown and laws of this kingdom to disturb the court, the Judges judicially sitting; that, notwithstanding, Thomas Harrison, clerk, did wickedly and maliciously defame sir Richard Hutton, knight, one of the Judges of that Court, and then judicially sitting there, seeking to deprive him of his life, goods, and chattels, and to procure the high displeasure of the king, and cause him to be accounted Traitor both by our sovereign lord the king, his peers, and all his subjects. That upon the 4th day of May, anno 14 R. the said Thomas Harrison did by force and arms violently rush to the bar of the said court of Common Pleas, and there accused the said sir Richard Hutton of High-Treason, openly, publicly, and with a high voice pronouncing these words: "I do "accuse Mr. Justice Hutton of High-Treason;" to the manifest scandal of all the courts of justice, and to the grievous scandal and damage of the said sir Richard Hutton.

Mr. *Attorney* declared, that Mr. Harrison had committed a notable and insolent contempt, to the disturbance of the court of Common-Pleas, an antient and a high court, for the administration of justice between subject and subject, with a wicked and malicious intent to bring Mr. Justice Hutton into the king's high displeasure, and into danger of his life and estates, an offence of a high nature against the crown, and against the dignity of all courts of justice.

His Examination was here read, wherein he did confess the words. The points of treason wherewith he did charge Justice Hutton, were two: 1. For denying the King's Supremacy. 2. For seducing the king's subjects to Sedition. The ground of his first Charge was, that he had heard by common fame, that Mr. Justice Hutton did as a Judge deliver his opinion, that the king could not lawfully levy the Ship-Money. The ground of his second Charge was, that by report near his dwelling, and upon his own knowledge the people of the county of Northampton do deny to pay the Ship-Money, being moved thereunto by some treasonable words, which Judge Hutton did deliver in his Charge at the Assizes there against the lawful levying thereof, which is contrary to the orthodox opinion of all the loyal and well-learned preachers of this kingdom. Being asked by the Lord Chief Justice at his examination, why he made choice of so public a place to charge the Judge, he answered, because the Judge had committed a public treason.

Mr. *Solicitor* told the lords, that Mr. Harrison being demanded in prison, why he took no other ministers with him, when he spoke the words, he boastingly replied, he did it, that they might take an example of courage.

Mr. *Attorney* informed the court, that Mr. Harrison had forged a most wicked and malicious slander against Mr. Justice Hutton, wherein was neither colour, nor evidence. That by the old law, false accusers were to suffer the same punishment that the party accused should have suffered, if he had been found guilty; so hateful was this offence to our forefathers. But Mr. Harrison's offence was much aggravated, if we consider the person against whom it was committed, the high place of honour and trust wherein he is, his majesty having given him the trust of life and member, of the persons and estates, of his subjects. Therefore a scandal against a person in such high honour and trust must needs deserve a most exemplary punishment; and then to do it in so barbarous and uncivil a way. But Mr. Harrison was much out of his trade to meddle with the laws of the kingdom, 'Tractent fa-'brilia fabri,' he may expound the scripture, but the common law hath given him no power to expound statutes, and acts of parliament. This offence doth concern the king himself. For that scandals cast upon the king's ministers are cast upon the king's justice. I shall now only desire your lordships to hold in mind, that this scandal was cast upon a most reverend and most learned, most honest and sage judge, and accordingly give your censures.

Mr. *Harrison* spake thus in his own defence. The reason why I pleaded Not Guilty, was not because I meant to deny the speaking of the words, but because no man can be guilty, that goeth about to defend the king. I confess that Judges are to be honoured and revered as sacred persons, but this is to be granted only so long as they hold themselves within the tenor of judges. They are then to be accounted but as other subjects. Indeed, I do not understand the common laws, nor do I go about to expound them; therefore, the charge of interpretation is laid a little too deeply. The oath of Supremacy I have divers times taken, and find myself bound to maintain it. And where any of the king's subjects have laboured to overthrow his royalty and supremacy, it is high time for any loyal subject to strike in, and to appeal the offender. Our usual phrase for the king's Supremacy is in all cases over all persons, and this is a case of Ship-Money.

Mr. *Attorney*. We shall not need to learn of you what the king's Supremacy is.

Mr. *Harrison*. A divine understands the Supremacy as well as a lawyer, and a great divine as well as a great lawyer.

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L. C. J. Then we must observe, that the denying of Ship-Money is against the king's Supremacy.

Mr. *Harrison.* As a loyal subject, I did labour the defence of his majesty; and in the point of sedition, I find there is treason committed in that. For the people of the country where I live, do now refuse to pay the Ship-Money, upon Justice Hutton's Charge in that circuit. Our duties are to tell the people their duties. We find that the king may do it. The reason why I did so publicly charge the Judge, was, because there are such delays and such windings in the proceedings of all courts, and matters carried by favour and affection, that I thought a private insinuation would do little good, and besides the offence being openly committed, I conceived it not amiss to make a public and open accusation.

Mr. *Attorney.* This is a scandal to all the courts of justice.

L. C. J. Mr. Harrison, if you have any thing to say in your own defence, you shall be heard: but this raving must not be suffered.

Mr. *Harrison.* I am not ignorant that somebody * in this place is not a favourer, but rather a disfavourer, of my opinion, and that in the person of a Judge. As for Mr. Justice Hutton, though he be a man in great account, yet all his actions have not been approvable. Concerning the Judges arguing in the matter of Ship-Money, it was the king's gracious clemency, to have his power manifested by strength of arguments, and to that end was pleased to permit counsel on the adverse party, who urge arguments against it, and that the Judges shall be moderators. And the analogy holds very aptly, between this kind of arguing, and the public disputations upon points of divinity in the schools, where we have a moderator, whose office is, if the opponent urge any argument weakly, to urge it home, yet in the end he must determine for the truth. So here the Judges being moderators may urge arguments against the king, but yet in the end to conclude for the king's prerogative. And as neither king nor God will suffer any divine to conclude in heresy, so neither doth his majesty give his Judges leave to conclude in Sedition, nor have the Judges power to make or pronounce laws against the king's prerogative, but are our moderators in the case of arguing.

Judge *Bartlett.* As we are moderators of cases, so we are moderators of persons too, and therefore will moderate your lavish liberty of speech. You have slandered one Judge already, and in all our apprehensions you have flown in the face of two more.

Mr. *Harrison.* If I had not had leave to speak, I had been silent: nor do I think, I have committed any offence against justice or reason. For I say still we are not to question the king's actions; they are only between God and his own conscience, 'Sufficit regi, quod 'Deus est.' And although the outward action might seem not to be altogether without some rashness, yet there was some matter in it of moment, and which every loyal subject ought to maintain. This thesis I will stand to, that whatsoever the king in his conscience thinketh he may require, we ought to yield.

L. C. J. Do you not think that the king may govern his people by the common laws?

Mr. *Harrison.* Yes, and by something else too.

Judge *Bartlett.* What do you think of this then, if the king shall be persuaded in his conscience, that he must present another man to your living; would you not maintain your right by law?

Mr. *Harrison.* No, with all my heart I would submit unto his majesty.

L. C. J. But you mistake my brother Bartlett's question; he meaneth thus, that if the king should be persuaded that he had right and title to your parsonage, and did desire that the title should be tried, whether in this case would you stand to a trial?

Mr. *Harrison.* I will answer your lordship. There is a difference between a demand that concerns some petty right, or the title of this or that particular matter, and a demand, which concerns the great royalty of the king; you unking him, if you deny his royalty.

Mr. *Attorney.* This Defence is a very impudent justification, which you may be questioned for in another place: as they are bold and audacious assertions, so they proceed from a distempered brain. For the matter of Ship-Money, or whatever else concerneth his majesty's royal prerogative, we, that are the king's counsel, have and will upon all occasions be ready to speak and do as becomes the duty of our places, and we shall not crave the aid of Mr. Harrison. I must let your lordships know that he protests a detestation of the fact, and willeth that your lordships give a severe Censure.

Verdict. Then the Jury without going from the bar presently found him Guilty.

Whereupon the Lord Chief Justice asked him what he could say for himself that judgment should not pass against him. He answered, If I have offended his majesty in this, I do submit to his majesty and crave his pardon.

L. C. J. Your *if* will be very ill taken by his majesty, nor can this be taken for a submission.

Mr. *Harrison.* That I spake the words, I confess, but whether well or not, let every loyal subject judge.

Mr. *Attorney.* My lords, this concerns Mr. Justice Hutton no more than your lordships. Therefore I crave judgment and such a censure as may become the heinousness of the offence. No damages, but a large fine.

The Censure. 1. Fine 5,000*l.* 2. Imprisonment during the king's pleasure. 3. To submit *vivâ voce* in the Exchequer-Chamber. 4. To be carried from thence to all the courts

* He must mean Judge Croke. See his Argument about Ship-Money *ante*, p. 1127.

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in Westminster with a Paper upon his head containing his offence. 5. And to be left open to Mr. Justice Hutton to take his remedy against him by his action.

And, in pursuance of the leave given to Justice Hutton in the 5th Article, he did in Trin. 14 Car. R. 1658, bring a special action of the case in the Common-Pleas against Mr. Harrison; sir Robert Heath one of the king's serjeants, and Mr. Lance the prince's Attorney, being of counsel for the Plaintiff. Mr. Bear and Mr. Maynard for the Defendant. The Declaration itself is upon record. The Witnesses to prove the words were Mr. William Smithson, Mr. Clove and Mr. Turner, all Clerks of the Common-Pleas. To the Declaration the Defendant Thomas Harrison pleaded Not Guilty. Whereupon issue was joined, Term. Mich. 14 Car. R. And a Jury of Middlesex consisting of knights and esquires, at the King's-Bench bar found for the Plaintiff Mr. Justice Hutton, and assessed damages to 10,000*l.* and the Defendant Harrison brought a writ of error.

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150. The Trial* of THOMAS Earl of STRAFFORD,† Lord Lieutenant of Ireland, for High Treason: 16 CHARLES I. A. D. 1640 ‡

November 11, 1640.

THIS day a Message from the Commons to the Lords was delivered by Mr. Pym, to this effect:

"My Lords; The knights, citizens, and burgesses, now assembled for the Commons in parliament, have received information of divers traitorous designs and practices of a great peer of this house; and, by virtue of a command from them, I do here, in the name of the Commons now assembled in parliament, and in the name of all the Commons of England, accuse Thomas earl of Strafford, Lord Lieutenant of

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* "An erasure was made in the Lords Journals, by order of that house, after the Restoration of Charles 2, of all the Proceedings against the Earl of Strafford this time. This extraordinary act was taken into consideration in a succeeding reign, and another order was made by the lords relating to it. This order is entered in the Journals just where the first erasure begins, and is in these words:—"Die Martis Julii 5to. 1698. The earl of Rochester reported from the lords committees, appointed to inspect the Journals of this house, in the year 1640 and 1641, relating to vacating or obliterating divers proceedings therein, pursuant to the act for reversing the earl of Strafford's attainder, as follows, viz. Upon perusal of the Journal of this house, in relation to the proceedings upon the Impeachment from the house of commons, it appears plainly, that, by the former orders made by this house, relating to the cancelling and obliterating the proceedings of the earl of Strafford, according to the act of parliament made for reversing of the said earl's attainder, it could not be intended that any other proceedings should be obliterated than those relating especially to the said act of attainder; it is therefore ordered and declared, by the lords spiritual and temporal in parliament assembled, That whatsoever stands crossed upon the Journals relating to the proceedings on the Impeachment of the said earl, ought not, or shall be looked on as obliterated; and that the several orders for obliterating and vacating any proceedings concerning the earl of Strafford must be taken to be intended only to the act of attainder."—Which report being agreed to by the house, it was ordered, "That there be a note, or memorandum, of the aforesaid Order in the margin of the Journals, where any such proceedings have been obliterated."—But an authentic copy of all the proceedings was afterwards interleaved in the original Journal by an order of the house, 15th Feb. 1768, and has since appeared in the printed editions of that work." 2 Cobb. Parl. Hist. 738.

† 1 Clar. Hist. 118, 152, &c. 1 May's Hist. of the Parliament, b. 1, c. 8. See the larger Trial, which being an entire volume in Rushworth's Collection, is purposely omitted, and this inserted in the stead thereof.

‡ Whitlock, whom Hume follows and quotes, says: "The time of the parliament's meeting drawing near, it was considered at York, whether the Earl of Strafford should repair to the house, or continue in the North with the army. The king was earnest for his going up to the parliament, as one, of whose service he should have great occasion, and placed much confidence in his faithfulness and abilities. The Earl humbly desired the king, to excuse his going to the parliament, alledging, 'That he 'should not be able to do his majesty any ser-'vice there; but should rather be a means to 'hinder his affairs; in regard he foresaw that 'the great envy, and ill-will of the parliament, 'and of the Scots, would be bent against him; 'whereas, if he kept out of sight, he would not 'be so much in their mind as he should be, by 'shewing himself in parliament; and if they 'should fall upon him, he being at a distance, 'whatsoever they should conclude against him, 'he might the better avoid, and retire from any 'danger, having the liberty of being out of their 'hands, and to go over to Ireland, or to some 'other place, where he might be most service-'able to his majesty, but if he should put him-'self into their power, by coming up to the parliament, it was evident that the house of commons, and the Scots, with all their party, espe-'cially being provoked by his coming amongst 'them, would presently fall upon him, and pro-'cure his destruction.' The king, notwith-

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Ireland, of High Treason. And they have commanded me further to desire your lordships, that he may be sequestered from Parliament, and forthwith committed to prison. They have further commanded me to let your lordships know, that they will, within a few days, resort to your lordships, with the particular Articles and Grounds of his Accusation; and they do further desire that your lordships will think upon some convenient and fit way, that the passage between Ireland and England, for his majesty's subjects of both kingdoms, may be free, notwithstanding any restraint to the contrary.".

After this, the Commons withdrew; and the Lord Keeper reported the effect of it to the house. And, after their lordships had considered of the Message, they resolved to give this Answer for the present, by the Lord Keeper: viz.

"That the lords do let them know, that they have been made acquainted with the Charge of High Treason, which the Commons have made against the Earl of Strafford; and their lordships do not doubt but that the Commons did take great consideration in it before they came hither; and their lordships will take it into their consideration, and will send them a further Answer, by messengers of their own."

Whereupon the Commons went to their own house; and the earl of Strafford, coming into the house, was commanded to withdraw. Then their lordships, falling into a serious debate of the Message, concluded, and ordered, "That the Earl of Strafford, for this Accusation of High Treason by the Commons, shall be presently committed to the safe custody of the Gentleman Usher of this house; and to be sequestered from coming to this house of parliament, until he hath cleared himself of this Accusation."

The Earl of Strafford being called to the bar as a delinquent, kneeling, the Lord Keeper, by direction of the house, signified to him as followeth:

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standing these reasons, continued very earnest for Strafford's coming up to the parliament; for which he laid his commands upon him: and told him, 'That as he was king of England, he 'was able to secure him from any danger; and 'that the parliament should not touch one hair 'of his head.' The Earl thanked his majesty, but replied, 'That if there should fall out a difference between his majesty and his parliament, concerning him, that it would be a great 'disturbance to his majesty's affairs; and that 'he had rather suffer himself, than that the 'king's affairs should in any measure suffer, by 'reason of his particular.' The king remained unalterable in his resolution concerning Strafford's coming up to the parliament, saying, 'That he could not want his advice in the great 'transactions, which were like to be in this parliament,' and in obedience to his commands, the Earl came up to London." Memorials, p. 36, fol. ed 1682. See also 2 Strafford's Letters, 416. It is impossible to consider this, and the subsequent conduct of king Charles towards Strafford, without perceiving that either the head or heart of the king was very much in fault in these transactions. Mr. Seward, from Baillie's Journal, has introduced into his "Anecdotes," the following interesting account of the commencement of this Impeachment against Strafford:

'All things go here as we could wish. The 'lieutenant of Ireland, lord Strafford, came but 'on Monday to town, late; on Tuesday rested: 'and on Wednesday came to parliament; but 'ere night he was caged. Intolerable pride 'and oppression call to heaven for vengeance. 'The lower house closed their doors; the 'Speaker kept the keys till his accusation was 'concluded Thereafter Mr. Pym went up with 'a number at his back to the higher house, and, 'in a pretty short speech, did, in the name of 'the commons of all England accuse Thomas 'lord Strafford of High Treason, and required 'his person to be arrested till probation might 'be made: so Mr. Pym and his back were re'moved. The lords began to consult on that 'strange and unpremeditated motion. The 'word goes in haste to the lord lieutenant, 'where he was with the king: with speed he 'comes to the house of peers, and calls rudely 'at the door. James Maxwell, keeper of the 'black rod, opens. His lordship, with a proud 'glooming countenance, makes towards his 'place at the board head, but at once many 'bid him void the house. So he is forced in 'confusion to go to the door till he is called. 'After consultation he stands, but is told to 'kneel, and on his knees, to hear the sentence. 'Being on his knees, he is delivered to the 'black rod to be prisoner, till he is cleared of 'the crimes he is charged with. He offered to 'speak, but was commanded to be gone without a word. In the outer room, James Maxwell required of him, as prisoner, to deliver 'him his sword. When he had got it, with a 'loud voice he told his man to carry the lord 'lieutenant's sword. This done, he makes 'through a number of people towards his 'coach, all gazing, no man capping to him, 'before whom that morning the greatest in 'England would have stood discovered; all 'crying, What is the matter? He said, A small 'matter, I warrant you. They replied, Yes 'indeed, high treason is a small matter! Coming to the place where he expected his coach, 'it was not there; so he behoved to return the 'same way through a world of gazing people. 'When at last he had found his coach, and was 'entering it, James Maxwell told him, my lord, 'you are my prisoner, and must go in my 'coach; so he behoved to do. For some days too 'many went to see him; but since, the parliament has commanded his keepers to be straiter. 'Poursuivants are dispatched to Ireland, to 'open all ports, and to proclaim, that all who 'had grievances might come over.' Baillie gives a not incurious or uninteresting account of this Trial.

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"My lord of Strafford; The House of Commons, in their name, and in the name of the whole Commons of the kingdom of England, have this day accused your lordship, to the lords spiritual and temporal in this high court of parliament assembled, of High Treason. The Articles they will within few days produce. In the mean time, they have desired of my lords, and the lords have accordingly resolved, That your lordship shall be committed to safe custody to the gentleman usher, and sequestered from this house, until your lordship have cleared yourself of the Accusation that shall be laid against you."

After this, he offering to speak, was not permitted, but immediately sent away. And so the earl of Strafford went out of the house to the gentleman usher. Afterwards, the lords thought it fit to send a Message to the Commons, to let them know how far they had proceeded for the present; and their lordships did agree, that the two Lords Chief Justices should deliver a Message to the Commons, to this effect: "That the lords of the high court of parliament have taken into consideration the Charge of High Treason, which the Commons have made against the earl of Strafford; and do let them know that their lordships have committed him to safe custody; and have sequestered him from coming to the house; and do desire that the Articles and Accusation against him may be brought in speedily; and further to let them know, that their lordships will take it into consideration how to free and open the passage between Ireland and England, notwithstanding any restraint; and to that purpose will move his majesty in it."

November 25. A Conference took place between both Houses; and the Lord Keeper reported the effect of it; viz. "That the House of Commons have delivered their Articles of High Treason against the Earl of Strafford, consisting of divers Charges; and that the Commons desired, 1. That the Earl may be called to answer the said Articles. 2. That they may be made acquainted with the Earl's Answer. 3. That they may be made acquainted with the Depositions. 4. They required further, they might add to their Accusation, as occasion should serve. After this, the Articles were read publicly, *in hæc verba:*

ARTICLES of the Commons assembled in Parliament against THOMAS Earl of STRAFFORD, in maintenance of the ACCUSATION, whereby he stands charged of High Treason.

I. That he the said Thomas Earl of Strafford hath traitorously endeavoured to subvert* the fundamental laws and government of the realms of England and Ireland, and, instead thereof, to introduce an arbitrary and tyrannical government against law; which he hath declared by traitorous words, counsels, and actions; and by giving his majesty advice, by force of arms to compel his loyal subjects to submit thereunto.

II. That he hath traitorously assumed to himself regal power over the lives, liberties, persons, lands, and goods of his majesty's subjects in England and Ireland; and hath exercised the same tyrannically, to the subversion and undoing of many, both of peers, and others of his majesty's liege people.

III. That the better to enrich and enable himself to go through with his traitorous designs, he hath detained a great part of his majesty's revenue, without giving legal account; and hath taken great sums out of the Exchequer, converting them to his own use, when his majesty wanted money, for his own urgent occasions, and his army had been a long time unpaid.

IV. That he hath traitorously abused the power and authority of his government, to the increasing, countenancing, and encouraging of papists; that so he might settle a mutual dependence and confidence betwixt himself and that party, and, by their help, prosecute and accomplish his malicious and tyrannical designs.

V. That he hath maliciously endeavoured to stir up enmity and hostility between his majesty's subjects of England and those of Scotland.

VI. That he hath traitorously broke the great trust reposed in him by his majesty, of lieutenant general of his army, by wilful betraying divers of his majesty's subjects to death, his army to a dishonourable defeat by the Scots at Newborne, and the town of Newcastle into their hands; to the end, that by the effusion of blood, by dishonour, and so great a loss as that of Newcastle, his majesty's realm of England might be engaged in a national and irreconcileable quarrel with the Scots.

VII. That to preserve himself from being questioned for those, and other his traitorous courses, he laboured to subvert the right of parliaments, and the antient course of parliamentary proceedings; and, by false and malicious slanders, to incense his majesty against parliaments. By which words, counsels, and actions, he hath traitorously, and contrary to his allegiance, laboured to alienate the hearts of the king's liege people from his majesty, to set a division between them, and to ruin and destroy his majesty's kingdoms: for which they impeach him of High Treason against our sovereign lord the king, his crown and dignity.

VIII. And he the said earl of Strafford was lord deputy of Ireland, and lieutenant general of the army of his most excellent majesty, for his kingdoms both of England and Ireland, and the lord president of the north, during the time that all and every the crimes and offences before set forth were done and committed; and he the said earl was lieutenant general of all his majesty's army in the north parts of England, during the time that the crimes and offences in the fifth and sixth articles set forth were done and committed.

IX. That the said Commons, by protestations saving to themselves the liberty of exhibiting at

* See Luders's "Considerations on the law of High Treason in the case of levying war," 83.

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any time hereafter any other Accusation or Impeachment against the said Earl; and also of replying to the Answers that he the said Earl shall make unto the said Articles, or to any of them, and of offering proofs; also of the premises or any of them; or any other Impeachment or Accusation that shall be exhibited by them, as the cause shall, according to the course of parliament, require: do pray that the said earl may be put to answer for all and every of the premises, that such proceedings, examinations, trials, and judgments may be upon every of them had and used, as is agreeable to law and justice.

ARTICLES of the Commons assembled in Parliament against THOMAS Earl of STRAFFORD, in maintenance of their ACCUSATION, whereby he stands charged with High-Treason.

Whereas the said Commons have already exhibited Articles against the said Earl, *in hæc verba*, now the said Commons do further impeach the said Earl as followeth: (that is to say)

I. That the said earl of Strafford, the 21st day of March, in the eighth year of his majesty's reign, was President of the king's council in the northern parts of England.

That the said earl being President of the said council, on the 21st of March a Commission under the great seal of England, with certain schedules of instructions thereunto annexed, was directed to the said earl, and others the commissioners therein named, whereby, among other things, power and authority is limited to the said earl, and others the commissioners therein named, to hear and determine all offences and misdemeanours, suits, debates, controversies and demands, causes, things and matters whatsoever therein contained, and within certain precincts in the said northern parts therein specified, and in such manner as by the said schedule is limited and appointed.

That, amongst other things in the said Instructions, it is directed, that the said President, and others therein appointed, shall hear and determine according to the course of proceedings in the Court of Star-Chamber, divers offences, deceits and falsities, therein mentioned, whether the same be provided for by acts of parliament or not; so that the Fines imposed be not less than by the act or acts of parliament provided against those offences is appointed.

That also, amongst other things in the said Instructions, it is directed, that the said President, and others therein appointed, have power to examine, hear, and determine, according to the course of proceedings in the Court of Chancery, all manner of Complaints for any matter within the said precincts; as well concerning lands, tenements, and hereditaments, either free-hold, customary, or copy-hold, as leases, and other things therein mentioned; and to stay proceedings in the court of Common Law by Injunction, or otherwise, by all ways and means, as is used in the Court of Chancery.

And although the former Presidents of the said Council had never put in practice such Instructions, nor had they any such Instructions; yet the said Earl, in the month of May, in the said 8th year, and divers years following, did put in practice, exercise and use, and caused to be used and put in practice the said Commission and Instructions; and did direct and exercise an exorbitant and unlawful power and jurisdiction over the Persons and Estates of his majesty's subjects in those parts, and did disinherit divers of his majesty's subjects, in those parts, of their inheritances, sequestered their possessions, and did fine, ransom, punish and imprison them; and caused them to be fined, ransomed, punished, and imprisoned, to their ruin and destruction; and namely, sir Coniers Darcy, sir John Bourcher, and divers others, against the laws, and in subversion of the same. And the said commission and instructions were procured and issued by advice of the said Earl.

And he the said Earl, to the intent that such illegal and unjust power might be exercised with the greater licence and will, did advise, counsel, and procure further Directions, in and by the said Instructions to be given, that no Prohibition be granted at all, but in cases where the said Council shall exceed the limits of the said Instructions: And that if any Writ of Habeas Corpus be granted, the party be not discharged till the party perform the Decree and Order of the said council.

And the said Earl, in the 13th year of his majesty's reign, did procure a new Commission to himself, and others therein appointed, with the said Instructions, and other unlawful Additions.

That the said Commission and Instructions were procured by the solicitation and advice of the said earl of Strafford.

II. That shortly after the obtaining of the said Commission, dated the 21st of March, in the 8th year of his majesty's reign, to wit, the last day of August then next following, he the said Earl (to bring his majesty's liege people into a dislike of his majesty, and of his government, and to terrify the Justices of the Peace from executing of the laws; he the said Earl being then President, as aforesaid, and a Justice of Peace) did publicly, at the Assizes held for the county of York, in the city of York, in and upon the said last day of August, declare and publish before the people there attending for the administration of justice according to law, (and in the presence of Justices sitting) that some of the Justices were all for law, and nothing would please them but law; but they should find that the King's Little-finger should be heavier than the Loins of the Law.

III. That the realm of Ireland having been time out of mind annexed to the Imperial Crown of this his majesty's realm of England, and governed by the same laws; the said Earl being Lord-Deputy of that realm, to bring his majesty's liege subjects of that kingdom likewise into dislike of his majesty's government, and intending the subversion of the fundamental laws and settled government of that realm, and the destruction of his majesty's liege people there, did upon the 30th day of September, in the

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9th year of his now majesty's reign, in the city of Dublin (the chief city of that realm, where his majesty's privy-council and courts of justice do ordinarily reside, and whither the nobility and gentry of that realm do usually resort for justice), in a public speech, before divers of the nobility and gentry of that kingdom, and before the mayor, aldermen, and recorder, and many citizens of Dublin, and other his majesty's liege people, declare and publish, That Ireland was a conquered nation, and that the king might do with them what he pleased. And speaking of the Charters of former kings of England made to that city, he further then said, That their Charters were nothing worth, and did bind the king no further than he pleased.

IV. That Richard earl of Cork having sued out process in course of law, for recovery of his possessions, from which he was put by colour of an Order made by the said earl of Strafford, and the Council-Table of the said realm of Ireland, upon a Paper-Petition, without legal proceeding, did the 20th day of February, in the 11th year of his now majesty's reign, threaten the said Earl (being then a peer of the said realm) to imprison him, unless he would surcease his suit; and said, That he would have neither law nor lawyers dispute or question his Orders. And the 20th day of March, in the said 11th year, the said earl of Strafford, speaking of an Order of the said Council-Table of that realm, made in the time of king James, which concerned a Lease which the said earl of Cork claimed in certain rectories or tythes, which the said earl of Cork alledged to be of no force, said, That he would make the said Earl and all Ireland know, that so long as he had the government there, any Act of State there made, or to be made, shall be as binding to the subjects of that kingdom, as an Act of Parliament: And did question the said earl of Cork, in the Castle-Chamber there, upon pretence of breach of the said Order of Council-Table: and did sundry other times, and upon sundry other occasions, by his words and speeches, arrogate to himself a power above the fundamental laws and established government of that kingdom; and scorned the said laws and established government.

V. That according to such his Declarations and Speeches, the said Earl of Strafford did use and exercise a power above, and against, and to the subversion of the said fundamental laws and established government of the said realm of Ireland; extending such his power to the goods, freeholds, inheritances, liberties, and lives of his majesty's subjects of the said realm: and namely, the said earl of Strafford, the 12th day of December, 1635, in the time of full peace, did in the said realm of Ireland give, and procure to be given, against the lord Mountnorris, (then and yet a peer of the said realm of Ireland, and then Vice-Treasurer and Receiver-General of the realm of Ireland, and Treasurer at War, and one of the Principal Secretaries of State, and Keeper of the Privy-Signet of the said kingdom) a Sentence of Death by a Council of War, called together by the said earl of Strafford, without any warrant or authority of law, or offence deserving any such punishment. And he the said Earl did also at Dublin, within the said realm of Ireland, in the month of March, in the 14th year of his majesty's reign, without any legal or due proceedings or trial, give, and cause to be given, a Sentence of Death against one other of his majesty's subjects, whose name is yet unknown; and caused him to be put to death in execution of the same Sentence.

VI. That the said earl of Strafford, without any legal proceedings, and upon a Paper Petition of Richard Rolston, did cause the said lord Mountnorris to be disseized, and put out of possession of his freehold and inheritance of his manor of Tymore in the county of Armagh, in the kingdom of Ireland, the said lord Mountnorris having been 18 years before in quiet possession thereof.

VII. That the said Earl of Strafford, in the Term of Holy Trinity, in the 13th year of his now majesty's reign, did cause a Case, commonly called 'The Case of Tenures upon defective Titles,' to be made and drawn up without any jury or trial, or other legal process, and without the consent of parties; and did then procure the Judges of the said realm of Ireland to deliver their Opinions and Resolutions to that case; and by colour of such opinion did, without any legal proceedings, cause Thomas lord Dillon, a peer of the said realm of Ireland, to be put out of the possession of divers lands and tenements, being his freehold, in the counties of Mayo and Roscommon, in the said kingdom: And divers other of his majesty's subjects to be put out of possession, and disseized of their freehold, by colour of the same resolution, without legal proceedings; whereby many hundreds of his majesty's subjects were undone, and their families utterly ruinated.

VIII. That the said Earl of Strafford, upon a Petition of sir John Gifford knt. the 1st day of February, in the said 13th year of his majesty's reign, without any legal process, made a Decree or Order against Adam viscount Loftus of Ely, a peer of the said realm of Ireland, and lord chancellor of Ireland; did cause the said viscount to be imprisoned, and kept close prisoner, on pretence of disobedience to the said decree or order.

And the said Earl, without any authority, and contrary to his commission, required, and commanded the said Lord Viscount to yield up unto him the Great Seal of the realm of Ireland, which was then in his custody by his majesty's command, and imprisoned the said Chancellor for not obeying such his command.

And without any legal proceeding did, in the same 13th year, imprison George earl of Kildare, a peer of Ireland, against law, thereby to enforce him to submit his title to the manor and lordship of Castleleigh in the Queen's county, (being of great yearly value) to the said Earl of Strafford's will and pleasure, and kept him a year prisoner for the said cause; two

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months whereof he kept him close prisoner, and refused to enlarge him, notwithstanding his majesty's Letters for his enlargement, to the said earl of Strafford directed.

And upon a Petition exhibited in October, 1635, by Thomas Hibbots, against dame Mary Hibbots widow, to him the said earl of Strafford; the said Earl of Strafford recommended the said Petition to the Council-Table of Ireland, where the most part of the Council gave their vote and opinion for the said lady: but the said Earl finding fault herewith caused an Order to be entered against the said lady, and threatened her, that if she refused to submit thereunto, he would imprison her, and fine her 500*l.*: that if she continued obstinate, he would continue her imprisonment, and double her fine every month. By means whereof she was enforced to relinquish her estate in the lands questioned in the said Petition, which shortly after were conveyed to sir Robert Meredith, to the use of the said Earl of Strafford.

And the said Earl in like manner did imprison divers others of his majesty's subjects, upon pretence of disobedience to his Orders, Decrees, and other illegal commands by him made for pretended debts, titles of lands, and other causes, in an arbitrary and extra-judicial course, upon Paper Petitions to him preferred, and no cause legally depending.

IX. That the said Earl of Strafford the 16th day of February, in the 12th year of his majesty's reign, assuming to himself a power above and against law, took upon him, by a General Warrant under his hand, to give power to the lord bishop of Downe and Connor, his chancellor or chancellors, and their several officers thereto to be appointed, to attach and arrest the bodies of all such of the meaner and poorer sort, who, after citation should either refuse to appear before them, or appearing should omit or deny to perform or undergo all lawful Decrees, Sentences, and orders, issued, imposed, or given out against them, and them to commit, and keep in the next gaol until they should either perform such Sentences, or put in sufficient bail to shew some reason before the Council-Table of such their contempt and neglect. And the said Earl, the day and year last mentioned, signed and issued a warrant to that effect; and made the like warrants to several other bishops, and their chancellors, in the said realm of Ireland, to the same effect.

X. That the said Earl of Strafford, being Lord-Lieutenant or Deputy of Ireland, procured the Customs of the Merchandizes exported out and imported into that realm to be farmed to his own use.—And in the 9th year of his now majesty's reign, he having then interest in the said customs, (to advance his own gain and lucre) did cause and procure the native commodities of Ireland to be rated in the Book of Rates for the Customs (according to which the customs were usually gathered) at far greater values and prices than in truth they were worth; that is to say, every hide at 20*s.*, which in truth was worth but 5*s.*; every stone of wool at 13*s.* 4*d.*, though the same were re worth but 5*s.*, at the utmost 9*s.*: by w means the Custom, which before was be twentieth part of the true value of the com dity, was enhanced sometimes a fifth part, a sometimes to a fourth, and sometimes to a th part of the true value, to the great oppre of the subjects, and decay of merchandize

XI. That the said Earl, in the 9th ye his majesty's reign, did by his own will a pleasure, and for his own lucre, restrain exportation of the commodities of that k dom without his licence; as namely, staves, and other commodities; and then re great sums of money for Licences of exp tion of those commodities, and dispensati the said restraints imposed on them: by w means the pipe-staves were raised from 4*l.* or 5*l.* per 1000, to 10*l.* and sometimes 11*l.* 1000. And other commodities were enha in the like proportion, and by the same me by him the said Earl.

XII. That the said Earl, being Lord De of Ireland, on the 9th day of January, in 13th year of his now majesty's reign, did then under colour to regulate the importation Tobacco into the said realm of Ireland, issue Proclamation in his majesty's name, prohibi the importation of Tobacco, *without* licence him and his council there, from and after 1st day of May, 1638. After which restra the said Earl, notwithstanding the said restrai caused divers great quantities of Tobac be imported to his own use, and freighted di ships with Tobacco, which he imported to own use: and that if any ship brought Toba into any port there, the said Earl and his ag used to buy the same to his own use, at the own price; and if that the owners refused let him have the same at under-values, they were not permitted to vent the same there By which undue means the said Earl having gotten the whole trade of Tobacco into his own hands, he sold it at great and excessive prices, such as he list to impose for his own profit.

And the more to assure the said monopoly of Tobacco, he the said Earl, on the 23rd day of February in the 13th year aforesaid, did cause another Proclamation, commanding that none should put to sale any Tobacco by wholesale from and after the last day of May then next following, but what should be made up in rolls, and the same sealed with two seals by himself appointed, one at each end of the roll. And such as was not sealed to be seized, appointing 6*d.* the pound for a reward to such persons as should seize the same; and the person in whose custody the unsealed Tobacco should be found, to be committed to gaol: which last Proclamation was coloured by a pretence for the restraining of the sale of unwholesome tobacco, but it was truly to advance the said Monopoly.

Which Proclamation the said Earl did rigorously put in execution, by seizing the goods, fining, imprisoning, whipping, and putting the offenders against the same Proclamation on the

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illory; as namely, Barnaby Hubbard, Edward Javena, John Tumen, and divers others; and made the officers of state, and justices of peace, and other officers to serve him in the compassing and executing these unjust and undue courses. By which cruelties, and unjust Monopolies, the said Earl raised 100,000*l.* per annum gain to himself. And yet the said Earl, though he enhanced the Customs where it concerned the merchants in general, yet drew down the impost formerly taken on Tobacco from 5*d.* the pound to 3*d.* the pound; it being for his own profit so to do.

And the said Earl, by the same and other rigorous and undue means, raised several other Monopolies and unlawful exactions for his own gain, viz. on starch, iron pots, glasses, tobacco-pipes, and several other commodities.

XIII. That Flax being one of the principal and native commodities of that kingdom of Ireland, the said Earl having gotten great quantities thereof into his hand, and growing on his own lands, did issue out several Proclamations, viz. the one dated the 31st of May, in the 12th of his majesty's reign; and the other dated the 31st of January, in the same year; thereby prescribing and enjoining the working of Flax into yarn and thread, and the ordering of the same in such ways, wherein the natives of that kingdom were unpractised and unskilful. Which Proclamations so issued, were by his commands and warrants to his majesty's justices of peace, and other officers, and by other rigorous means, put in execution: and the Flax wrought or ordered in other manner than as the said proclamation prescribed, was seized and employed to the use of him and his agents: and thereby the said earl endeavoured to gain, and did gain in effect, the sole sale of that native commodity.

XIV. That the said Earl, by proclamation dated the 16th of October, in the 14th year of his majesty's reign, did impose upon the owners, masters, pursers, and boatswains of every ship, a new and unlawful oath, viz. That they, or two or more of them, immediately after the arrival of any ship within any port or creek in the said kingdom of Ireland, should give in a true invoice of the outward bulk of wares and merchandizes first laden aboard them, together with the several marks and number of goods, and the qualities and condition of the said goods as far as to them should be known; the names of the several merchants proprietors of the said goods, and the place from whence they were fraughted, and whither they were bound to discharge: which Proclamation was accordingly put in execution, and sundry persons enforced to take the said unlawful oath.

XV. That the said Earl traitorously and wickedly devised and contrived, by force of arms, and in a warlike manner, to subdue the subjects of the said realm of Ireland, and to bring them under his tyrannical power and will; and in pursuance of his wicked and traitorous purposes aforesaid, the said Earl in the 8th year of his majesty's reign, did by his own authority, without any warrant or colour of law, tax and impose great sums of money upon the towns of Baltimore, Baudenbridge, Talowe, and divers other towns and places in the said realm of Ireland; and did cause the same to be levied upon the inhabitants of those towns by troops of soldiers, with force and arms, in warlike manner. And on the 9th of March, in the 12th year of his now majesty's reign, traitorously did give authority unto Robert Savile, a serjeant at arms, and to the captains of the companies of soldiers in several parts of that realm, to send such numbers of soldiers to lie on the lands and houses of such as would not conform to his orders, until they should render obedience to his said orders and warrants; and after such submission, and not before, the said soldiers to return to their garrisons: And did also issue the like warrants unto divers others, which warrants were in warlike manner, with force and arms, put in execution accordingly; and by such warlike means did force divers of his majesty's subjects of that realm to submit themselves to his unlawful commands.

And in the said 12th year of his majesty's reign, the said Earl did traitorously cause certain troops of horse and foot, armed in warlike manner and in warlike array, with force and arms, to expel Richard Butler from the possession of the manor of Castle-Cumber, in the territory of Idough, in the said realm of Ireland; and did likewise, and in like warlike manner, expel divers of his majesty's subjects from their houses, families, and possessions; as namely, Edward Obrenman, Owen Oberman, John Brenman, Patrick Oberman, sir Cyprian Horsefield, and divers others, to the number of about an 100 families; and took and imprisoned them and their wives, and carried them prisoners to Dublin, and there detained, until they did yield up, surrender or release their respective estates and rights.

And the said Earl in like warlike manner hath, during his government of the said kingdom of Ireland, subdued divers others of his majesty's subjects there to his will; and thereby, and by the means aforesaid, hath levied war within the said realm against his majesty and his liege people of that kingdom.

XVI. That the Earl, the 22nd of Feb. in the 7th year of his majesty's reign, intending to oppress the said subjects of Ireland, did make a Proposition, and obtained from his majesty an allowance thereof, That no complaint of injustice or oppression done in Ireland, should be received in England against any, unless it appeared that the party made first his address to him the said Earl: and the said Earl having by such usurped, tyrannical, and exorbitant power, expressed in the former Articles, destroyed and oppressed the peers, and other subjects of that kingdom of Ireland, in their lives, consciences, lands, liberties and estates; the said Earl, to the intent the better to maintain and strengthen his said power, and to

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bring the people into a disaffection of his majesty, as aforesaid, did use his majesty's name in the execution of the said power.

And to prevent the subjects of that realm of all means of complaints to his majesty, and of redress against him and his agents, did issue a Proclamation, bearing date the 17th day of September, in the 11th year of his majesty's reign, thereby commanding all the nobility, undertakers, and others who held estates and offices in the said kingdom, (except such as were employed in his majesty's service, or attending in England by his special command) to make their personal residence in the said kingdom of Ireland, and not to depart thence without licence of himself.

And the said Earl hath since issued other Proclamations to the same purpose, by means whereof the subjects of the said realm are restrained from seeking Relief against the oppressions of the said Earl, without his licence; which Proclamations the said Earl hath by several rigorous ways, as by fine, imprisonment, and otherwise, put in execution on his majesty's subjects; as namely, one ——— Parry, and others, who came over only to complain of the exorbitances and oppressions of the said Earl.

XVII. That the said Earl having, by such means as aforesaid, subverted the government and laws of the kingdom of Ireland, did, in March, in the 16th year of his majesty's reign, in scandal of his majesty's government of all his kingdoms, and in further execution of his wicked purposes aforesaid, speaking of the Army in Ireland, declare, That his majesty was so well pleased with the Army of Ireland, and the consequences thereof, that his majesty would certainly make the same a pattern for all his three kingdoms.

XVIII. That the said Earl, for the better effecting of his traitorous designs and wicked purposes, did endeavour to draw a Dependency upon himself of the Papists in both kingdoms of England and Ireland; and to that end, during the time of his government in Ireland, he restored divers Fryeries and Mass-houses (which had been formerly suppressed by the precedent Deputies of that kingdom; two of which houses are in the city of Dublin, and had been assigned to the use of the University there) to the pretended owners thereof, who have since employed the same to the exercise of the popish religion.

And in the months of May and June last the said Earl did raise an Army in the said realm, consisting of 8,000 foot, all of which, except 1,000, or thereabouts, were Papists; and the said 1,000 were drawn out of the old Army there, consisting of 2,000 foot, and in their places there were a 1,000 Papists, or thereabouts, put into the said old Army by the said Earl.

And the more to engage and tie the said new Army of Papists to himself, and to encourage them, and to discourage and weary out the said old Army; the said Earl did so provide, that the said new Army of Papists were duly paid, and had all necessaries provided for them, and permitted the exercise of their religion; but the said old Army were for the space of one whole year and upwards unpaid.

And the said Earl being appointed a Commissioner within eleven several counties of the northern parts of England, for compounding with Recusants for their Forfeitures due to his majesty, which commission beareth date the 8th of July, in the 5th year of his majesty's reign that now is; and being also receiver of the Composition-Money thereby arising, and of other debts, duties, and penalties, by reason of recusancy within the said counties, for his majesty's use, by letters patents dated the 9th day of the same July; he, to engage the said Recusants to him, did compound with them at low and under rates, and provided that they should be discharged of all proceedings against them in all his majesty's courts, both temporal and ecclesiastical, in manifest breach of, and contrary to, the laws and statutes of this realm, in that behalf established.

XIX. That the said Earl having taxed and levied the said Impositions, and raised the said Monopolies, and committed the said other Oppressions in his majesty's name, and as by his majesty's royal command; he the said Earl, in May, the 15th year of his majesty's reign, did of his own authority contrive and frame a new and unusual oath, by the purport whereof, among many other things, the party taking the said oath was to swear, That he should not protest against any his majesty's royal commands, but submit himself in all due obedience thereunto. Which Oath he so contrived, to inforce the same on the subjects of the Scotish nation inhabiting in Ireland; and out of a hatred to the said nation, and to put them to a discontent with his majesty and his government there; and compelled divers of his majesty's said subjects there to take the said oath against their wills; and of such as refused to take the said oath, some he grievously fined and imprisoned, and others he destroyed and exiled; and namely, the 10th Oct., A. D. 1639, he fined Henry Steward and his wife, who refused to take the said Oath, 5,000*l.* a-piece, and their two daughters and James Gray 3,000*l.* a-piece, and imprisoned them for not paying the said Fines: the said Henry Steward, his wife and daughters, and James Gray, being the king's liege people of the Scotish nation. And divers others he used in like manner. And the said Earl upon that occasion did declare, That the said Oath did not only oblige them in point of allegiance to his majesty, and acknowledgment of his supremacy only, but to the ceremonies and government of the church established, and to be established by his majesty's royal authority; and said, that the refusers to obey he would prosecute to the blood.

XX. That the said Earl hath in the 15th and 16th years of his majesty's reign, and divers years past, laboured and endeavoured to breed in his majesty an ill opinion of his subjects,

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namely, of those of the Scotish nation; and divers and sundry times, and especially since the Pacification made by his majesty with his said subjects of Scotland in summer, in the 15th year of his majesty's reign, he the said Earl did labour and endeavour to persuade, incite, and provoke his majesty to an offensive war against his said subjects of the Scotish nation. And the said Earl, by his counsels, actions, and endeavours, hath been and is a principal and chief incendiary of the war and discord between his majesty and his subjects of England, and the said subjects of Scotland; and hath declared and advised his majesty, that the demands made by the Scots, in their parliament, were a sufficient cause of war against them.

The said Earl having formerly expressed the height and rancour of his mind towards his majesty's subjects of the Scotish nation, viz. the 10th day of October, in the 15th year of his majesty's reign, he said, That the nation of the Scots were rebels and traitors; and he being then about to come to England, he then farther said, That if it pleased his master, meaning his majesty, to send him back again, he would root out of the said kingdom, meaning the said kingdom of Ireland, the Scotish nation both root and branch, some lords and others, who had taken the said oath in the precedent article, only excepted: And the said Earl hath caused divers of the ships and goods of the scots to be stayed, seized, and molested, to the intent to set on the said war.

XXI. That the said Earl, shortly after his Speeches mentioned in the last precedent Articles, to wit, in the 15th year of his majesty's reign, came into this realm of England, and was made Lord Lieutenant of Ireland, and continued his Government of that kingdom by a deputy: at his arrival here, finding that his majesty with much wisdom and goodness had composed the Troubles in the North, and had a Pacification with his subjects of Scotland, he laboured by all means to procure his majesty to break that Pacification, incensing his majesty against his subjects of that kingdom, and the proceedings of the parliament there.—And having incited his majesty to an offensive war against his subjects of Scotland by sea and land; and the pretext thereof to raise forces for the maintenance of that war; he counselled his majesty to call a parliament in England: yet the said Earl intended, that if the said proceedings of that parliament, should not be such as would stand with the said Earl of Strafford's mischievous designs, he would then procure his majesty to break the same, and by ways of force and power to raise monies upon the subjects of this kingdom.—And for the encouragement of his majesty to hearken to his advice, he did before his majesty and his privy-council, then sitting in council, make large declaration, That he would serve his majesty in any other way, in case the parliament should not supply him.

XXII. That in the month of March, before the beginning of the last parliament, the said Earl went into Ireland, and procured the parliament of that kingdom to declare their assistance in a War against the Scots, and gave directions for the raising of an Army there, consisting of 8,000 foot, and 1,000 horse, being for the most part papists. And confederating with one sir George Radcliffe, did, together with him the said sir George, traitorously conspire to employ the said army for the ruin and destruction of the kingdom of England, and of his majesty's subjects, and of altering and subverting of the fundamental laws and established government of this kingdom.

And shortly after the said Earl returned into England, and to sundry persons declared his opinion to be, That his majesty should first try the parliament here; and if that did not supply him according to his occasions, he might use then his Prerogative as he pleased, to levy what he needed; and that he should be acquited both of God and man, if he took some other courses to supply himself, though it were against the wills of his subjects.

XXIII. That upon the 13th day of April last the Parliament of England met, and the Commons House (then being the representative body of all the commons in the kingdom) did, according to the trust reposed in them, enter into debate and consideration of the great Grievances of this kingdom, both in respect of Religion and the public Liberty of the kingdom; and his majesty referring chiefly to the said earl of Strafford and the archbishop of Canterbury the ordering and disposing of all matters concerning the parliament; he the said Earl, with the assistance of the said Archbishop, did procure his majesty by sundry Speeches and Messages, to urge the said Commons House to enter into some Resolution for his majesty's Supply for maintenance of his war against his subjects of Scotland, before any course taken for the relief of the great and pressing Grievances wherewith this kingdom was then afflicted. Whereupon a demand was then made from his majesty of twelve Subsidies, for the release of Ship-money only. And while the said Commons then assembled (with expression of great affection to his majesty and his service) were in debate and consideration concerning some Supply, before any resolution by them made; he the said Earl, with the help and assistance of the said Archbishop, did procure his majesty to dissolve the said Parliament upon the 5th day of May last. And upon the same day the said Earl did treacherously, falsly, and maliciously endeavour to incence his majesty against his loving and faithful subjects, who had been members of the said house of commons, by telling his majesty they had denied to supply him: And afterwards, upon the same day, did traitorously and wickedly counsel and advise his majesty to this effect, viz. That having tried the affections of his people, he was loose and absolved from all rules of government, and that he was to do every thing that power would admit; and that his majesty had tried all ways, and was refused, and should be acquitted towards God and man; and that

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he had an army in Ireland, (meaning the Army above-mentioned, consisting of Papists, his dependants, as is aforesaid) which he might imploy to reduce this kingdom.

XXIV. That in the said month of May, he, the said Earl, falsely, traitorously, and maliciously published and declared before others of his majesty's privy-council, that the Parliament of England had forsaken the king; and that in denying to supply the king, they had given him advantage to supply himself by other ways. And several other times he did maliciously, wickedly, and falsely publish and declare, That seeing the parliament had refused to supply his majesty in the ordinary and usual way, the king might provide for the kingdom in such ways as he should hold fit; and that he was not to suffer himself to be mastered by the frowardness and undutifulness of the people. And having so maliciously slandered the said late house of commons, he did, with the help and advice of the said archbishop of Canterbury, and the lord Finch, late Lord-Keeper of the great-seal of England, cause to be printed and published in his majesty's name a false and scandalous Book, entitled, 'His majesty's Declaration of the 'causes that moved him to dissolve the last 'Parliament,' full of bitter and malicious invectives, and false and scandalous aspersions against the said house of commons.

XXV. That not long after the dissolution of the said last Parliament (viz. in the months of May and June) he, the said Earl, did advise the king to go on vigorously in levying the Ship-Money, and did procure the sheriffs of several counties to be sent for, for not levying the Ship-Money, divers of which were threatened by him to be sued in the Star-Chamber; and afterwards, by his advice, they were sued in the Star-Chamber for not levying the same; and divers of his majesty's loving subjects were sent for and imprisoned, by his advice, for that and other illegal payments.

And a great Loan of 100,000*l.* was demanded of the city of London; and the lord mayor, and sheriffs, and aldermen of the said city were often sent for, by his advice, to the Council-Table, to give an account of their proceedings in raising of Ship-Money, and furthering of that Loan; and were required to certify the names of such inhabitants of the said city as were fit to lend: which they with much humility refusing to do, he the said Earl did use these and the like speeches, viz. That they deserved to be put to fine and ransom; and that no good would be done with them till an example were made of them, and that they were laid by the heels, and some of the aldermen hanged up.

XXVI. That the said Earl by his wicked counsels having brought his majesty into excessive Charge, without any just cause, he did in the month of July last (for the support of the said great Charges) counsel and approve two dangerous and wicked projects, viz. To seize upon the Bullion and the money in the Mint. And to imbase his majesty's Coin with the mixtures of brass.—And accordingly he procured 130,000*l.* which was then in the Mint, and belonged to divers merchants, strangers, and others, to be seized on and stayed to his majesty's use. And when divers merchants of London, owners of the said bullion and money, came to his house to let him understand the great mischief that course would produce here and in other parts, and what prejudice it would be to the kingdom, by discrediting the Mint, and hindering the importation of Bullion; he, the said Earl, told them that the city of London dealt undutifully and unthankfully with his majesty; and that they were more ready to help the rebels than to help his majesty; and that if any hurt came to them, they may thank themselves; and that it was the course of other princes to make use of such monies to serve their occasions.

And when in the same month of July the officers of his majesty's Mint came to him, and gave him divers reasons against the imbasing the said money, he told them, That the French king did use to send commissaries of horse with commission to search into men's estates, and to peruse their accounts, that so they may know what to levy of them by force, which they did accordingly levy. And turning to the lord Cottington, then present, said, That this was a point worthy of his lordship's consideration: Meaning, this course of the French king to raise Monies by force was a point worthy of his lordship's consideration.

XXVII. That in or about the month of Aug. last, he was made Lieutenant-General of all his majesty's forces in the North, prepared against the Scots; and being at York, did then in the month of September, by his own authority, and without any lawful warrant, impose a Tax on his majesty's subjects in the county of York of 8*d.* per diem for maintenance of every soldier of the trained-bands of that county, which sums of money he caused to be levied by force. And to the end to compel his majesty's subjects out of fear and terror to yield to the payment of the same, he did declare, That he would commit them that refused the payment thereof, and the soldiers should be satisfied out of their estates; and they that refused it were in very little better condition than of high-treason.

XXVIII. That in the months of September and October last, he the said Earl being certified of the Scotish army coming into the kingdom, and he the said Earl being Lieutenant-General of his majesty's army, he did not provide for the defence of the town of Newcastle, as he ought to have done, but suffered the same to be lost, that so he might the more incense the English against the Scots.

And for the same wicked purpose, and out of a malicious desire to engage the kingdoms of England and Scotland in a national and bloody war, he did write to the lord Conway, the general of the horse, and under the said Earl's command, That he should fight with the Scotish army at the passage over the Tine, whatsoever should follow; notwithstanding that the said lord

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Conway had formerly by letters informed the said Earl, that his majesty's Army, then under his command, was not of force sufficient to encounter the Scots: by which advice of his he did, contrary to the duty of his place, betray his majesty's army, then under his command, to apparent danger and loss.

All and every which words, counsels, and actions of the said Earl of Strafford were spoken, given, and done by him, the said Earl, traitorously, and contrary to his allegiance to our sovereign lord the king, and with an intention and endeavour to alienate and withdraw the hearts and affections of the king's liege people of all his realms from his majesty, and to set division between them, and to ruin and destroy his majesty, and his majesty's said kingdoms; for which they do further impeach him the said Thomas Earl of Strafford of High-Treason against our sovereign lord the king, his crown and dignity. And he, the said Earl of Strafford, was lord deputy of Ireland, or lord lieutenant of Ireland, and lieutenant-general of the army there under his most excellent majesty, and a sworn privy-counsellor to his majesty for his kingdoms both of England and Ireland, and lord president of the North, during the time that all and every the crimes and offences, before set forth, were done and committed; and he, the said Earl, was lieutenant-general of his majesty's army in the North parts of England during the time that the crimes and offences, in the 27th and 28th Articles set forth, were done and committed.

ANSWER to the Twenty-eight Special ARTICLES.

To the First Article, he saith, He conceives that the Commission and Instructions differ not from those formerly granted, but refers to them; and that such Alterations and Additions as were made, were (for aught he knoweth) rather for the explanation, than for the enlarging of the jurisdiction: the care whereof was left to the Secretary of that Council, and to the king's learned counsel, to be passed for the good of the king's service, and the public welfare of that province. For the legality of the proceedings, divers eminent lawyers were joined with the President, who, for the legal parts, was by them to be directed. He did not advise or procure the Enlargement of the Commission and Instructions, and he believeth nothing hath been practised since, that was not in former times contained in former commissions, under general words. He believeth sir Conyers Darcy was lawfully fined for Misdemeanors, as a Justice of Peace; and hath heard, he being in Ireland, that sir John Bourcher was fined for some great abuse at the king's being at York, going into Scotland to be crowned: to the Proceedings he refers himself. He denies that he hath done any thing by that Commission or Instructions, other than he conceived he might by virtue thereof lawfully do.

To the Second Article, He denieth the speaking of those Words: but saith, That 30*l.*, 40*l.*, or more, being returned as Issues out of the Exchequer, against some that had compounded for Knighthood for 10*l.* or 30*l.*, so as the Issues far exceeded the Composition, and yet would next time have been increased; the said Earl upon this occasion said, That now they might see, that the Little-finger of the Law was heavier than the King's Loins; which he spake to nourish good affections in them towards his majesty, and not to threaten or terrify any, as the Article supposed.

To the Third Article, he saith, Ireland is not governed by the same laws that this kingdom is, unless it be meant by the common laws; their customs, statutes, execution of martial laws, proceedings at council-board very much differ: the words in the Article were not spoke to any such intent. He saith, It might be fit enough for him to remember them of the great obligation they had to the king and his progenitors, that suffered them, being a conquered nation, to enjoy freedom and laws, as their own people of this kingdom: and it might be, that upon some such occasion he said to those of Dublin, That some of their Charters were void and nothing worth, and did not bind his majesty farther than he pleased; which he believes to be true, having been formerly so informed by his majesty's learned counsel upon sundry occasions.

To the Fourth, he saith, That the legal and ordinary proceedings at Council-Table are, and time out of mind have been, by Petition, Answers, Examination of Witnesses, as in other courts of justice concerning British Plantations, the Church, and cases hence recommended by the king for the time being, and in Appeals from other courts there; and the Council-Board have always punished Contempts to Orders there made, to Proclamations, and Acts of State, by Fine and Imprisonment. He saith, That it might be, he told the earl of Cork, that he would imprison him if he disobeyed the Orders of the Council-Table, and that he would not have lawyers dispute or question those Orders, and that they should bind; but remembereth not the comparison of acts of parliament: and he hath been so far from scorning the laws, that he hath endeavoured to maintain them. The Suit against the Earl in the Castle-Chamber was concerning the possessions of the college of Youghall, worth 6 or 700*l.* which he hath endeavoured to get, by causing of unlawful oaths to be taken, and very undue means: the matter proceeded to Examination and Publication of Witnesses; and after, upon the earl of Cork's humble suit, and payment of 15,000*l.* to his majesty, and his acknowledgment of his Misdemeanors, obtained a Pardon, and the Bill and Proceedings were taken off the file: and he remembers not any suit for breach of any Order made at Council-Table

To the Fifth, he saith, The Deputies and Generals of the Army have always executed martial law, which is necessary there; and the Army, and the members thereof, have been long time governed by printed Orders, according to which, divers, by sentence of the council

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of war, have formerly been put to death, as well in the time of peace as war. The lord Mountnorris being a captain of a company in the Army, for mutinous words against the said Earl, general of that army, and upon two of those ancient Orders, was proceeded against by a Council of War, being the principal officers of the army, about twenty in number, and by them, upon clear Evidence, sentenced to death: wherein the said Earl was no judge, but laboured so effectually with his majesty, that he obtained the lord Mountnorris's pardon; who by that Sentence suffered no personal hurt or damage, save about two days imprisonment. And as to the other persons, he can make no Answer thereunto, no particulars being described.

To the Sixth, he saith, The Suit had depended many years in Chancery; and the Plaintiff complaining of that delay, the said Earl upon a Petition, (as in such cases hath been usual) calling to him the then Master of the Rolls, the now Lord Chancellor, and the Chief Justice of the Common Pleas, upon the Proofs in the Chancery, decreed for the Plaintiff; to which he refers himself: and it may be the lord Mountnorris was thereupon put out of his possession.

To the Seventh, he saith, His majesty being intitled to divers lands, upon an Inquisition found, Proclamation was made, That such as claimed by patent should come in by a day, and have their patents allowed, as if they had been found in the Inquisition; and accordingly divers were allowed. The lord Dillon produced his patent, which being questionable, he consented, and desired that a Case might be drawn; which was drawn by counsel, and argued, and the Judges delivered their opinions: but the lord Dillon nor any other were bound thereby, or put out of possession; but might have traversed the office, or otherwise legally have proceeded, that case or opinion notwithstanding.

To the Eighth, he saith, That upon sir John Gifford's Petition to the king, his majesty referred it to the deputy and council of Ireland, where the matter proceeded legally to a Decree against the lord Loftus; and upon his Appeal, that Decree by his majesty and his council of England was confirmed: to which Decree and Order he refers himself, believing the lord Loftus was committed for disobeying that Decree, and for continuance in contempt committed close prisoner. He saith, That the lord Loftus having committed divers Contempts, the Council by warrant required him to appear at the Board, and to bring the great seal with him; which order he disobeyed, and was shortly after committed, and the great seal was delivered up by his majesty's express command, and not otherwise. And an Information was exhibited in the Star-Chamber, for grievous Oppressions done by the lord Loftus as Chancellor; whereof he was so far from justifying, as that he submitted, desiring to be an object of his majesty's mercy, and not of his justice.

The Earl of Kildare, for not performing of an Award made by king James, and of an Award made in pursuance thereof by the said Earl of Strafford, upon a reference from his majesty, was by the Deputy and Council committed: and a Letter being unduly obtained, he did not thereupon enlarge him: but upon another letter, and submission to the orders, as by the king was directed, he was enlarged.

The lady Hibbots, and one Hoy her son, having upon a Petition, Answer, Examination of Witnesses, and other Proceedings at Council-Board, been found to have committed foul abuses by fraud and circumvention, to have made a bargain with the petitioner Hibbots, for lands of a great value, for a small sum of money; was ordered to deliver up the writing, no assurances being perfected, or money paid; and it is like he threatened her with commitment if she obeyed not that order; but denieth that the lands were after sold to sir Robert Meredith to his use, or that, by any order by himself made, any one hath been imprisoned concerning freeholds, but for debts and personal things, as some have been used by all his predecessors in like causes.

To the Ninth, he saith, Warrants to such effects have been usually granted to the bishops in Ireland, in the times of all former deputies; but the Earl not satisfied with the conveniency thereof, refused to give any such Warrants in general to the Bishops as had been formerly done: but being informed that divers in the diocese of Downe gave not fitting obedience, he granted a Warrant to that bishop, whereto he referreth, which was the only warrant he granted of that nature; and hearing of some Complaints of the execution thereof, he recalled it.

To the Tenth, he saith, The Lord Treasurer Portland offered the Farm of the Customs for 13,000*l.* per annum, in some particular species, but the earl of Strafford advanced the same Customs to 15,500*l.* per annum, and 8,000*l.* Fine; and by his majesty's command became a Farmer at those Rates proposed, without addition to those Rates, as by the printed books 7 Car. regis may appear. He dissuaded the advance of Rates lately proposed by sir Abraham Dawes, so as it was declined: The Rates of Hides and Wool are moderate, consideration being had of their true value, and of the places whereto they are to be transported, and of the statute made in the time of queen Elizabeth, and there in force, prohibiting the exportation of Wool, unless they pay to the crown 6*s.* the stone. The Trade and Shipping of that kingdom are exceedingly increased.

To the Eleventh, he saith, Pipe-staves were prohibited in king James's time, and not exported but by licence from the Lord Treasurer of England, or lord deputy of Ireland, who had 6*s.* 8*d.* per 1000, and his secretary 3*s.* 4*d.* for the Licence: but to restrain that destruction of timber, by command of his majesty and advice of his council for his revenue in Ireland, first 30*s.* then 6*l.* was charged. The money

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was paid to his majesty, who hath thereby about 1,500*l.* per annum; and his lordship lost about 4 or 500*l.* per annum, which his predecessors had for such Licences. This is paid by the transporter, not by the natives, whose commodity nevertheless appears by the Article to be very much increased.

To the Twelfth, he saith, The Subsidies there are an inheritance in the crown by act of parliament; 6*d.* was paid for subsidy, and 1*s.* 6*d.* for impost upon every pound of Tobacco, and farmed at 10 or 20*l.* per annum. The Commons in parliament, 10 Car. regis, finding the revenue to be short of the expence of that kingdom 24,000*l.* per annum, petitioned those Grants might be applied to increase his majesty's Revenue, without calling upon the subject but upon urgent occasions. Hereupon, upon the advice of the Committee of the Revenue, and in consideration of a Proclamation made in England, several Proclamations were made, and this settled in a way, till it could be confirmed by parliament; for which purpose a Bill is transmitted, according to the desire of the commons, and the impost of Tobacco is lett to contractors for 11 years, at 5,000*l.* per annum for the first five years, and 10,000*l.* per annum for the other six years. And the Earl hath lent money to forward the business, and by his majesty's allowance is a partner; but hath not as yet, in two years last past, had any Accounts thereof, or made benefit thereby. He knoweth of no Whipping, or other Punishment. The Farms of the Customs are better than formerly 2,000*l.* per annum, five 8th parts whereof is yearly paid unto his majesty: the prices of Tobacco exceed not 2*s.* or 2*s.* 4*d.* the pound; the settling of that Revenue is according to the Petition of the Commons; he hath not raised or countenanced any Monopolies, but opposed the same.

To the Thirteenth, he saith, He endeavoured to advance the manufacture of Linen rather than of Woollen-Cloth, which might prejudice that trade here: he bought Flax-seed in the Low-Countries, and sold it at the same rate to such as desired it; they making their cloths not above a foot broad, and winding eight or ten threads from several bottoms together; the contrary was twined: their flax, formerly not above a foot, became a yard in length: and that soil is fit to bear it, and the people love such easy works. He hath set up many looms, made much cloth, and sold it to the loss of some thousands of pounds; but when the state saw the natives would not change their old courses for new and better, the Proclamation was declined. What he did was for the public good, and had nothing from them that was not fully paid for.

To the Fourteenth, he saith, He refers to the Oath and Proclamation, which was set forth by the said Earl and Council of State there, at the instance of the Farmers of the Customs, to prevent the defrauding of the king's Duties, whereof his majesty had five eight parts. He never heard any complaint of the Oath, or of any that refused to take it; and conceived it to be lawful, divers of the Council approving it, being learned judges of the law, to whose judgment for the legality he submitted, as well in that, as to other matters of the like nature.

To the Fifteenth, He denieth what is in the Article objected; but saith, That about the year 1626, certain agents authorized in Ireland were sent into England, and offered and agreed to pay to his majesty 120,000*l.* in six years, towards the maintenance of his Army; and a like payment of 20,000*l.* per annum, was after agreed, and continued for three years longer. The Assessments were made, and it was shortly after, by them and the lord Faulkland, then Deputy, agreed in Ireland, that the money should not be charged upon record, but levied by captains, by Paper-assignments, upon Warrants from the Lord Deputy: and this course was held four years in the lord Faulkland's time, and the four years wherein the lord Loftus and the earl of Cork were lords justices there; and it held for the remaining year only, after the earl of Strafford came thither. But the earl of Cork having spared those towns, for the benefit of himself and tenants, during the time of his being justice; the earl of Strafford reduced the assessment to what it was made by the lord Faulkland, and gave way to sir William St. Lieger, lord president of Munster, should take the same arrearages, in satisfaction of a debt due unto him by his majesty: and he is confident no force was used in levying the same. It hath been usual to lay soldiers to levy that contribution, to send soldiers to apprehend contemners of Orders made at Council-Board, and the like; and when outlaws and rebels have been in the woods, no soldiers have in his time been laid, but by the advice of the council there. Touching the Castle-Cumber, it is a parcel of the territory of Idough, whereto the king was intitled by inquisition, and the possession established in a legal way, when the said Earl was in England; and no soldiers were sent, but only 12, at the intreaty of Mr. Wanesford, for the security of his houses and plantations against rebels that then were out, and burned and spoiled houses thereabouts: and neither Richard Butler's, nor any other family, were thence expelled by the said earl from their estates.

To the Sixteenth, he saith, There was such a Proposition, which was just, to prevent clamorous complaints here, which there might be redressed; but conceives, that by the laws there, and the Articles known since, (by the name of the Articles of Grace, made about 14 years since) none ought to depart that kingdom without Licence. Thereupon, by the advice of the State, the Proclamations were set forth, but not with such intent as in the article.—He denied licence only to three, the earl of Cork, the lord Mountnorris, and sir Frederic Hamilton: to the two former, in regard of criminal suits then against them in the Castle-Chamber; to the other, by special command from his majesty. But so soon as sir Frederic said

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he would complain of the Earl, he made suit to his majesty that sir Frederic might come over; which was granted. He conceives such restraint to be necessary, and if that be not continued, it will prove of evil consequence to that kingdom.—Parry was questioned at the Council-Board for Misdemeanors, and, to avoid Sentence, secretly went out of the kingdom; and at his return, for that and other offences, was fined and imprisoned; to the Sentence thereof he refers, and knows of no other that were imprisoned, as by the Article is charged.

To the Seventeenth, he saith, It is like he might say, (for the better encouragement of the Officers and Soldiers of the old Irish Army, in discharge of their several duties) that his majesty was so well satisfied in the way and pains they took in using and practising of their arms, that, in that point, he would set them as a pattern to be imitated: and conceives it would not be ill if they were so; they being, in the opinion of those that have seen them exercise, very able and expert soldiers. He spake not other words, or to other purpose.

To the Eighteenth, he saith, When the earl of Cork was one of the Lords Justices, he seized some houses in Dublin, pretending they belonged to Jesuits and Friars, without legal proceedings; which upon suits prosecuted at Council-Board, were, according to justice, restored to the owners: but how since employed, the Earl of Strafford knoweth not, but endeavoured the utmost he could to maintain that seizure. Touching the 8,000 men, he saith, They were raised according to the king's warrant, and that the said Earl left the care thereof to the earl of Ormond and others; and what number are Protestants, what papists, he knoweth not, but believeth such a body cannot be there raised, without many papists: the greatest number of the captains and officers are Protestants, chosen by the said Earl. The thousand men were drawn out of the old, to make officers for the new Army; and believeth the thousand put to the old Army are Protestants, in regard, by his express order, no Papist is to be admitted there a common soldier. He never preferred any captain, lieutenant, or ensign, to be of that Army that was a Papist, and conceives they are duly paid; and believes those newly raised exercise religion no otherwise than was practised before the Earl's coming thither. He was a Commissioner to compound with the Recusants for their Forfeitures, and endeavoured to be informed of the utmost value of their Estates: in four years he brought that Revenue from 2,300*l.* to between 11 and 12,000*l.* per annum, more than ever was raised formerly in so short a time; by which faithful dealings for his majesty, he procured the hard opinion of the Recusants throughout the kingdom: That out of those Compositions he hath paid near 100,000*l.* into the Exchequer; and they had no other Privileges than what were exercised in the Commission, and in former like Commissions, and as are in the present commission to the Lord Treasurer, and others.

To the Nineteenth, he saith, The last summer was twelve months, when the English and Scotch lay in the fields near Berwick, the Earl and Council of Ireland having a general notion thereof, were in fear that the Scots in Ulster (being almost 100,000 in number) might be drawn to side with the Covenanters; and advising how to secure that kingdom; the principal of the nation of Scotland, living in Ireland, came to Dublin, and petitioned, that they might have an Oath whereby they might give testimony of future obedience to his majesty. Whereupon an Oath was by the advice of the Council of State framed, and chearfully taken by those Scotch gentlemen, and generally by all the nation in Ireland, as the Earl conceives, to their advantage, and the satisfaction of others. He believes that some were sentenced for refusing it, but none were otherwise exiled. The Earl, in his Vote, said, That he would endeavour that all of that nation should take that Oath, or leave the kingdom. All which was done by his majesty's direction and approbation: And it was not contrived to the intents of the Article charged, but to prevent their adhering to the Covenanters then in open arms, and not concerning the ceremony or government of the Church.

To the Twentieth he saith, That in the year 1638, the Earl was in Ireland, when preparations were made for war, and summons sent to the nobility of this kingdom. In the year 1639, a General was appointed, and an Army drawn to the field, and encamped near Berwick; whereby it appears he was not acquainted that the Article of Pacification had been broken on both sides, and so distempered, that it was held fit an army in England should be raised to suppress the Covenanters, if the business could not with honour and safety be otherwise composed. The said Earl humbly advised his majesty to call a Parliament and used many motives thereunto. After the Parliament was called, and before the sitting thereof, ten of the lords, and other of the Council for foreign affairs being assembled, his majesty then present, an honourable person related the Covenanters demands. It was then voted by all, That they were such as might not in honour and safety be condescended unto by his majesty; and if they could not be otherwise reduced, his majesty must be constrained to bring them to it by force. The like Resolution was voted after at the Council-Table by twenty of the council. Whereupon his majesty appointed a Council of War; and it was held necessary to borrow 200,000*l.* upon good security, till the Supplies by the Parliament might come in. He never said the Scotch nation were Rebels, but was ever persuaded that many of them were most loyal subjects.—Those that raised arms, when they were at such a distance from his majesty, he might say they were no less than Rebels and Traitors. By Warrant from the Lord Admiral he caused divers ships and goods to be seized, but not with an intent to set on the war, but, as much as in him lay,

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to bring all to fair accommodations without expence of blood.

To the Twenty-first, he saith, The Pacification was broken before he came over, as in the Answer to the former Article: he moved his majesty for a parliament in England, but not with such intent as in the Article, but out of a desire to have settled a right understanding between the king and his people. It may be said, (though he remembereth it not) That if the parliament would not supply his majesty, he would serve his majesty in any other lawful way; being well assured that his majesty would not employ him, nor any man else, in any other kind.

To the Twenty-second, he saith, According to his majesty's Instructions, he did set forth to the Parliament of Ireland the State of the Affairs, as they then stood; and they freely gave four Subsidies, as an acknowledgment of his goodness and happy government, as by the act and remonstrance appears in print. He by his majesty's direction, then gave order for the raising of 8,000 men, who still remain in the king's pay, and were sent into Ulster to secure those parts, or to land in Scotland, to divert the earl of Argyle, in case he joined with the Covenanters army against the king. But it was mentioned in the king's Letter, 2 Martii 1639, he had purposely given out, That they should join with the king's army at Berwick, to colour other designs: But the true cause of their levying was made known to be as aforesaid unto the earl of Ormond, sir John Burlace, and the marquis of Hamilton, and the earl of Northumberland, at the time of the writing the Letter. And he denies the Words charged in the Articles, or any other words to such intent and purpose.

To the Twenty-third, he saith, The matters of the Parliament were no otherwise referred to him than to the rest of the Council: That coming sick from Ireland about ten days after the Parliament were set, and after the Treaty with the earl of Dunfermline and lord Lowden, Scotch Commissioners, was broken off, and the army preparing, and the parliament not supplying monies as his majesty desired, his majesty advised what might move them to prefer his supply. In debate whereof, he humbly advised his majesty, by a Message to the house, to lay down Ship-money and promise never to demand it, and give way to reverse the Judgment by a Writ of Error in parliament, and to promise a Redress of Grievances when they should be prepared. And secondly, That they would presently agree upon such Supply as should maintain his Army for reducing the Scots to their obedience, wherein their safety and his honour was concerned. His majesty assented conditionally, that he might have twelve subsidies: The Earl besought him that it might not pass as a condition, but to relinquish Ship-Money, and put himself upon their affections; and drew up the Message in writing, and delivered it to Mr. Secretary Vane, to deliver to the House of Commons. He desired to know if his majesty would not take less than twelve. His majesty answered, He feared less would not serve his occasions. The earl of Strafford besought his majesty to accept of eight. So his majesty assented, and desired Mr. Secretary to signify so much, as occasion should be offered: But whether he did so or not, the said Earl knoweth not. The House of Commons being in debate two days, and not resolving, his majesty about the 5th of May last called a Council at 7 o'clock in the morning: The said Earl being sick, came late, and was told, as he remembereth, by the earl of Berkshire, the king had declared his resolution to dissolve the parliament. The earl of Strafford besought his majesty to hear the advice of his Council, and first of those that were members of the house of commons, by whom the rest might the better be guided. Mr. Secretary Windebank said, He feared the house would first be answered of their Grievances, and voted for a breach of the parliament. Mr. Secretary Vane, in opposite terms, said, That there was no hope that they would give the king a penny, and therefore absolutely voted for a breach. And the earl of Strafford conceiving his majesty's pleasure to have accepted eight subsidies had been delivered to the house of commons by Mr. Secretary Vane, did in his turn deliver his Vote for breach of the parliament, which otherwise he would not have done, it being contrary to what he resolved when he came thither; and the like opinion was delivered by the rest of the lords, being about twenty, except two or three at the most. The Parliament being dissolved, his majesty desired Advice of his Council how Money might be raised, affirming that the Scotch army was ready to enter into the kingdom: The said Earl, in presence of others in the Council, delivered his opinion, That in a case of absolute and unavoidable necessity, which neither would nor could be prevented by ordinary remedies provided by the laws, nor all his majesty's other means sufficient to defend the commonwealth, himself, or their lives and estates from an enemy, without force of arms, either actually entered, or daily expected to invade the realm; he conceived that his majesty was absolved from ordinary rules, and might use (in a moderate way, as the necessity of the cause would permit) all ways and means for defence of himself and kingdom; for that he conceived in such extremity, 'Salus Populi' was 'Suprema 'Lex,' provided it were not colourable, nor any thing demanded employed to other use, nor drawn into example, when law and justice might take place: and that when peace was settled, reparation was to be given to particular men, otherwise it would be unjust. This was not officiously declared, but in council, forced by the duty of the oath of a counsellor, which is, That he shall in all things to be moved, treated, and debated in council, faithfully and truly declare his mind and opinion according to his heart and conscience: Which Oath the said Earl took, and humbly prays their

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lordships consideration thereof. He denies the Words in the Article, or any words to the intent thereby expressed.

To the Twenty-fourth, he saith, He delivered his opinion with such cautions and restrictions, as in the Answer to the precedent Article; and is well assured his discourse at all times hath been without ill intentions to either of the houses of parliament, which he ever did and shall speak of with all reverence. He denies that he knew of the publishing or printing of the Book, or who caused it to be printed or published; for at that time he was sick in his bed, more like to die than to live.

To the Twenty-fifth, he saith, Ship-Money was levied, and adjudged to be due, before his coming over. Sheriffs were then called up as before, and not otherwise. If any were sued in Star-Chamber, it was without any particular endeavour of his. It appearing at the Board that the mayor and sheriffs of London had been slow in collecting Ship-Money, he saith, They were but ministerial, and ought to exact, and not dispute the king's writs; and that if through their remissness the king should be less able to provide for the public safety, when any foreign army was ready to enter the kingdom, they might deserve to be fined and ransomed: which he spake more to hasten them, than of purpose to advise any such prosecution. But denies the other Words, being, under favour, such expressions as he is not accustomed unto.

To the Twenty-sixth, he saith, He advised not either of those Projects, being then sick in bed: But it being debated at the Council-Table whether it were better for the king to raise Gold and Silver, or coin base Money, he, for the reasons then given, delivered his opinion for the latter. Sundry merchants adventurers coming to his house, desired him to move his majesty, then at Oatlands, to release the bullion, or money: He told them he knew of no such thing, and would not meddle with it; nor would his health permit him to go abroad: and said, That if by their denying the king in such a public danger the loan of 100,000*l.* upon good security, the king were constrained, for the preservation of the land, to stay the bullion, they might thank themselves; and the city receiving so great a benefit by residing amongst them, they made but an unthankful acknowledgment in such a strait, to refuse the loan of that sum. The officers of the Mint came to the Council-Board, and the Earl then shewed a Letter he received from the earl of Leicester, wherein was related, That the cardinal had appointed commissioners to go into the merchants houses at Paris, to peruse their shop-books and accompts, and cess every man according to his ability, towards the payment of the king's army; and then said, That it was but just for us here in England to bless God for being under a king which could not think upon such a pressing upon the people. But the Words in the Article, or words to any such intent, he did not speak; and cannot sufficiently bemoan himself to have been in all his words so ill understood, or so untruly reported as he hath been.

To the Twenty-seventh, he saith, He persuaded the gentry of that county to allow the Trained-Bands a month's pay; which they yielded, and his majesty graciously accepted. It was by Council of War, his majesty being present, thought fit the Trained-Bands should return, save the two regiments under the command of sir William Pennyman and sir Thomas Danby. It was assented unto by his majesty, and the great council of peers then assembled, That those spared should contribute; and the said Earl was commanded by them to see it done. Which was done accordingly by Warrants from him, and from his Deputy-Lieutenants, which was much less charge to the counties than otherwise. And denies the other particular in the Article mentioned.

To the Twenty-eighth, he saith, He was lieutenant general to the earl of Northumberland, about the 24th of August, of 10 or 12,000 foot, and 2,000 horse, being at Newcastle, under the command of the lord Conway and sir Jacob Astley, and the rest of the army at York. The said Earl went from London on the 26th of August, notwithstanding his extreme weakness, and came to York. And having received a Letter from sir Jacob Astley that Newcastle was fortified, and that they must be infamous beasts to lose it, and that it was fully secured; and being acquainted with several Dispatches sent by Mr. Secretary Vane, by his majesty's directions, to the lord Conway, general of the horse, to oppose the passage of the Scots over the river Tyne, the one dated 22 Aug., the other 23 Aug., another 24 Aug., another 26 Aug., the substance of which Letters are particularly mentioned in the Answer to this Article: and to the same Letters the said Earl referreth himself.

The said Earl, upon sight of this and sir Jacob Astley's letter, had reason to believe that all fitting preparation was made; and then understanding that if the Scotish Army should pass the river, not only Newcastle, altogether unfortified on the south part, would be lost, but the said army of 11,000 foot and 2,000 horse endangered; and hearing that the Scotish army was distressed for want of victuals, and knowing the advantage that was in opposing the passage of such a river: Hereupon the said Earl, by a Letter dated the 27th of August, advised the lord Conway, with all the horse, and at least 8,000 foot, and all the cannon, to march and fight with them upon the passage of the river: At which time the said Earl had no charge of the army. But the truth is, the lord Conway having not with him all the horse, and not above 1,500 foot, and only some part of the cannon, was in a posture to fight for the passage before the said letter of advice came, which he received not half an hour before the fight began, and proceeded according to his own judgment, and his majesty's said general direction. And afterwards, that is, about the

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30th of August, and not before, the said Earl took upon him the charge of the Army at Darlington, and brought it to York to be supplied with necessaries that they wanted, and purposed to have staid where they were quartered. But hearing from many hands that there was a purpose to question him in parliament, and his majesty having given him liberty of staying there, or coming away, he left the charge of the army with the lord Conway, and other officers, as his majesty had directed, and came to London on Monday the 9th; and the 11th of November was put under restraint, and so hath ever since remained. And saith, That the town of Newcastle was no way under his care. And as to other matters, whereto by law he ought to answer, and hath not answered, he saith, He is not guilty of them, or any of them, in such manner and form as in the said Article is expressed; and humbly prayeth a convenient time for making his Proofs, and to justify and maintain his actions in Ireland by sight of his majesty's Warrants, Records, and witnesses in that kingdom; and that if any mistake be in his Answer, it may be amended.

And this the said Earl hopeth, that, upon equal construction of his words and actions, he shall appear free from any great and heinous offences wherewith he is charged: And howsoever it shall please God to dispose of him, he shall ever pray, that by their lordships great wisdom and prudence, the affections of his majesty, and duty of his subjects, may this parliament be so surely knit together, as may by God's blessing lastingly tend to the prosperity and flourishing estate both of king and people.

THE TRIAL.*

The place appointed for the Trial was the great Hall in Westminster, where there was a throne erected for the king, on each side thereof a cabinet enclosed about with boards, and before with a terras. Before that were the seats for the Lords of the upper house, and sacks of wool for the Judges; before them, ten stages of seats, extending farther than the midst of the Hall, for the gentlemen of the house of commons: at the end of all was a desk closed about, and set apart for the Lord Lieutenant and his counsel.

March 22.

Monday morning about seven of the clock he came from the Tower, accompanied with six barges, wherein were 100 soldiers of the Tower, all with partizans, for his guard, and 50 pair of oars. At his landing at Westminster, there he was attended with 200 of the Trained-Bands; and went guarded by them, into the Hall. The entries at White-hall, King-street, and Westminster, were guarded by the constables and watchmen, from four of the clock in the morning, to keep away all base and idle persons.

The king, queen, and prince, came to the house about nine of the clock, but kept themselves private within their closets, only the Prince came out once or twice to the Cloth of State; so that the king saw and heard all that passed, but was seen of none. Some give the Reason of this, from the received practice of England in such cases: others say, that the lords did intreat the king either to be absent, or to be there privately, lest pretensions might be made hereafter, that his being there was either to threaten, or some otherwise to interrupt the course of justice: a third sort, That the king was not willing to be accessary to the Process till it came to his part, but rather chose to be present, that he might note and understand what violence, rigour, or injustice happened.

* "Much time," says lord Clarendon, "was spent in consideration of the manner of the trial; for they could find no precedent would fit their case: Whether it should be in the house of peers? which room was thought too little, for the accusers, witnesses, judges, and spectators: Who should prosecute? Whether members chosen of the commons, or the king's council? Whether the bishops, which were 24 in number, and like to be too tender-hearted in matter of blood, and so either to convert many or increase a dissenting party too much, should have voices in the trial! Whether those who had been created peers since the accusation was carried up, should be admitted to be judges? And lastly, Whether the commoners who were to be present at the trial, should sit uncovered? and, whether any members of the house of commons should be examined at the trial on the behalf of the Earl? who had sent a list of names, and desired an order to that purpose.—After much debate it was agreed, that the Trial should be in Westminster-hall, where seats should be built, for the reception of the whole House of Commons, which together with the Speaker should be present: for they then foresaw, that they might be put to another kind of proceeding than that they pretended; and, though with much ado, they consented to sit uncovered, lest such a little circumstance might disturb the whole design. —For the prosecution, they had no mind to trust the king's council; who neither knew their secret evidence, nor being informed, were like to apply and press it so vigorously as the business would require: and therefore, they appointed that Committee which had prepared the Charge, to give in the Evidence, and in the name of all the Commons of England, to prosecute the Impeachment.—For the Bishops; after many bitter invectives; and remembering the faults of particular persons; and the canons which seemed to involve the whole body; with sharpness and threats: They took the case to be so clear upon an old canon (the only one they acknowledged for Orthodox) that 'Clericus non debet interesse sanguini,' that they were content 'to refer that to the house of peers, as proper only for their determination.' And this they did, not upon any confidence they had in the matter itself, whatever law, or reason, or canon they pretended; or in the lords,

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When the Lieutenant entered the Hall, the porter of the Hall (whose office it is) asked Mr. Maxwell, whether the axe should be carried before him or no? Who did answer, That

the major part of whom, when any difference of opinion was, always dissented from their designs: but that they had a trick of doing their business by intimation; and had a sure friend amongst the bishops, who had promised them seasonably to free them of that trouble.—They would not trust their lordships own inclinations with the other point, of the new barons, which they knew would be controverted; but in plain terms demanded, 'that no peers, created since 'the day upon which the earl of Strafford was 'impeached of High Treason, because they 'were involved as Commoners in the making 'that accusation, should sit as judges at his trial.'

"For the Earl's demand, 'of an order to 'examine some members on his behalf, upon 'matters of fact, at his trial;' after a long debate, they left it only in the power of the persons themselves who were nominated, to be examined if they would, not without some smart animadversions, that they should take heed what they did, and refused to enjoin them; though the same had been done at their desire, for the lords of the council: but that was against the Earl, and so the less to be considered.

"The Lords, in the absence of the Lord Keeper, who was very sick, made choice of the earl of Arundel to preside and govern the Court; being a person notoriously disaffected to the earl of Strafford. And for the great business of the Bishops, they were saved the labour of giving any rule, which it may be would have troubled them, by the bishop of Lincoln's standing up, and moving, on the behalf of himself, and his brethren, 'that they might be excused from 'being present at the Trial, being ecclesiastical persons, and so not to have their hands 'in blood; and such other reasons, as, when 'they are examined, will not be found of very 'great weight.'—The example of the Bishops, prevailed with some lords, who had been created since the Accusation, to quit their right of judging; and amongst them, the lord Littleton, who had been made a baron upon the desire of the earl of Strafford, for that only reason, that he professed, 'If he were a peer, he 'would, and indeed he could, do him notable 'service,' was the first who quitted his right to judge, because he had been a commoner when the Accusation was first brought up: but they who insisted upon their right, as the lord Seymour, and others, and demanded the judgment of the house, were no more disturbed, but exercised the same power to the end, as any of the other lords did; and so, no doubt, might the Bishops too, if they would: for, though there might be some reason for their absence, when the Trial was according to law, before and by his peers only; yet, when that Judgment was waved, and a Bill of Attainder brought against him, their votes in that Bill were as necessary and essential, as of any other of the lords. And it may be, their unseasonable, voluntary, unjust quitting it then, made many men less solicitous for the defence of their right afterwards.

"On Monday, the 22nd of March, the Earl of Strafford was brought to the bar in Westminster-hall; the lords sitting in the middle of the Hall in their robes; and the commoners, and some strangers of quality, with the Scottish commissioners, and the committee of Ireland, on either side; there being a close box made at one end, at a very convenient distance for hearing, in which the king and queen sate untaken notice of: his majesty, out of kindness and curiosity, desiring to hear all that could be alledged: of which, I believe, he afterwards repented himself; when his having been present at the trial, was alledged and urged to him, as an argument for the passing the Bill of Attainder."

The following are Mr. Laing's reflections upon this transaction: "While the treaty was thus protracted, the fate of Strafford was determined in parliament. An endeavour to subvert the fundamental laws was a species of constructive treason till then unknown, and was established on facts which were either indifferent in themselves, or insufficient separately to constitute such crime. Whether from the novelty of the accusation, or from the defective nature of the evidence, a bill of attainder was necessary to reach his devoted head. Charles, who, according to the ordinary dispensation of justice, might have remained a silent spectator of his fate, was reduced, by the bill of attainder, to the cruel alternative of becoming accessary to the death of a favourite minister, endeared by his services, or of involving himself in a rupture with parliament, and in a civil war, while he was unprepared for the event. As a constitutional precedent, the attainder of Strafford is surrounded with difficulties. Were an act, declaratory of treason, to be restrained, on the one hand, within the limits of the established law, a statesman, secure from the stroke of justice, might conspire, with impunity, to subvert the fundamental laws of the constitution, which implies no treasonable design against the crown; yet, on the other hand, an act declaratory of new crimes might ultimately recoil on the people themselves; and a servile parliament might indulge the ambition or the resentment of a minister, by the attainder of every opponent whom he hated or feared. The evidence against Strafford was defective, however, as it indicated rather his advice and opinion, than a concerted design to render Charles independent of parliament: but, as mercy is not the attribute of collective bodies, he suffered, without legal evidence, from the violence of his accusers, and the secret conviction or the fears of his judges. The apprehensions of his escape if the trial were interrupted, seem to have first suggested the bill for preventing the dissolution of parliament without its own consent."

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he king had expressly forbidden it: nor was it the custom of England to use that ceremony, but only when the party accused was to be put upon his jury. Those of the upper house did sit with their heads covered, those of the lower house uncovered. The Bishops upon the Saturday before did voluntarily decline the giving of their suffrages in matters criminal, and of that nature, according to the provision of the Canon Law, and practice of the kingdom to this day; and therefore would not be present: yet withal they gave in a Protestation, that their absence should not prejudice them of that or any other privilege competent to them as the lords spiritual in parliament; which was accepted.

The earl of *Arundel*, as Lord High Steward of England, sat apart by himself, and at the Lieutenant's entry commanded the house to proceed. Mr. Pym being Speaker of the Committee for his accusation, gave in the same Articles which were presented at his last being before the Upper House; which being read, his Replies were subjoined and read also, the very same which were presented before in the Upper House. Some give the reason of this, because the Lower House had not heard those Accusations in public before; others, that the formality of the process required no less: however, that day was spent in that exercise.

The Queen went from the house about eleven of the clock; the King and Prince staid till the meeting was dissolved, which was after two. The Lieutenant was sent to the Tower by his guard, and appointed to return upon Tuesday at nine of the clock in the morning. The croud of people was neither great nor troublesome; all of them saluted him, and he them, with great humility and courtesy, both at his entrance and at his return: therefore let fame pretend what it please about the malice and discontent of the multitude, 'That if he 'pass the Stroke of Justice, they will tear him 'in pieces;' yet I see there is more in rumour than in sight and appearance; and in this report, as in all others of this nature, more is thrust upon the vulgar (who seem as well fearful of punishment, as exempt from it, for all their great number) than they do justly deserve.

March 23.

On Tuesday in the morning he came accompanied as before to Westminster; and having staid in the Exchequer-Chamber till nine of the clock, the king, queen, and prince came as before upon the first day.

Then Master *Pym* being called for, aggravated the Charge, which was given the day before, by a very ample Speech. It is impossible to call to mind all the hyperboles, the flashes, and superlative expressions that he used; the main points were, That it was Treason far beyond the reach of words, that he the Lieutenant, a native subject and a peer of England, the prime governor of Ireland, the commander of his majesty's forces, and a Protestant in religion, should have in such an impious and gross manner recompensed his majesty's favours, abused his goodness, and drawn all his dominions into hazard and peril of their religion, lives, goods, and privileges: That one of these faults alone had been enough, and too much, for the fulfilling of the exorbitancy and wickedness of any one man; and that no punishment could be thought upon, sufficient to expiate crimes of such a transcendent nature.

The *Lieutenant*, with no less moderation and wisdom than the other with heat and passion, spake to his own defence; and that with such a measure of eloquence and livelihood, that his very enemies were affected with it, and do marvellously report of it. He modestly recounted his services done to the king and crown of England, his endeavours for advancement as well of the honour as commodity of both kingdoms in general, but in particular that of Ireland; how he had engreatened and advanced the king's revenues there, restored the Church's maintenance, suppressed the Outlaws, established obedience to royal authority, and impedited the tyranny and usurpation of greater ones over the Commons. And for the effecting of all these actions, he mentioned himself the most weak and meanest instrument, with a wonderful prudence, in a middle way, betwixt the affectation of baseness, or dejectedness, and arrogance.

Master *Pym*, after the close of his Speech, told him that there were three new Articles adjoined (by an after-search) to his Charge; and desired that he might presently reply to the same.

Whereunto the *Lieutenant* answered, It was very strange, that after the close of the process, and when matters were come to be scanned, and examined by proof, that any new charge should be given in; yet, lest he should seem to decline the maintenance of his own innocency, and the just defence of his honour, he was most willing to hear them, and have them alledged, provided that a convenient time might be assigned him to make his Replies against them, as he had done to the other given in before.

But Master *Pym* excepted against this, and told him, that the house did conceive it to be dangerous to grant any farther prorogation.

Upon this, the Lords of the Upper House (who did not think it fit as yet to voice any particular in the audience of the house of commons) did retire themselves, and after a pretty time of stay they returned and declared, that they had found the Lieutenant's suit to be equitable, in desiring of further time for answering; yet seeing the Articles themselves, neither for number nor weight, seemed to be of that importance, but that he might furnish out a present Answer, they thought it fitting to grant no delay.

The *Lieutenant* then, entreating them to pass by and pardon the weaknesses of his extemporary Answers, desired to hear the Articles read, which were these:

'First, That he had within these two years 'withdrawn 40,000*l.* sterling from the Exche-

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'quer in Ireland, and employed it to his own 'private uses.'

'Secondly, That in the beginning of his go-'vernment, the Garrisons in Ireland had been 'maintained by the English Treasury.'

'Thirdly, That he had advanced popish and 'infamous persons, as the bishop of Waterford 'and others, to the prime rooms in the church 'of Ireland.'

To the First he answered, That 30,000*l.* were set apart for the king's late service, at his own most special and most peremptory commands; for which he produced the king's own Letter, already approved as his acquittance at the Exchequer board in Ireland.

To the Second, That at the beginning of that Charge against him, as ever before his time, the Garrisons had been burdensom to the kingdom of England; but that he had so improved it, and settled the king's Revenue there, that the like is not to be heard in all the times that are by-past: for which, if the best endeavours of a subject may justly expect any reward from his king and country, he craved leave to think that he rather deserved many thanks, than the least punishment.

To the Third, He appealed to all the Clergy in Ireland, if ever he had taken upon him any particular meddling in advancing their Churchmen, or whether he had done any thing concerning such affairs, but upon the special advice and desire of the best and wisest of their number. For his part, when he befriended the bishop of Waterford, he conceived of him as a man of integrity and learning, fit for such an employment; nor was there then the least suspicion of those monstrous Impieties, wherewith he was afterwards charged; that he had now justly suffered for the same, and that he hoped they would not lay a necessity upon him to prophesy and divine of the future conditions and deportments of men. For others of the Church, suspected of Popery, he knew none such, but should answer to the particulars so far as they concerned him, when they should happen to be alledged.

After this the House dissolved for that night, the king's majesty and the prince having staid all the time: and the Lord Lieutenant was appointed to come thither again on Wednesday morning; at which time they are to proceed to the first Article, to give an oath to the Witnesses, and to examine all the Proofs whereon the process was builded.

It will be a very hard matter for him to expect every man's testimony, and to give his Answers, either for full satisfaction or diminution of all objections; which way of proceeding will spend at least a fortnight, if not a greater space of time; yet it is thought the Lower House are impatient of delays. The expectations are exceeding various and different about the event of this great action: some think it will be impossible to escape the many and great Accusations laid to his Charge; others, and that the greater number too, are of opinion that he will be in no hazard of his life, and that it will not be possible to bring him into the compass of treason ('quod tam misere cupio ut non credam).' His adverse party is so great, and so far interested both in point of safety and honour against him, that 'flectere si nequeunt superos,' &c. nothing will be left unessayed, that may accelerate his ruin.

He hath all this time carried himself courageously, to the admiration, and withal so moderately, that it is to the great satisfaction of his very enemies: so that he seems neither dejected with fear, nor to affect boldness with confidence, but to carry himself with that constancy and resolution, which his innocency and brave parts do promise.

The Irish Commissioners here, have hitherto abstained from giving in any Remonstrance against the Lieutenant, and do still plead to have an immediate dependance from the king, and not from the parliament of England. There was a report that the parliament of Ireland had sent a Protestation against the act made the last year, for the king's Supply in his Expedition against the Scots, as a thing which was violently in part, and in part surreptitiously obtained from them: but I have learned this to be an untruth. I had almost forgotten one passage of Mr. Pym, who in the aggravation of the Lieutenant's Faults, had this expression, That he was like the Whore in the Proverbs, 'He wiped his mouth, and with a brazen face 'said he had done no evil.'

To this the noble lord replied, That he wished his innocence might not be taken for impudence; that he hoped shortly to clear himself of all those foul aspersions which his malicious enemies had cast upon him; and he was very confident that he should give the honourable houses full satisfaction concerning his life hitherto, and thought of nothing more hereafter than to retire himself from all public employments.

Mr. Pym gave at this a great shout, and desired the house to take notice what an injury he had done to the honourable house of commons, in calling them his 'malicious enemies.'

Whereupon the Lieutenant falling down upon his knees, humbly besought them that they would not mistake him; and withal gave a large panegyric of their most just and moderate proceedings, protesting that if he himself had been one of the house of commons, (as he had the honour once to be) he would not have advised them to have done otherwise against his dearest friend: but withal told them, that he might justly say he had his own un-friends, which he hoped in time to make known. Nor did he all this time speak one bitter word against Mr. Pym, though justly incensed; which hath infinitely advanced his reputation.

I have been a daily hearer of these Proceedings against this great personage now upon the stage, therefore do presume I can give a reasonable account thereof. The Book of his Charge is extant in print; so it shall be needful for me only to name the Articles, as they were canvas-

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ed, and those designed by the house of Commons to be his Accusers: which were these that follow:

The Names of his Accusers.

Pym, Glyn, Maynard, Whitlock, lord Digby, St. John, Palmers, sir Walter Earle, Stroud, Selden, Hampden, &c.

One of these began the Speech; the rest, after their colleague hath done, follow in their turn: so that he hath all of them to wrestle against, and yet sufficiently able for them all; though by his agitation his spirits are much exhausted.

Mr. *Glyn*, after a large flourish, on Wednesday, told the lords, That the lord Strafford was impeached, not with simple, but accumulative Treason: for though, in each particular Article, such a monstrous crime could not be deprehended: yet when all was conceived in the mass, and under one view, he should be undoubtedly found the most wicked and exorbibant traitor that ever was arraigned at the bar. He added, That his Charge was for intending to subvert and change the fundamental laws, liberties, and privileges of both kingdoms, and to introduce an arbitrary and tyrannical form of government. This, he said, could not appear but by the fruits, which were either in expression or action. The expressions were four:

First, That before several Witnesses he had said at York, 'That the king's little-finger 'should be heavier to them than the loins of the 'law.'

To this the Lieutenant replied, That having spoken sufficiently before to his justification in general, he would moreover add these few words, by their favours: That it did strike him to the heart to be attached of such a wicked crime, by such honourable persons; yea, that it wounded him deeper, in regard that such persons who were the companions of his youth, and with whom he had spent the best of his days, should now rise up in judgment against him: yet he thanked God for it, it was not guilt, but grief, that so much troubled him. He added, That it was a wonder how he had gotten strength sufficient in such infirmity of body, and such anguish of mind, to collect his thoughts, and say any thing at all for himself; but the Almighty God, who knows him to be innocent, had furnished him with some abilities to give testimony to the truth, and to a good conscience: He therefore intreated, that if either in judgment or in memory he should at any time fail, it might be imputed to his great weakness. And although the gentlemen his Accusers should seem more ready in their Accusations than himself in his Defence, yet that might not prejudice his cause; who, in very unequal terms, had to do with learned and eloquent lawyers, bred up a long time and inured to such judiciary pleadings, and whose rhetorick, he doubted not, might present many things to their view in a multiplying-glass. He told them farther, That for these many years he had been weary of public service, and that now it was his resolution, after he had vindicated his honour, to retire himself, and enjoy his much longed-for privacy: and yet he could not but tell them so much, that it had been his hearty wish and desire, rather voluntarily to have resigned his places of honour, like a ripe fruit fallen from the tree, than to be violently pulled from thence, as a fruitless and unprofitable withered branch.

To the Charge of Treason he said, That under favour he conceived, that although all the Articles contained in his Impeachment were verified against him, yet they would not all amount to Treason; neither simple nor accumulative: For (said he) I do not understand by what interpretation of law the diversion of justice can be called a subversion of the same; or the exceeding of a commission, the usurpation of a new power. To the particular he replied, That his words were clearly inverted, for that his expression was, 'That the little-finger of 'the law (if not supported by the regal power, 'in granting Pardons for Penalties of the same) 'was heavier than the king's loins.' That this was his expression, he verified, 1. By the Occasion: for he spake the words a long time since, to some men who had lain imprisoned at York, and were then by the king's favour set at liberty; whom he incited to thankfulness (by this expression) towards his majesty. 2. By Witnesses produced by him. In the Examination of their witnesses he convinced one of them of untruth, by interrogating him where he was when the Speech was heard, and how far distant from him: when the man replied, that he was 12 yards from him; he answered, that it was impossible for him to hear a man three yards off, by reason of a deafness that had held him 14 years: which being found true, the Witness was rejected.

Another Witness (sir David Foulis*) was brought against him; against whom he excepted, as his known and professed enemy: it was told him, that he himself did not use to admit of exceptions against Witnesses, and therefore was to expect the same measure.

He replied, That Master Pym might one day perhaps be attached, for persuading the house of commons to commit the same crime that was laid upon him as a charge of Treason. But for all this, the Witness was received, because in matter of Treason a man's enemy may witness against him 'pro domino nostro rege:' though I suppose, the king's advice was never asked for the present. This was all that was done for that time.

On Thursday he was charged with the second Expression: 'That he said Ireland was a con-'quered kingdom, and that the king might pre-'scribe them what law he pleased.'

This they aggravated as a prime Note of his tyrannical will and affection, that would permit

* See his Case No. 143, vol. ii. p. 586; and note the part taken against him by Lord Strafford on that occasion.

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no law to bound the subject, but what himself, and such as he, might draw up by sinistrous informations from a gracious and well-meaning prince; and if this were admitted, the whole power and liberty of the Republic would be utterly lost.

To this he replied, That neither was the Expression in those words, nor in that sense spoken or meant by him. The first part of it (said he) cannot be denied: to the second, that he had said only, 'That the king was the law-'giver,' which he hoped none could deny without incurring the crime of Treason; and that 'the king's Sentence was a law in matters not 'determined by acts of parliament,' which all but disloyal subjects would grant. And that it had ever been his endeavour to have the Liberty of the Subject and the Royal Prerogative follow both in one channel; if either of them crossed other, we could expect nothing but a subversion of the Commonwealth, either by tyranny or rebellion: That the prerogative was like the first, the liberty of the subject like the second Table; either both or neither can be preserved. That in his duty he stood obliged first to the king, as God's Anointed; then in the second place to his country, if it did not cross the regal power. And therefore hoped, that what he had spoken was so far from being treason, that he thought a thousand such expressions would not make up one felony.

March 26.

On Friday the two other Expressions were followed: That he said, 'He would not suffer 'his Ordinances to be disputed by lawyers, be-'fore inferior judicatories, and that he would 'make an Act of State equivalent to an Act 'of Parliament.'

To the first he said, That he had often said (more than once) that he would not suffer his Ordinance to be contemned; because, in him, his master's honour was wounded.—To the second, He thought a proportionable obedience was due to Acts of State, as well as to Acts of Parliament; otherwise they were made in vain, if that both did not bind in one kind.

The Lord *Cork*, (though his mortal enemy) was now examined, and admitted as a witness; whom in his Deposition he convinced of two shameful oversights: for Cork had declared upon his oath, that the Lieutenant had caused to be interlined an Ordinance against himself, and had caused some words to be scraped out; which words were notwithstanding still found to be in the Sentence, by an authentic Copy under the hand of sir Paul Davison, clerk to the Council-Board of Ireland.—Then Cork alledged, That he had advanced a groom of his to be a Preacher; who by a testimony from the University of Dublin he verified to have been a Master of Arts ten or twelve years before his advancement: adding withal, that my lord of Cork was an excellent scholar, who was able to breed such grooms.

Upon Saturday, having done with his Expressions, they canvassed the first Article about his actions: Against the lives of the king's subjects, both in the Case of the lord Mountnorris, and also of another of the king's subjects, both of whom he had sentenced to death by Martial Law, contrary to all law, and to the manifest subversion of the privileges of subjects, Magna Charta, and the Petition of Right.

To the lord Mountnorris's Case he replied, 1. That though that Sentence had been unjustly given and rigorously prosecuted against him, yet the greatest crime that he could be charged withal, would but amount to manslaughter, or felony at the most. 2. That he hoped, though this were true, to obtain a pardon from his gracious master the king's majesty, as well as Conway and sir Jacob Astley had lately done, for exercising martial law in the northern army.

Then he replied to all the parts of the Charge, which were four:

1. That he had exercised Martial Law in time of peace.

To this he answered, 1. That all armies have been, and must be, governed ever by martial law. 2. That there is a standing Army in Ireland, and therefore the case is all one in time of peace or war; and that the army might be undone, if they should not use Martial law, but were to expect remedy for the settling of a mutiny, or assurance of obedience, from the common law. 3. That it had ever been the practice of the Deputies, particularly of Wilmot, Falkland, Chichester, yea Cork himself; and therefore was no new thing brought in by him. This he proved, both by the production of the military Ordinances, and by divers Witnesses who knew Sentences given in that kind by them. 4. That he had a particular Warrant in his Commission for this power. 5. That in the lord Mountnorris's Case, he was commanded to exercise the same by the king's particular Letter: both which he caused to be read.

The second Charge was, That he was both Party and Judge in the lord Mountnorris's Cause.

To this he replied, That he had sitten in Judgment, because he was one *sine quo non*, the Judgment could not proceed without him: but that he was not judge, but party, appeared, 1. Because he sat uncovered all the time. 2. Because he refused to give his own opinion. 3. Because he did not give his suffrage one way or other. 4. Because he removed his brother sir George from having a hand in the process, in regard of interest of blood.

The third Charge was, That he proceeded summarily in the matter of the lord Mountnorris.

He replied, 1. That he was not Judge in it, and that the Council of War was to be answerable in the justification of their own proceedings. 2. That after a long reasoning he had heard them say, that no delay could safely be granted in Martial Courts.

The fourth Charge was, That he had not

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heard the Exceptions made by Mountnorris against his Witnesses.

To this he answered, as before, That he was not judge in the case, and that he remembers no exceptions made against any witnesses. To which he added, That as he had been regulated in his proceedings, so he had been moderate in the execution of that Sentence: for though the lord Mountnorris justly deserved to die, yet he had obtained him the king's Pardon, for the saving of his life; and protested, that he intended nothing by that Sentence, but in some measure to repair his own honour, and to give Mountnorris fair reproof, who was known to be of an exorbitant and licentious tongue and spirit. Adding, that if the House of Commons would go on the same way with him, and assure him that the issue of his Charge should be nothing else but to admonish him for the time to come, he would thank them heartily for it, and study amendment in all pretended oversights. And whereas Mountnorris complained that he had jeeringly told him when the Sentence was passed and pronounced against him, That ere he lost his head, himself would lose his hand; he answered, That he had been thought to be very insolent and haughty, yet he was never so impertinent to use this expression: If any fault were, it was for undervaluing himself, in saying, That ere a hair of Mountnorris's should perish, he would lose his hand. And truly (said he), if Mountnorris would say so to me now, even in the worst sense that can be conceived, That ere I died he would lose his hand, I would take it very kindly from him.

For the other man, he avouched that he himself had voiced to hang him, both because he was an arrant thief, and also had fled from his colours, which by the common law (and to this effect he cited a Statute 20 Hen. 6, and 7 Hen. 7,) is felony. He concluded, That seeing he was not accessary to the Sentence against Mountnorris, had not sat there as Judge, had a power to keep Martial Courts by his commission, had not exercised the same till a new command came from his majesty, had done no more than ever was practised in Ireland before his time, and had at last obtained Mountnorris's Pardon; he hoped there was nothing accusable in him, but his too remiss and too moderate proceedings.

Master *Glyn* bitterly replied, That he knew the time when the Earl of Strafford was no less active and stirring to enlarge the Liberty of the Subject, and advance the Petition of Right, than now he is for extending his own arbitrary and tyrannical government.

To this he replied, without the least semblance of passion, That if at any time he had done the least service to the house of commons, he thought his whole life well spent; nor could they ever so graciously reward him, as to give commission to that gentleman to express so much before that honourable assembly: but withal, if ever any such thing was done by him, he intreated it might now be remembered, and might now serve to overbalance some slight and mean oversights committed by him; which he hoped should never make him guilty of Treason, unless it were treason for a man to have no more wit and prudence than God and nature had bestowed upon him.—And so much for Saturday.

March 29, 1641.

Upon Monday he was charged with the sixth Article: That he had used a tyrannical Government, not only over the lives (as appeared by the last), but also over the lands and goods of the king's subjects, as appeared by this Article; wherein he was charged to have dispossessed the lord Mountnorris of a tenure of lands, by a summary process before himself, contrary to all law: and therefore had failed, 1. Against the act of 7 Hen. 6, which provides all matters to be determined by the ordinary judges. 2. Against the Cautions sent to Ireland by king James, expressly forbidding such power hereafter to be exercised. 3. Against the king's late Proclamation. 4. Against the practice of all Deputies before that time.

Withal they added, That it was a tyranny that could not be expressed, to exercise this power over the persons of the peers of the land, and their goods.

To this he replied, That for his part, in matter of Justice (under favour he spoke it) he thought there was no distinction to be made betwixt a Peer of the land and one of the Commons, except they did think that either fear or faction should do something, which had no place in him.—To the Particulars:

1. That the act of Hen. 6, answered itself sufficiently, both because it excepted the Court of Requests (and that his proceedings were nothing else in Ireland), and also makes an express reservation of the king's prerogative; which he said was his strength, because he derived his Commission from the king, and that the act was the most express warrant in the world for him.

2. That he had not failed against the Cautions given by king James, 1. Because they were not charged upon him. 2. Because they were never observed, nor could be by the Deputies to whom they were given; which he proved both by witnesses and writings. 3. Because the Caution made rather for him than against him, in that it contained the word 'hereafter;' which manifestly implied that the power had been sometimes before exercised in Ireland, and not only by himself; and therefore thanked them for that testimony and hint. 4. That though the Cautions had been given to him, yet he had received an express command from the king his master to put that power in use: causing the king's Letter, for that purpose, to be read; and professing withal, That he was tender to exercise that power, till the king (induced by the humble Remonstrance of the meaner sort of people) had most peremptorily, and upon most just reasons, commanded him.

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3. That he could not obey the king's Proclamation five years before it came out; and that he wished from his heart, that they would but respect the king's commands and commissions with that tenderness of affection and obedience, as he did his Proclamations.

4. He proved it to be the constant practice of all Deputies that went before him.

It was objected, That other Deputies had indeed upon suits of equity determined themselves, as to matters of debt, but never of land.

He replied, 1. That the same authority reacheth as well to the one as to the other. 2. That neither he nor they had ever given Sentence, or determined any thing concerning matters of inheritance; but only concerning violent intrusion, which fell directly within a suit of equity. To which he added, 1. The Equity of that Court; that it proceeds upon the same grounds and evidences as that of the Common Pleas, and that he had the assistance of two of the learned Judges in deciding the controversy. 2. The Profit of that Court, which dispatcheth the poor in a day or two; whereas the common law would keep them so many years, which they are not able to sustain. 3. The Necessity of that Court in that kingdom, which ever hath been governed by that way, and therefore impossible to debar the natives from it, without great inconvenience; for it would utterly undo them, and none is prejudiced by it but the lawyers. And therefore seeing that he had done nothing but what was customary, necessary, and equitable, being commanded to it, and the sentence just; he hoped rather for thanks from the state, than a charge for his ill deportment. Withal, he shewed with what extortion and violence the lord Mountnorris had taken seizure of that piece of land, and made the playing of his game to be very foul. And at last he added, That he had done no more in Ireland, than the Court of Request in England usually doth, and that the Chancery Court in Ireland doth the same daily; and the last Chancellor was never charged (said he) for such proceedings, though this his power and authority was less than mine: but the difference of the person and his authority (it seemeth) differeth the matter.—And this was the business on Monday.

March 30.

On Tuesday they passed by the 7th Article, and the two first parts of the 8th, and insisted on that part about the lady Hibbot's Land, That he had violently thrust her from her possession by this summary way of Justice, and afterwards purchased the Land to his own use, by borrowing the name of sir Robert Meredith. In this probation, the testimony of the gentlewoman's own son was used, of the lord Cork, and the lord Mountnorris, all his back-friends, or professed enemies: and yet they prove very little, but what they took upon hearsays. Their prime allegation was, 1. That though the major part of the Council Board had voted for the lady, yet the Lord Lieutenant had given Decrees against her. 2. That all was done to his own behoof.

To the First, He produced the Sentence under the hand of the Clerk of the Council Board, subscribed by the major part. To the Second, He attested that he had no under dealing with Meredith; for the lady had got her own lands back from the said sir Robert Meredith. He also declared, at length, with what fraud and deceit the lady had come to her lands, and upon what reasons they were restored.

After this Article they fell upon the 9th, about the giving of Commission to the bishop of Downe and Connor, for apprehending all such persons, and presenting them before the Council Board, as contemned the Ecclesiastical Ordinances. This was aggravated as a point mainly against the Liberty of the Subject. To this he replied:

1. He produced the primate of Ireland's testimony under his hand, (he being himself sick) that the same course had been used in Ireland before; and that bishop Mountgomery, his predecessor in the bishopric of Meathe, had had the same.

2. He shewed the equity that such assistance should be given to churchmen, who otherwise, because of Papists and Schismaticks, either to God or the king, would have no respect or obedience given them in that kingdom.

3. He proved by two witnesses, that such warrants were in use before his time.

4. He said, he had never granted any but that one, and had presently, within some few months, called the same in again. What (said he) was the bishop of Downe's carriage in it, he had no reason to answer for: but he presumed the bishop could give a satisfactory Answer for himself, when he should be called in question. And so he concluded, that a matter so just, so necessary, so customary and practical before, he hoped should not be charged upon him as an introduction of a new and tyrannical form of government; and therefore submitted himself to the mercy of God, and the equity of his peers in his trial.—This was the work on Tuesday.

The ability of this brave gentleman ravished his hearers with admiration, though he be infinitely spent both in body and mind by the continued and almost uninterrupted agitation.

March 31.

After the 9th Article was passed against the Commission issued in favour of the bishop of Downe and Connor, upon Wednesday Mr. Glyn proceeded to the 10th Article. The Charge was, That the Earl of Strafford having established an arbitrary and tyrannical government over the lives, lands, and liberties of the king's subjects, his next desire was to make intrusion upon the crown itself; that by applying to his own use the public revenues, he might be the more enabled to accomplish his disloyal and traitorous intentions. To which end, having by a new Book of Rates, enhanced the Customs, he had gotten by advantage of his Lease above 20,000*l.* yearly. This (they added) was a crime of a higher nature than those contained in the preceding Articles, because in

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those there was some colour or pretext of justice, here none; those in particulars, this in general; those against the subject only, this against the king himself.

For the Proof of the Charge, they produced the lease of the duke of Buckingham. Which was read and compared with that lease to the duchess of Buckingham, (which the Lieutenant hath now by assignment) and some differences shewn, arising to the sum of 2,000*l.* in the duke's Lease; only the moiety of concealed and forfeited goods were due to him, but the whole goods to the duchess in her Lease. Again, the king's ships of Prizes did not pay custom in the duke's Lease; in the duchess's they did. Again, the Impost of the Wines (then belonging to the earl of Carlisle) was not in the duke's Lease; in the duchess's it was. Lastly, Whereas the earl of Strafford paid but 14,000*l.* per annum for the Custom; it was worth to him, as was apparent by the Books of the Exchequer, 40,000*l.*

Witnesses were examined.

1. Sir *James Hay*, who deposed, That the earl of Carlisle had an advantage of 1,600*l.* per ann. by his Lease of Wines.

2. The lord *Ranelagh*; who deposed, That by the inspection of the Books of Accompts, he had found the Customs to be anno 1636, 36,000*l.* anno 1637, 39,000*l.* anno 1638, 54,000*l.* anno 1639, 59,000*l.*

With the Proof they concluded the Charge, That notwithstanding the Lord Strafford pretended a great measure of zeal and honesty in his majesty's service, yet it is evident he had abused the trust put upon him; and by withdrawing so great sums of money from the crown, had weakened the king, prejudiced the subjects of the protection they were to expect from him, and had been the cause that the extraordinary way of Impost and Monopolies had been undertaken for supplying of the royal necessity. And that this act, therefore, ought to be enough to make the Charge and Impeachment of High-Treason laid against him.

The Lieutenant's Reply was, That he conceived he had given full satisfaction to all hitherto brought against him about that pretended arbitrary government: nor would he spend time in vain repetitions: For the present Article, though in all its parts it were granted to be true, yet he could not perceive by what interpretation of law it could imply the least act of Treason; and when it should be directly charged upon him as a point of Misdemeanour, Oppression, or Felony, he made no doubt but he should be very able to clear himself abundantly in that point also; yet, lest any prejudice might stick to his honour by these bold assertions, he was content to step so far out of the way, as to give answer:

1. That it concerned him nothing what particulars in the Lease had passed betwixt the king and the Duchess of Buckingham, or whether she had obtained a more easy condition than the duke her husband, especially seeing that same was granted some years before his coming to that government: yet thus much he could say, That the duchess had paid 30,000*l.* Fine; and therefore no marvel her yearly rent was the less.

2. For the Book of Rates (wherein the chief matter of Oppression and Grievance seemed to rest), the same was there established by the deputy Falkland, anno 1628, three years before his going into Ireland; and therefore it was exceeding strange in his apprehension, how that could rise up in judgment against him.

3. That he had his interests in the Customs by assignation of a Lease from the duchess, which was given her before his government: nor did he ever hear it alledged as a crime of Treason, for a man to make a good bargain for himself.

4. That not of his own accord, but at the king's special command, he had undergone that Charge, in hopes that, upon the inquiry into the worth thereof, the Customs might be improved for the benefit of the crown, and the true value thereof discovered. This he proved by the lord Cottington and sir Arthur Ingram.

5. That when a new Book of Rates was recommended to him by the Council-Board of England, in the time of his Lease, he so far preferred a fear he had that the trade of Ireland might thereby be discouraged before his own commodity, as he presumed, in all humility, to refuse the said Book of Rates, and tendered his reasons thereof to the kingdom and council-board of England.

6. That he never understood that the Customs could arise to those great sums alledged; but though they should, yet his advantage was but small. For, first dividing the 14,000*l.* he paid to the king; then five parts of eight, which was yearly given in upon oath (and that procured first by himself) at the Exchequer-Board; the other three parts divided amongst four of them, which were equal sharers in the Lease, would not amount to any great sum of money. And therefore except it were treason for him to have improved the king's Revenue, encouraged the Trade, and refused the new Book of Rates, he could, in his own weak judgment, discern none there; nor could he think it a crime for him to take an assignation of a lease granted before his time, and to insist on the Book of Rates used before his coming over. And therefore was confident the Lords would rather take his Accusation as an exercise of rhetoric in the gentlemen his adversaries, than as a thing spoken in good earnest by them.

The same day the 11th Article, concerning Tobacco, was charged on him by the same man, Mr. *Glyn*, after this manner: That for the farther advancement of his tyrannical and avaricious designs, he had of himself established a Monopoly for the restraint of Tobacco in that kingdom: where they offered five Particulars to the Proof; 1. That he had restrained the Importation of Tobacco. 2. That in the mean time he had brought in a great quantity himself, and sold the same at exorbitant prices. 3. That of Tobacco already imported, he had forbidden any to be sold but what was first

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sealed by his officers. 4. That upon a pretended disobedience he had punished a great number of people by seizures, imprisonments, fining, whipping, pillory, and such-like cruel and inhuman usages. 5. That by these means he had gained 100,000*l.* yearly.

For Proof hereof, 1. The Proclamation for restraining Tobacco was read. 2. The Proclamation about the sealing of the same. 3. Some Witnesses, who declared that Ships had been restrained from landing Tobacco. 4. Others, who had known some Tobacco seized on as forfeited. 5. The Remonstrance of the house of commons in Ireland, declaring that the Earl had sold 500 tun of Tobacco, which, sold at 2*s.* 6*d.* per pound, amounts to 100,000*l.*

They concluded the Charge, That he had sucked up the blood, and eaten up the king's liege people; and had, by this one point of Oppression, raised greater sums to himself than all the king's Revenue in that kingdom extended unto. And therefore was liable to the crime of Treason, for troubling the peace, and bereaving the people of their goods, who were intrusted to his care and government.

The Lieutenant's Reply was, That his most secret thoughts were conscious of nothing but a sincere intention and endeavour to promote and advance the welfare of that kingdom: and withal, he conceived (by their leaves) that nothing in that Charge could have the least reference to Treason; yet, as he said before, for removing of all prejudice, he was contented to answer: 1. That long before his coming to Ireland the same restraint had been of Tobacco, and the same impost of 18*d.* per pound enjoined by king James. 2. That at that time the tradesmen for this commodity paid but 20*l.* a year to the crown for the impost, but now 400*l.* 3. That the Parliament in Ireland, 1628, had petitioned to have this Impost settled by an Act of State for ever afterwards, as a part of the revenue of the crown. 4. That he had express command from the king for issuing those Proclamations: and therefore could not imagine more danger in them, than in others for Monopolies in England, in the worst sense. 5. That the Proclamations were not put forth by himself alone, but by the whole Council-Board of Ireland. 6. That for the Contract of Tobacco, he was so tender of it, that it was sent over hither, and seen and approved of by the Council-Board of England before it was condescended to in Ireland.

For the Proclamations, he told them it was his own opinion, (and if he failed in it, he humbly craved pardon, and hoped that it should not be Treason to have no more judgment than God had bestowed on him), that the king was endued by God with a power to make temporary laws, and cause the same to be promulgated for the good of his people, upon sudden emergent occasions; to which laws obedience is due, till they be abrogated by ensuing parliaments. That he restrained no man from importing Tobacco, who was willing to pay the appointed impost. That for his part, he had never trafficked in all his time in that kind, nor had any part with the contractors: And if any Tobacco was seized on, it was upon contempt of the Proclamations. And if any person were censured to the pillory or whipping, it was for known perjury, the ordinary and usual punishment in such a case. Concerning the Tobacco imported, (he said) no consideration was taken of the prices given for the Tobacco beyond seas, of the king's Revenue of 4,000*l.* of the merchants pains and danger in bringing the same home. For his part, if any advantage were made, surely it was not his; nor could he annul every contract or lease made by the king. And therefore, seeing his interest was none, he had done nothing but at the king's directions, and at the advice of the Council-Board; seeing the same Impost was in king James's time, and petitioned for by themselves in Ireland, he hoped his carriage in the business should be so far from a crime of treason, that it should rather be thought no crime at all.—So much for Wednesday.

April 1.

Upon Thursday he was charged with the 12th Article, concerning Flax, by master *Maynard*, on this manner: That the Flax being the native and principal commodity of that kingdom, was by him (the Lieutenant) restrained, and the subjects put to that which was unknown, yea, impossible, for the Irish to make the same into Yarn. Here they complained of three things: 1. That by Proclamation he had restrained selling of Flax. 2. That he had ordered the making of yarn of such and such lengths and number of threads. 3. That the native Irish being unacquainted with such customs, upon pretended disobedience, had all their Flax and Yarn seized on to his use; whereby a great many families were reduced to such penury, that they died by great numbers in the fields for want of food.

For Proof hereof, they brought, 1. The Proclamation about the Restraint. 2. The Warrant for seizing the forfeited goods. 3. The Execution of the Warrant proved by sir John Clotworthy, and lord Ranelagh. 4. The Remonstrance from the house of commons in Ireland, That upon the rigorous course and execution of this Warrant many persons died for want of food. They concluded the Charge therefore, Though the Article did not individually imply treason, yet it did make very much for the accumulation of Treason.

The Lieutenant's Reply was, That, as before, he would, and must ever repeat it, that nothing was in the Charge that contained treason. To the matter itself he answered, 1. That the Proclamations issued forth were grounded not only upon convenience, but upon necessity; because that, except some way had been taken for ordering of Yarn, the merchants had absolutely given over the linen-trade in that kingdom. 2. That the Council-Board was as liable to the charge as himself, amongst whom were at that time the primate of Ireland, the arch-

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bishop of Dublin, chancellor Loftus, and the lord Mountnorris, all subscribers to the proclamation, men, to them, of known integrity and judgment. 3. That nothing was more common than for the Council-Board of Ireland to give orders for reducing the natives to the English Customs, and to fine them for drawing their horses by the tails, during their corn, and such like; and he conceived that to be a thing of the same nature. 4. That the special thing inducing him to it was, because he perceived the trade of Wool to increase much in that kingdom. He dissuaded by all means the making of Woollen-Cloth, because of the infinite detriment that might happen thereby to the kingdom of England; and therefore thought this the best way to encourage the wear of linen-cloth. For the Warrant to seize upon the goods, he affirmed the same to be necessary, because there should be no contempt to Proclamations: But that any part thereof did accrue to him, he flatly denied. If any rigour was used in the execution, he said, not he, but his officers were to answer for it: for this might happen in the most just and necessary commands; nor was there ever any complaint presented to him of any such matter. For his part, he had lost 3,000*l.* in the manufacture, established by himself for the encouragement of others.

To that, That persons died by that means, he replied, That it was more than ever he heard, or could think possible; yea, that he was cleared by the Allegation itself, which saith, that the same happened since his coming from Ireland.

To the Remonstrance of Ireland, he conceived, That a Charge was but a slender proof of a Charge; and that especially upon Interrogatories, not upon Oath, seeing that privilege was not due to the house of commons neither here nor there; that he might say it in truth and modesty, he deserved much better of that people, and might take up that in the Gospel, 'For 'which of all my good deeds,' &c. yet he hoped to be better understood shortly both here and there. And for his part, though his pursuit had been very hot, yet God was his witness, he never intended to take the least impression of revenge for those discontents and affronts which had been eagerly put upon him; or to carry any thing hence with him from that bar, where so many foul aspersions had been unjustly thrown upon him, but only *gratuitas cicatrices.*

The same day a fresh man (master *Palmer*) entered the lists against him; who having passed by, for want of Proof, the 13th, 14th, and part of the 15th Articles, insisted only upon the second part, for giving Warrant to serjeant Savil for seizing and laying soldiers upon the subjects. He charged thus: That the lord Strafford, having by a tyrannical power inverted the ordinary course of justice, and giving immediate Sentence upon the lands and goods of the king's subjects, under pretence of disobedience, had used a military way for redressing of the contempt, and laid soldiers upon the lands and goods of the king's subjects, to their utter ruin, this Article (he said) of itself did contain an individual Treason; so that if there were no more than this, it were more than sufficient to convince him of his Impeachment.

Here he offered two things: 1. The proof of the point. 2. By what Statute this act of tyranny directly, and by itself, implied Treason. For the first, serjeant Savil was called, who produced the copy of the Warrant upon which he had settled the Soldiers.

At this the Lieutenant rose, and humbly intreated the lords no evidence should be received against him upon an Article of such importance, but what might be thought authentic; and such a one, under favour, he conceived that copy not to be: 1. Because no transcript, but the original only, can make faith before the King's-Bench in a matter of Debt; therefore far be it from them to receive a most slender testimony in matter of life and death, before the supreme judicatory of the kingdom. 2. If Copies be at any time received, they are such as are given in upon oath to have been compared with the Originals, which are upon record: such an one was not that copy.

It was replied by Master *Glyn*, (for all of them spake as occasion served) That the house had but the day before admitted Copies as Evidences; much more should they do this, when it was produced by the officer himself, who best knew it, having executed the same.

To this the Lieutenant answered, That all other Copies ought to be received upon oath, to have been compared with the original, as right reason requireth; but that this was not so: and for the officer himself producing it, That was the best argument he could use, why it should not be admitted. For, said he, master Savil may be charged with Treason, for cessing men of war upon the king's subjects; he hath nothing for his defence, but a pretended warrant from me. Now, what he swears to my prejudice, is to his own advantage; nor can a man, by any equity in the world, be admitted to testify against another *in suam justificationem.*

The point seemed exceeding weighty, and in effect was the ground-work of the whole Article; which not proved, nothing could evince him to have been accessary to the consequence. The Upper House therefore adjourned themselves, and went up to their own court; and after a very hot contestation between the Factions, and above an hour's stay, they returned, and declared that the lords, after mature deliberation, had resolved that the Copy should not be admitted, and desired them to proceed to other Proofs: which after a little pause they did.

First, the lord Ranelagh affirms, that he heard of such a Warrant, and knew sometimes three, sometimes five soldiers billeted by it. 2. Master Clare declares the very same. 3. Another deposeth, he hath seen such a Warrant under the deputy's hand and seal. And so much for the Proof.

For the Statute, they alledged one of Ed. 3,

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6. That whosoever should carry about with them English enemies, Irish rebels, or hooded-men, and cess them upon the subject, should be punished as a traitor. Another of Hen. 6, 7. That whosoever should cess men of war in his majesty's dominions, should be thought to make war against the king, and punished as a traitor. They concluded, It was evident the lord Strafford had incurred the penalty and breach of both the Statutes, and therefore desired the lords should give out judgment against him as a Traitor.

The Lord Lieutenant's Reply was, That in all the course of his life he had intended nothing more than the preservation of the lives, goods, and welfare of the king's subjects; and that he dared profess, that under no deputy, more than under himself, had there been a more free and uninterrupted course of justice.

To the Charge he answered, 1. That the Customs of Ireland differed exceedingly from the Customs of England, as was clear by Cook's Book; and therefore thought cessing of men might seem strange here, yet not so there. 2. That even in England he had known Soldiers pressed upon men by the Presidents of York and Wales, in case of known and open contempts; and that both in point of outlawry and rebellion, and also even for sums of debt between party and party, there is nothing more ordinary than these cessings to this day in Scotland, whereby the chief house of the owner is seized upon. 3. That to this day there hath been nothing more ordinary in Ireland, than for the governors to appoint soldiers to put all manner of Sentences in execution; which he proved plainly to have been done frequently, and familiarly exercised in Grandison's, Falkland's, Chichester's, Wilmot's, Cork's, Evers's, and all preceding deputies times; and had even for Outlawries, for the king's Debts in the Exchequer, of Collection, of Contribution-Money, and, which comes home to the point, for petit sums of money between party and party: so that he marvelled, *qua fronte*, or with what boldness it could be called an Arbitrary Government lately brought in by him. To this the lord Dillon, sir Adam Loftus, and sir Arthur Teringham, deposed; the last of whom told, that in Falkland's time he knew 20 soldiers cessed upon a man for refusing to pay 16*s.* sterling. 4. That in his Instructions for executing his Commissions, he hath express Warrant for the same, as were in the Instructions to the lord Falkland before him; both of which were produced and read. 5. That although these Precedents were not, yet it were not possible to govern the kingdom of Ireland otherwise, which had been from all times accustomed to such summary proceedings. 6. That no testimony brought against him can prove that ever he gave warrant to that effect; and for the deeds of the Serjeant at Arms, he did not conceive himself to be answerable for it.

As for the Acts of Parliament, he had reserved them to the dispute of his lawyers; but was content to say thus much for the present: 1. That it is a ground in the Civil Law, that where the king is not mentioned, there he cannot be included: but, with all deference to his sacred person be it spoken, he conceived himself to be in his master the king's place, for so his Commission did run, in that kingdom of Ireland. 2. The words of the Statute are not applicable to him; for God knows, he never went about in person to lay soldiers upon any of the king's subjects. 3. That the king's own soldiers, requiring in a customary way obedience to his orders, could in no construction be called 'Irish Rebels,' 'English Enemies,' or 'hooded-men.' 4. That the use and custom of the law was the best interpreter thereof; and for that he had already spoken enough. 5. That it savoured more of prejudice than equity, to start out such an old Statute against him, and none others, though culpable of the same fact, to the overthrow and ruin of him and his posterity. 6. That, under favour, he conceived, for any Irish custom, or upon any Irish Statute, he was to be judged by the peers of Ireland. 7. That Statute, of what force soever, was repealed. 1st, By the 10th of Hen. 7, where it is expressly declared, nothing shall be reputed Treason hereafter, but what is so declared by the present statute: now, not a word there of any such Treason. 2dly, By the 11th of queen Eliz. where expressly power is given to the Deputy of Ireland to cess and lay soldiers, although the same be reputed treason in any other.

To the Statute of Henry 6, he replied, That a slender Answer might serve: He hoped that no man would think him so inconsiderate, to war against the king of Britain and Ireland, by the cessing of five soldiers; that he had been charged by many for taking arms for the king, but to that time never for taking arms against him; and that he heartily wished, that no man in all his majesty's dominions had more practice, with rebels, and rebellious designs against the king than himself.—So much for Thursday.

At the close he desired the intermission of a day, that he might recollect his spirits and strength against the next quarrel; and with some difficulty obtained rest till Saturday.

April 8.

Upon Saturday Mr. *Pulmer* proceeded to the Sixteenth Article, and charged thus: That the lord Strafford having established a tyrannical and independent authority, by giving summary Decrees and Sentences, had deprived the subject of all just remedy; for in that kingdom there was none supreme to himself, to whom they might appeal: and lest their just Grievances might be made known to his majesty, he had obtained a restraint, that no complaint should be made of injustice or oppression done there, till the first address had been made to himself, and that no person should come out of that kingdom but upon licence obtained from himself.

For Proof of this, 1. The Instructions were read, whereby that restraint was permitted.

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1. The Proclamation, That all noblemen, gentlemen, undertakers, officers or other subjects that should resort into that kingdom, should not come from thence without a licence from him. 3. That he had restrained the earl of Desmond, because of a suit in law depending between the Earl and himself, till publication of the same was passed. 4. That the lord Roch being informed against before the Star-Chamber, he would not license him to come into this kingdom, till the Sentence was passed against him. 5. That one Marchatee having pretended a mind to travel, was denied a Licence. 6. That the whole Committee for the Parliament was restrained this last year by deputy Wansford, which they said might be interpreted to be his fact, both because they had such intelligence the one from the other, as also by the Proclamation issued by him before. 7. That one Parry, servant to chancellor Loftus, was fined 500*l.* at his return, for departing Ireland without licence. 8. That the Irish Remonstrance complained of this, as the greatest innovation and thraldom put upon them since the time of the Conquest.

They concluded the Charge, That by this means having taken off that intelligence which should be between the king and his people, and having deprived them of that remedy which in reason they might expect from so just and so gracious a prince, he had taken upon him a royal and independent power, and had faulted highly both against king and state.

The Lieutenant's reply was, That he hoped to make it clear, that he had done nothing in that particular, but what was usual, necessary, and just; and that he should be very well able (by the grace of God) not only of that, but of all other his public actions, to give a reasonable account, though not free from much weakness yet certainly from all malice and treason.

To the Particulars: 1. For Instructions laid upon him, he was not so much chargeable as those of the Council of England, whereof there was a great many present who could witness their commands; but lest any thing should seem unjustly enjoined by them, or embraced by him, he desired that the reasons of their Instructions might be read: which were, 'That 'it were injustice to complain of injuries, of 'oppression done in that kingdom, till first the 'deputy's judgment was informed, and trial 'made of his integrity: That it would much discourage the ministers of state there, and expend the monies of that kingdom, if upon 'every trifling business complaints should be 'admitted in England: and that if justice were 'there denied by the deputy, it should be lawful for any man to come over.' 2. For the Proclamation, that the same was builded upon the Statute of that kingdom, the 25th Hen. 6, which contained the same restraint verbatim. 3. That anno 1628, the Agents for the Irish nation had petitioned for the same from the king. 4. That the Deputy Falkland had set forth the same Proclamation. 5. That he had the king's express warrant for it, anno 1634, which was read. 6. That he had received the Warrant in January, yet the Proclamation issued not out till September after. 7. That the whole Council-Board of Ireland had not only condescended, but also pressed him to it. 8. The necessity of the kingdom required the same; for if the gentlemen had the Ports open to go to Spain, and their scholars to Doway, Rheims or St. Omers, it were likely that at their return they would put fire both in Church and State, and produce very sad events, by practising to distemper both. 9. He conceived the the king, as great master of the family, might restrain whom he pleased from departing his kingdom without his privity: and here it was not lawful for any to go from England without licence; how much more necessary was this from Ireland!

To the Proofs he answered, 1st, For Desmond, he granted he was restrained indeed, but not for any suit of law betwixt them, but because at that time he stood charged with Treason before the Council in Ireland, for practising against the life of one sir Valentine Cooke. 2. For the lord Roch, he had oftentimes marvelled with what reason the man at that time could seek a Licence, seeing he was a prisoner for debt in the castle of Dublin; and if he had granted a licence to him, then it had been a far more just charge of Treason than now. 3. For Marchatee, he was afraid of his going to Spain; and if he had intended to go for England, and complain of himself, he would not have refused him liberty, as he never did to any. 4. That the Committee of Irish was not restrained by him, and therefore did not concern him at all. 5. That for Parry, he was fined indeed; but that it is expressly said in his Sentence, that it was not for coming over without licence, (as is suggested) but for sundry Contempts against the Council-Board in Ireland. 5. That he had replied in the last Article, a Remonstrance was no Proof at all. He concluded, that he hoped the least suspicion of Treason could not accrue to him from the Article: for Oppression or Misdemeanour, when it was laid to his Charge, he made no doubt but he should be able to answer it.

The same day a new man was hurried out against him (Mr. *Whitlock*); who having passed over the 17th and 18th Articles, rested on the 19th, about the Oath administered to the Scots in Ireland, and charged thus:

That it was the height of his tyranny, not only to domineer over the bodies, but also over the consciences of men; to which purpose, he had enjoined an Oath to the Scots in Ireland: and because some out of tenderness of conscience did refuse to take the same, he had fined them in great sums of money, banished a great number from that kingdom, called all that nation Traitors and Rebels; and said, if ever he returned home from England, he would root them out both stock and branch.

For Proof of this, 1. Sir Jammy Mountgomery was produced; who declared at large how that oath was contrived. 2. Sir Robert

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Maxwell of Orchiardon, who spoke to the same purpose. 3. Sir John Clotworthy, who declared, that a great number had fled the kingdom for fear of that oath. 4. One Mr. Samuel, who deposed, that upon the 10th Oct. 1638, he heard the Deputy say these words, 'That 'if he returned, he would root them out stock 'and branch.'—They concluded, That this was a point of the most tyrannical and arbitrary government that before this time was ever heard of, not only to lord it over the fortunes, but also over the souls of men: and that it rested only in the parliament, which hath the legislative power, to enjoin oaths. And that therefore this was one of the chief points he had done against the privileges and liberty of the subject.

The Lieutenant replied, That every new Article acquainted him with a new Treason; that if he had done any thing in all his life acceptable to the king and country, he conceived it to be this.

To these Particulars; 1. He desired the lords would call to mind the condition of those times; no man (pointing to my Lord Steward) knows better than your lordship, who had then the chiefest place in his majesty's service. I would be very sorry to rub (said he) old sores, especially seeing I hope things are in a fair way to a firm peace, and I wish that I may not be deceived, that is, that it may be so; only thus much I may say, we had then greater fears and apprehensions in Ireland, lest the Scots in the kingdom (who were above 100,000 souls) might have joined with their countrymen at home, for the disturbance of our peace: mean time we detected a Treason of betraying of the Castle of Knockfergus to a great man in that kingdom, (whose name I now spare) by one Freeman, who upon the discovery was executed. The Council-Board therefore in Ireland resolved to prescribe the Scots an oath, whereby they might declare their discontent at their countrymen's proceedings, and oblige themselves to the king's service: But while we were about this, they of their own accord came to Dublin to petition for it, and took it with a wonderful alacrity and heartiness; so that it is a marvellous falsehood for any man to say it was invented, or violently enjoined by me.

2. About the same time the same Oath, *verbum verbo*, was by the Council of England prescribed to the Scots at London, and elsewhere; which was no small encouragement to us in Ireland.

3. I had (said he) which I never shewed, because I had no need before this time, a special Warrant from the king, all written with his own hand, to that effect: and when the king commands a matter not contrary to law, truly I (said he) do conceive it both contrary to law and conscience not to yield him all due obedience. For the Proof brought against him, there was nothing seemed to be of any moment but the Words.

For the first Words, 'That he had called all 'the nation Rebels and Traitors,' he said there was no Proof at all, nor indeed could there be any: for if I had said it, (quoth he) I had been perfectly out of my wits; and, he thanked God, such irrational speeches used not to escape him. He honoured that kingdom very much, because it was the native soil of our dread sovereign, his gracious master; and because he knew a part, yea, (he hoped) the greatest part of them had been, and ever will be, as loyal and dutiful to the king as any other of his subjects: and of those too who had subscribed that unhappy combination, he knew a great many had done it against their hearts and wills, and would be ever ready upon occasion to remonstrate the same, by adhering to the king's service. So that this Accusation was nothing but a wresting and perverting his words and meaning, of purpose to make him odious, and irritate a whole nation against him.

For the other Words, they were proved only by one Witness, which could make no sufficient faith; and that witness too he would evince, if not of perjury, yet of a notable mistake; for he had sworn positively that he had spoken these words the 10th of October, whereas he was come out of Ireland into England the 12th of Sept. before, and was at London the 21st.

For those that had fled the kingdom because of that Oath, he knew none such; and if they did, they fled into Scotland; which might sufficiently argue their intentions and resolutions. For his part, if they were not willing to give that testimony of their loyalty to their prince, although he had known of their departure, he would have been very loth to have kept them against their wills, but should have been gladly rid of them, and have made them a bridge to be gone, rather than stay.

April 5.

Upon Monday, Master *Whitlock* proceeded to the 20th Article, and told him, That because the matter was intervenient, *et consimilis naturæ*, they had resolved to join the five next Articles together, because all of them tended to one point or period; that is, to shew what bad design he had, to have subdued the kingdoms both of England and Scotland by force of arms, and to reduce them to that Arbitrary Government he had lately introduced into Ireland.

The Lieutenant intreated that they would proceed according to the Order prescribed by the house, which was Article by Article: he said, five Articles were many, the matter weighty, his memory treacherous, his judgment weak.

It was bitterly replied by Master *Glyn*, That it did not become the prisoner at the bar to prescribe them in what way they should give in their Evidences.

The Lieutenant modestly answered, That if he stood in his place, he would perhaps crave the like favour, unless his abilities did furnish him with more strength than he could find in himself: for his part, he was contented they

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should proceed any way, always provided they would grant him a competent time for replying.

Then *Whitlock* went on, and told the lords, That something in those Articles concerned the Scotish, something the English nation. That which concerned the Scotish he reduced to five Heads:

1. That the Deputy had said at the Council-Board, 'That the Scots Demands contained 'sufficient matter to persuade to an offensive 'war.'

2. 'That the same Demands did strike at 'the root and life of monarchical government, 'and were only to be answered by the sword.'

3. That he caused some Scotish goods and ships to be seized on in Ireland.

4. That he had engaged the Irish parliament, by their Declaration, in that war against the Scots.

5. That by all possible means he had put bad thoughts and suspicions into his majesty against his Scotish subjects, and laboured to make a national quarrel between them and England; which, if the king's piety and the prudence of better-affected statesmen had not prevented, could not have been soddered up again without much blood.

Concerning England, his Speeches were either before or after the Parliament:

1. Before his creature and bosom-friend sir George Ratcliff, he had said to sir Robert King, when he was doubting how the king might have Monies to pay his Armies, 'That the 'king had 400,000*l.* in his purse, 30,000 men 'in the field, and his sword by his side; and if 'he wanted money afterwards, who would pity 'him?'

2. That his brother sir George Wentworth had said to sir Robert Barington, upon the dissolution of the last Parliament, 'That seeing 'the English would not grant Supply to the 'king, it seems they were weary of their peace, 'and desired to be conquered a second time.'

3. That he himself, upon a discourse with the primate of Ireland, had said, 'That he was 'much of the mind of those English Divines, 'who maintained it lawful for a king, having 'tried the affection and benevolence of his 'people, and then denied their help, upon an 'inevitable necessity and present danger of 'the kingdom, that he might use his Preroga-'tive for his own Supply, and the Defence of 'his subjects.'

4. To the lord Conway, in a discourse, he had said, 'That if the Parliament' (meaning the last Parliament) 'should not grant a com-'petent Supply, that then the king was ac-'quitted before God and man, and might use 'the authority put into his hands.'

5. That he did say at the Council Board, 'If 'the Parliament should deny to help the king, 'he would take any other way he could for his 'majesty's service and assistance.'

His Expressions after the Parliament were two:

1. 'That the Parliament had forsaken the 'king, and that the king should not suffer him-'self to be over mastered by the frowardness, 'obstinacy, and stubbornness of his people.'

2. 'That if his majesty pleased to employ 'Forces, he had some in Ireland that might 'serve to reduce this kingdom.'

The Proofs for the Scots Particulars were these:

1. The lord Traquair, who was indeed very favourable to the Lord Lieutenant, and spake nothing to his disadvantage but what was screwed from him: with much difficulty he told them, That when he gave in the Demands, he heard him say, 'That it was high time for the king to 'put himself into a posture of war;' but that first all the council of England said the same as well as he. 2ndly, That it was a double supposition: 1. That the Demands were truly given in. 2. That there was no other remedy left but arms, to reduce them.

2. The earl of Morton's testimony (being sick himself) was produced, and it was one and the same with the Article.

3. Sir Henry Vane was examined, who declared, That he had heard the Lieutenant to advise the king to an Offensive War, when his own judgment was for a Defensive.

4. The Testimony of the earl of Northumberland was produced, which was the very same with sir Henry Vane's.

5. The Treasurer of England deposed the same with Traquair.

6. One Beane from Ireland told, That he had known ships seized on there; but by whose procurement or warrant, he knew not.

To the Articles about England:

1. Sir Robert King and the lord Ranelagh deposed the same, That sir Robert King and the lord Ranelagh had heard sir George Ratcliff speak those words in the Article.

2. Sir Robert Barington, of sir George Wentworth.

3. The Primate's Testimony (who is sick) was the same with the Article.

4. The lord Conway deposed the same with the Article.

5. Sir Henry Vane deposed, he had heard those words spoken at the Council Board.

For the Words spoken after the Parliament:

To the first, sir Tho. Jermyne, lord Newburg, earl of Bristol, earl of Holland, were examined. Bristol did mince the matter, but Holland's testimony was express, because of the exceeding great love he carried to the man.

For the last, which were the most dangerous Speeches, (about reducing of this kingdom) there was only sir Henry Vane's testimony;*

* "The ruin that last act brought to the king was irreparable; for, besides that it served their turn (which no question they had discovered before) to prove those Words against the earl of Strafford, which sir Harry Vane so punctually remembered; and besides, that it was matter of horror to the counsellors, to find that they might be arraigned for every rash, every inconsiderate, every imperious expression or word they had used there; and so made them more

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who declared only thus, That he had heard either those words, or the like.

Here some of the Lieutenant's friends shewed themselves:

1. The lord Savil, who desired of sir Henry Vane to know whether he said 'their,' or 'this,' or 'that kingdom;' and withal said, It was very hard to condemn a man for Treason upon such petit circumstances.

2. The earl of Southampton desired to know, whether sir Henry Vane would swear those words positively or not. Sir Henry Vane said, Positively either them or the like. The Earl replied, That under favour 'those or the like' could not be positive.

3. The earl of Clare desired to know what could be meant by 'this' kingdom; for his part (he said), he thought it meant of the kingdom of Scotland, to which the word 'this' might very well be relative, that kingdom being only mentioned in the preceding discourse: and that he was the more ready to be of that opinion, because he could not see by what grammatical construction it could be gathered from his words, that he meant to reduce England, which neither then was, neither is now (God be thanked) out of the way of obedience, nor upon rebellious courses.

They at last concluded the Charge, That the Words were so monstrous, that to aggravate them was to allay them; and therefore they would simply leave them to the Judgment of the Lords.

The Lieutenant's Reply was,

That though the heaping up of those Articles had put him to a great confusion, yet he would endeavour to bring his Answer into the best method he could; and first he would reply to the Proof, then add something in general for himself, in what a hard taking and lamentable condition he was, to have his private discourses, his most intimate and bosom friends, searched and sifted to the least circumstance, that he might seem guilty of that which, by God's assistance, he should never be.

To the lord Traquair's and the deputy's Depositions, he thought their Proofs did not much stick upon him. For upon the Suppositions, 1. That the Demands were true; 2. That they were not justifiable; 3. That no other course could prevail: He could not see what other advice he could possibly give the king, than to put himself into a posture of war, especially seeing then there were frequent reports of the Scots invading or entering into England; nor was he of any other mind than all the rest of the Council-Board.

For that of Morton's, he doth not positively remember the Words, but if the Demands were read, perhaps they would imply nothing less; and if so, how otherwise to be answered but by the sword, and other means being first essayed, which is ever to be supposed?

For sir Henry Vane's and Northumberland's Testimony, about persuading of an offensive war, he said, He remembered it very well, and thought it as free for him to give his opinion for an offensive, as they for a defensive War; Opinions, said he, if they be attended with obstinacy or pertinacy, may make an heretic, but that they ever made a traitor, he never heard it till now: nor, under favour, should I be an heretic either (said he); for as I was then, so am I now, most willing to acknowledge my weakness, and correct my errors, whereof no man hath more, or is more sensible of them, than I myself; yet, if that opinion of mine had been followed, it might perhaps have spared us

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engaged to servile applications: it banished for ever all future freedom from that board, and those persons, from whom his majesty was to expect advice in his greatest streights; all men satisfying themselves, 'that they were no more 'obliged to deliver their opinions there freely, 'when they might be impeached in another 'place, for so doing;' and the evincing this so useful doctrine, was without doubt more the design of those grand managers, than any hope they had, of receiving further information thereby, than they had before.—And for my part I must ask leave of those noble lords, who after the king's consent gave themselves liberty to be examined, to say, that if they had well considered the oath they had taken when they were admitted to that society, which was 'to keep secret all matters 'committed and revealed to them, or that 'should be treated of secretly in council,' they would not have believed, that the king himself could have dispensed with that part of their oath. It is true, there is another clause in their oath, that allows them with the king's consent to reveal a matter of council; but that is, only what shall touch another counsellor; which they are not to do without the leave of the king, or the council." Lord Clarendon.

The noble historian relates in a lively manner, the scene which took place in the House of Commons on young sir Harry Vane's disclosure of his having purloined his father's Papers; (see p. 1457) and assigns the following causes of old sir H. Vane's enmity against Strafford: "Sir H. Vane had not far to look back to the time that the Earl had with great earnestness opposed his being made Secretary, and prevailed for above a month's delay; which, though it was done with great reason and justice by the Earl, on the behalf of an old fellow servant, and his very good friend sir John Coke (who was to be, and afterwards was, removed to let him in) yet the justice to the one, lessened not the sense of unkindness to the other: after which, or about the same time (which it may be made the other to be the more virulently remembered) being to be made earl of Strafford, he would needs in that patent have a new creation of a barony, and was made baron of Raby, a house belonging to sir Henry Vane, and an honour he made account should belong to himself, which was an act of the most unnecessary provocation (though he contemned the man with marvellous scorn) that I have known, and I believe was the chief occasion of the loss of his head."

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some Money, said he, and some reputation too, of which we have been prodigal enough.

For the last, about the Ships, it proves nothing: but he would willingly confess, that some ships were there detained, and that by himself and his own direction, as Vice-Admiral of Connaught, but it was at the command of the Lord Admiral the earl of Northumberland; and produced his Letter to that purpose.

To the English Proof: He marvelled much how sir George Ratcliff's words could be put upon him; Sir George, though alledged to be his bosom-friend, yet, had thoughts of his own, and he, the earl, might have other thoughts in his bosom, and use other expressions than sir George Ratcliff: No man, said he, can commit Treason by his Attorney; and should I, by my friend sir George, as by a proxy?

For his Brother, he never knew him before so rash; but that was nothing to him, except they could prove a nearer identity than nature had instituted, and that his brother's Words and his were all one: yet withal he conceived, that his brother's words might be very well understood of the Scots conquering England, but not at all of the Irish; and so he wished with all his heart, that he had not spoken something which is like a prophecy.

To the Primate's Testimony (with all reverence to his integrity be it spoken), he is but one witness, and in law can prove nothing: Add to this (said he), that it was a private discourse between him and me, and perhaps spoken by me *tentandi gratia;* and how far this should be laid to a man's charge, let your lordships judge.

Yea, this seems to me against humanity itself, and will make the society of men so dangerous and loathsome to us, that our dwelling-houses will be turned to cells, and our towns to desarts: That which God and nature, our Tongues, have bestowed upon us, for the greater comfort of venting our own conceptions, or craving the advice of wiser and learneder men, should become snares and burdens to us, by a curious and needless fear; yet if my Words be taken, said he, with all that went before and followed after, I see no danger in it.

To the lord Conway I may reply the same, with this Addition, That it is a very natural motion for a man to preserve himself; every creature hath this privilege, and shall we deny it to monarchy, provided this be done in a lawful, though in an extraordinary way? This grain of salt must be added to season all my discourse.

To that of sir Henry Vane, of offering my Service to the king, I thank him for the Testimony, and think he hath done me much honour thereby; but if he or any body else do suspect that his majesty will employ me in unlawful enterprizes, I shall think them more liable to the charge of Treason than myself.

To the subsequent Testimonies, I shall not need to wrestle about them much, only the last of sir Henry Vane's pinches, and lies sore upon me; but to that which the earl of Clare, and I thank him for it, hath said already, give me leave to add this, That the Testimony of one man is not a sufficient Witness, nor can a man be accused, much less condemned, of Treason upon this; and for that read the Stat. Hen. 7, 12, and of Edw. 6, 5.

Now, my lords, (said he) to give you further satisfaction, I shall desire all the Lords of the Council which were then present, only to the number of eight, may be examined whether they heard these Words or not; for the Archbishop and sir Francis Windebank, they cannot be had; sir Henry Vane gives the Testimony, I deny it; four only remain.

1. The earl of Northumberland's Testimony, which was read, had declared expressly, that he had never heard those Words, nor any like them, from the lord Strafford, but he spake with great honour and regard to the kingdom of England.

2. The marquis Hamilton, who declared upon his oath, that he had never heard such words, but that he had heard the Lieutenant often say, that the king was to rule his royal power *candide et caste*; that it would never be well for this kingdom till the prerogative of the Crown and the Privilege of the Subject went in one place together; and that Parliaments were the happiest way to keep a correspondence between the king and people.

The very same was delivered by the Lord Treasurer, and the lord Cottington.

Now, my lords, you may marvel how these Words rested only on the ears of sir Henry Vane: but, my lords, (said he) that I may remove all scruple from you, I will make it evident, that there was not the least intention that the Irish Army should set a foot in England; and then, I hope, you will conceive that I had no meaning to reduce this kingdom.

This he made clear by the Testimony of Northumberland, the Oaths of marquis Hamilton, lord Cottington, Lord Treasurer, sir Thomas Lucas, who only were privy to that matter.

For other of my Words, my lords, (said he) I desire you would not take them by halves; if so, who should be free from treason; Certainly, if such a precedent take footing, Westminster-hall shall be more troubled with treason than with common-law; look therefore to the antecedents and consequents of my Speeches, and you shall find the state of the question clearly altered: the antecedents were upon an absolute or inevitable necessity, upon a present invasion, when the Remedy of a parliament cannot be expected; the consequents, for the Defence of the kingdom, which accounts afterward to the parliament. The qualifications too in a lawful, convenient, and ordinary way, so far as the present necessity can permit. Add but these, and which of you are not of my mind? Is the king endowed with no power from the Lord? Is he not 'publicus inspector regni?' Stands it not him in hand to do something on present necessities?

And that these were his words, he often proved, over and over again, by the marquis,

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by the Lord Treasurer, Cottington, sir Thq. Jermyne.

My lords, what I have kept to the last (said he) is this, and I would intreat you seriously to think of it: If a man's table, his bed, his house, his brother, his friends (and that too after they have given an oath of secrecy) are to be racked to find out Treason against him, who never knew what it meant, what earthly man shall pass free from treason? Let my misfortune, my lords, be your advertisement: your wise ancestors were glad to put bands and limits to this lion, Treason; if you give him the large scope of Words to range into, he will at last pull you or yours all to pieces.

But, my lords, I did never think till now, that matter of Opinion should be objected as matter of Treason.

For, 1. Opinions are free, and men may argue both *Pro* and *Con*, in all faculties, without any stain of reputation; otherwise all consultations would be vain.

2. I may be of another Judgment than I declare myself, to be, of opinion, perhaps, to gain better arguments for the maintenance of my own grounds.

3. Many, and myself oftentimes, have propounded my Opinion; yet upon hearing better Judgments, have presently changed it.

4. We use to strain our Opinions too high sometimes, that we may meet in a just moderation with those whom we conceive in the other extremity to be too low.

5. It is expressly commanded by the Stat. Hen. 6, 9. That though a man should say, 'the king is not lawful heir to the crown, 'and may be deposed,' yet he is not to be charged with Treason, but only with Felony; and I hope, my lords, those Words are of a more transcendent and superlative nature, than any alledged by me to be spoken. But, my lords, (said he) lay it to your hearts, it must come to you; you and your posterity are they whom God and nature, birth and education have fitted to beautify the royal throne, and to sustain the weighty affairs of the kingdom; if to give your Opinions in political agitations should be accounted Treason, who will be willing to serve the king, or what a dilemma are you in? If, being sworn counsellors, you speak not your minds freely, you are convict of Perjury; if you do, perhaps of Treason. What detriment, what incommodity shall fall to king and kingdom, if this be permitted! which of you hereafter will adventure, yea dare adventure so much as to help by your Advice, unless you be weary of your lives, your estates, your posterity, yea your very honour? Let me never live longer than to see this confusion—yea, I may say it, this inhumanity in England. For my part (my lords), I here confess myself, I ever have, and ever shall speak my opinion freely in any thing that may concern the honour and safety, either of my gracious king or my dear country, though the sword be two-edged; fearing rather Him that killeth the soul, than him whose power reaches only to the body.

Nor do I see how I am culpable of Treason, unless it be treason for not being infallible; and if it be so, my lords, you have this rag of mortality before you, loaden with many infirmities; though you pull this into shreds, yet there is no great loss; yea, there may be a great gain, if by the same I may seem to have dared too far, to give a testimony to the world of an innocent conscience towards God, and a resolute loyalty towards my prince (which have ever been my only pole-stars in the whole course of my life): and if by spilling of mine, there be not a way found how to trace out the blood of the nobility (which I hope your lordships will look to), there is no disadvantage at all suffered by the loss of me. (You have his very words as near as I could recollect.)

Tuesday was a day of rest.

April 7.

Upon Wednesday *Whitlock* charged thus: That the preceding Articles were of so high a consequence, and of so transcendent a nature, that nothing wanted to make up the perfect measure of the most horrid treason and monstrous attempt that ever by a native was intended against his king and country, by putting these designed projects into execution; which had undoubtedly happened to the ruin and subversion both of Church and State, had not the clemency and goodness of the prince, and the piety and carefulness of the well-affected peers, timously foreseen and prevented the same: that still the principles of tyranny and oppression had lodged within his bosom, and therefore had burst forth into these Expressions and Advices contained in the following Articles; where first in the Twenty-Fifth they charged him with three things:

1. That he had advised the king to a rigorous and unlawful exaction of Ship-Money.

2. That he had given counsel, That if the Sheriffs should deny their best endeavours and assistances to that effect, they should be sent for, and be fined and imprisoned by the Star-Chamber.

3. That when the aldermen of London had in all humility represented the causes why the Ship-Money could not be collected amongst them, and had given in the Reasons why they refused to give in a list of their Names, within their city, who were able to afford the Loan-Money; he in a contemptuous and tyrannical manner, in the face of the Council-Board, had said to the king: 'Sir, these men, because of 'their obstinacy and frowardness, deserved 'very well to be fined, ransomed, and laid by 'the heels; and it will never go well with your 'service, until some of them be hanged up for 'examples to others.'

The Proofs were these:

1. The bishop of *London* Lord Treasurer, who declared, That he remembered the Words very well, that the Lord-Lieutenant had advised the king to cause the Ship-Money to be gathered in; but he remembered withal, that both himself and all the Council had done the

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like; and that it was upon a present necessity, and defect of Money for entertaining the Army, which (the condition of the times considered) they all conceived was by any means to be kept on foot.

2. Alderman *Wiseman* declared, that upon an humble Remonstrance made to the Council-Board, the City would take it ill, if a Tax-Roll should be delivered of their estates who were thought able for the Loan-Money; the lord Strafford said, They ought to be fined, ransomed, and laid by the heels: but for words of hanging them up, he heard not at all.

3. The earl of *Berkshire* declared, That the lord Strafford had said, That upon the refusal of such a Service enjoined by the king's peremptory command, it was his opinion they might be fined.

4. Alderman *Garway* attested the preceding Words; and withal added, that the Lord Lieutenant, to his best remembrance, had said, 'It 'were well for the king's service if some of them 'were hanged up.'

They closed the Charge, That by such undutiful Expressions he had injured the propriety of the Subject, and had put such discontent upon the City, that they were the less willing upon any occasion to concur for the advantage of the king's service.

The Lieutenant replied,

1. That though all the Charge were in the most strict and rigid way or sense verified against him, yet he could not conceive by what interpretation of law it could be reached home to High-Treason: and to that common objection (that the Treason was not individual, but accumulative), he replied, That under favour, he thought, talking in that manner were as much as to say, no Treason at all. Because, 1. That neither in Statute Law, Common Law, nor Practice, there was ever till this time heard of such a matter as accumulative Treason, or a Treason by way of consequence; but that it is a word newly coined to attend a charge newly invented, such an one as never was before. 2. That Treason was a thing of a simple and specificative nature, and therefore could not be so by accumulation: but either must be so in some or either of the Articles, or else could not be so at all. 3. He did conceive that it was against the first principles of nature, and false, That an heap or accumulation should be, and not be, of homogeneous things; and therefore that which in its first being is not treasonable, can never confer to make up an accumulative treason. *Cumulus*, an Heap of Grain, so called, because every, or at least some of the individuals, are grain; if otherways, an heap it may be, but not an heap of grain. Just so, perhaps, these Articles may make up an heap of felonies, oppressions, errors, misdemeanors, and such like (and to the thing itself I shall give an answer, when under that name they shall be charged against me); but they can no ways confer to the making up of Treason, unless some, at the least, be Treason in the individual.

2. That the Testimonies brought against him were all of them single, not two one way; and therefore could not make faith in matter of debt, much less in matter of life and death; yea, that it was against the statute expressly, to impeach a man of High Treason under the evidence of two famous Witnesses, much less to adjudge and convince him upon attestation of one.

3. To the Lord Treasurer's Testimony, he did with all his heart condescend unto it; but upon these grounds only, That there was a present necessity of money; that all the Council-Board had so voiced with him, yea, before himself, and he always thought it presumption in a man not to follow the wiser and more judicious: and that there was then a Sentence of the Star-Chamber for the right of paying Ship-Money. For his part, he would never be more prudent than his teachers, nor give judgment against the Judges. And therefore he thought it not far amiss to advise the king for the collecting of that, which by law was his own, in such a present and urgent necessity. And although his opinion (and it was no more) had been amiss, he hoped that though in case of Religion, being attended with stubbornness and pertinacy, it might come home to Heresy, yet in his case opinion could not reach so far as Treason; unless it be Treason for a man to speak his judgment freely, when he is upon his oath to do the same.

4. For the Words about fining, he had already acknowledged them in his general Answers to be true; but with these qualifications, that it was his Opinion only; that it was upon the refusal (as he conceived) of a just service that he had spoken them, by no means to prejudice the citizens, but to make them the more quick and active in the king's service; that no ill consequence happened upon them; that they were words might have been spared indeed, but innocently, though suddenly spoken, which he hoped might proceed from a man of such a hasty and incircumspect humour as himself, (made so both by nature and his much infirmity of body) without any mind at all to treason; and that if all choleric expressions of that nature should be accounted treasonable, there would be more suits of that kind fly up and down Westmintser-Hall than common-law.

5. To those Words attested by the Alderman, he positively denied them; and hoped they should never rise up against him in judgment, because the testimony was single, and not positive, but only to his best remembrance; and that it was exceeding strange that no man, neither of the council or any other alderman, were so quick to observe them, but only alderman Garway; which he thought sufficient to nullify that single testimony, except he could demonstrate himself to have some rare and singular faculty of hearing.

In the close he desired the Lords, from his misfortune, to provide for their own safety, and seriously to consider what a way was chalked

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out to ruin them both in their lives and estates, if for every Opinion given in Council, or Words suddenly or hastily spoken, they (who are born to wield the great affairs of the kingdom) should be arraigned and sentenced as traitors.

Then they went to the 26th Article and charged thus:

That the lord Strafford, having by his wicked Advices exhausted the king's Treasury, did also counsel him. 1. To imbase the Coin by an allay of Copper-money. 2. To seize upon all the Bullion in the Mint. 3. That in discourse with some of the Aldermen about that business, he had said, The city was more ready to countenance and relieve the rebels than the king; and that the king of France did use to manage such businesses, not by entreaties or requests, but by sending forth his commissaries to take account of mens estates, accompanied with troops of horses.

The Proofs were:

1. Sir *Thomas Edwards*, who declared, That in discourse with the lord Strafford, having remonstrated unto him that their goods were seized on beyond seas, because of the money taken out of the Mint, he told him, 'That if 'the Londoners suffered it, it was deservedly, 'because they had refused the king a small 'Loan of Money upon good security; and that 'he thought them more ready to help the rebels 'than the king.'

2. Mr. *Palmer* declared that he spake something about the king of France; but whether with relation to England, or not, he did not remember.

3. Sir *William Parkise* attested in the same words; and withal, that the lord Cottington was then present, and could declare the whole business.

4. Sir *Ralph Freeman* declared, that in a discourse with the lord Strafford he had said, that the servants in the Mint-House would refuse to work the Copper-Money; and he replied, 'That then it were well to send those 'Servants to the House of Correction.'

They closed the Charge, That by such undutiful Counsel and Words, he had given more than sufficient proof of his design and purpose to subdue this kingdom, and subvert the fundamental law and privileges of the same.

The Lieutenant's Reply:

1. That he expected some Proofs about the two first particulars, but did hear of none; and that it was no small disadvantage to him to be charged with a great many odious crimes by a Book, printed and flying from hand to hand through the whole kingdom, yet when they came to prove, there should be no such thing laid against him.

2. About the Speeches: He ingenuously confessed, that some such thing might perhaps have escaped the door of his lips, when he saw their backwardness to his majesty's service; and as the times were then conditioned, he did not think it much amiss to call that Faction by the name of Rebels; but he thought he had abundantly satisfied for that over-sight (if it was any) at York: For having understood there, the city of London were willing to make a of money, he there, before the great cou the peers, expressed himself to this sense, 'the Londoners had sufficiently made e 'their delays hitherto by their act; t 'king was obliged to their forwardnes 'that he himself should be as ready to 'them as any poor gentleman in Eng About the other Words, he said, That h conference with some of the Londoners came at that time to his hands a Letter the earl of Leicester, then at Paris, w were the Gazettes inclosed, reporting th Cardinal had given some such Order, levy Money by forces. This he said, h told the lord Cottington standing by, the least application or intention conc the English affairs. Cottington being exam upon this, declared the same in the same m

3. To sir Ralph Freeman, he said, That testimony did not concern the Charge a nor did he think any thing amiss in it, t he had said it: If the servants of the Mi fused to work according to directions, the deserve the House of Correction; nor wa treasonable to say, the king might use house for the correction of his servants, as as any man in the city for theirs.

4. He said that there was no great likel that he had committed real acts of Treas when his adverse party was content to m away so much time about Words; neither is there any treason in them, though they been fully verified: and therefore in that (a all other Articles) he reserved a power for counsel to dispute in matter of law.

They went to the 27th Article, and charg thus: That immediately after his appointm to be Lord-Lieutenant of the Army here in Ire land, he shewed what principles of Arbitra Government lurked within his bosom; for his own immediate authority, without a against law, he had laid an impost of m upon the king's subjects. Where they men three Particulars:

1. That he had imposed 8*d. per diem* o the county of York, for entertaining the Train Bands there one whole month.—2. That had sent out Warrants for collecting the sa and threatened to imprison such as should fuse to pay.—3. That he said, That it wa crime nigh to the crime of High-Treason, t to pay the same.—4. They added, That in general Replies he had brought two things his Defence: 1. That this money was free and voluntarily offered by those in Yorkshi 2. That the Great Council of the peers to notice of the same.

To the first they answered, That a Petitio was indeed preferred by the Yorkshire men and a month's pay offered; but that the E Strafford had refused to present the same, upo this exception only, Because in the same Pe had petitioned for a Parliament: whereby h evidently declared what little inclination he had to that way.

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To the second, They appealed to all the lords present, whether any such order did pass before the council of the peers at York.

The Proofs were; 1. A Warrant issued by col. Pennyman for this money, and another by sir Edward Osborne.—2. Sir John Burrows, who declared that he was Clerk to the Great Council, but did remember of no Order; and withal added, that it might have passed at that time when he attended at Rippon.—3. Mr. Dunston, who declared that he had known that money alevied by some musqueteers.—4. By sir William Ingram, who declared that he had heard the Lieutenant say, 'That to refuse 'the same, came nigh to the crime of High-'Treason.'

They concluded the Charge, That by these Particulars it was more than evident what unhappy purpose and traitorous designs he had to subdue this kingdom, and subvert the fundamental laws and privileges.

The Earl replied, First, to the Petition, That it was true, a Petition was drawn up by the Yorkshire Gentlemen; and as true, that he had refused to present the same, because of that clause about the parliament. But the matter was thus: At his majesty's coming to York, it was thought necessary for the Defence of that Country, to keep the Trained-Bands on foot, because the enemy was upon the Borders; and therefore the king directed him to write to all the freeholders in Yorkshire, to see what they would do for their own defence.

The time and place were designed by the king; but the night before the meeting, a small number convened, and in a private and factious way did draw up that Petition. Upon the morrow, at their appointed Dyet, in presence of the whole number, the Petition was presented to him; where he did advise them to leave out that Clause, and that because he knew the king, out of his own gracious disposition, had intended to call a Parliament, which he desired should rather be freely done, than upon the constraint and importunity of Petitions: Moreover, it would seem a mercenary thing in them, at one and the same time to offer a Benevolence, and withal to petition for his favour. Upon this Remonstrance, they were all willing to recal the Petition, and directed him by word of mouth to offer unto the king the month's pay in their names; which he did accordingly in the presence of forty of them, to their no small advantage.

This he proved by sir William Pennyman, sir Paul Neale, sir George Wentworth, sir William Savile, sir Thomas Danby, who all of them declared as much in ample terms; and withal added, That nothing was done upon better grounds of necessity and obedience than the offer of that Money, and that they never had heard any man grudge against it to this time.

For the Second, about the Council of Peers, he alledged, that he never made mention of any Order of theirs; but he remembered very well it was twice propounded before them, that the king had approved it at that time a just and necessary act, and none of the Council had contradicted it; which he conceived as a tacit approbation, and an order in equivalence.—But though that had not been, yet there was nothing done in the business, but at the special desires of the gentlemen themselves, and for their necessary defence and protection; yea, though he had done it by himself alone, yet he conceived he had so much power by his commission (causing the commission to that effect to be read.) That albeit he should mistake his commission, and do some inferior act beyond it, (because military proceedings are not always warranted by the common law) yet it should not be imputed as an act of treason to him. (And to this effect he read a Statute 7 Hen. 2.)

To the Proofs: 1. Col. Pennyman's Warrant, or sir Edward Osborne's, it nothing concerned him; and he doubted not but these worthy gentlemen could justify their own act, and that he had enough to do to answer his own misdemeanours.—2. For sir John Burrowes, he was at Rippon when the proposition was made.—3. That as the Warrant, so neither the execution, troubled him at all.—4. For sir William Ingram, he was but a single testimony, and that such an one too, as he could produce an Evidence to testify he had mistaken himself in his testimony upon oath, if it were not to disadvantage the gentleman.

He concluded, That he had done nothing in that business but upon the Petition of that county, the king's special command, the connivance at least of the Great Council, and upon a present necessity, for the defence and safety of the county.—And so much for Wednesday.

April 8.

Upon Thursday the Committee for the Charge declared that they had done with all the Articles, and were content to wave the last, for reasons best known to themselves: only sir Walter Earle added, That he had some observations to bring forth upon the 22d Article, which he conceived might do much to prove the earl of Strafford's designs for landing the Irish forces in England.* And they were,

* "The seven last Articles," says Whitlock, Memorials, p. 40, "upon the which Whitlock was appointed to manage the Evidence, were matters of very high nature; and some of them, particularly the 24th Article, relating to the design of bringing over the Army in Ireland into Scotland, and so to England to reduce this kingdom. Whitlock having spoken with sir Henry Vane the elder, and with the other witnesses to the 24th Article, and finding that their testimony would not make good the matter of that Article, thought it not honourable for the House of Commons to proceed upon an Article whereof they could not make a clear Proof, and thereupon proposed it to the Committee to omit that Article in his proceedings. The Committee were of the same opinion, but upon sir Walter Earle's undertaking to manage

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1. That in his commission he had power to land them in Wales, or in any part of England, or in Scotland; which were altogether superfluous, unless there had been some purpose for the same. 2. That within two days before the date of the Commission, letters were sent to the lord Bridgewater and Pembroke from sir Francis Windebank, to assist the earl of Worcester in levying forces for the king's service; and these might be supposed to have intended a joining with the Irish. 3. That the lord Ranelagh, at the raising of the Irish Army, did fear such a design as this. 4. That the town of Ayre in Scotland, where the lord Strafford pretended he would land those forces, was fortified with a bulwark, a garrison, and block-house, which would prohibit landing there; and the earl of Argyle's Bounds were divided thence by the sea, and that the bar or entry into the town was very dangerous and shallow.

The Proofs were only the reading of the Commission granted to the lord Strafford.

The Lieutenant replied, 1. That his Commission was the same verbatim with Northumberland's for England, and that it was drawn up by the Council-Board here, and sent over unto him; so no more design in him than in the gentlemen of the English army, nor no larger than that was put upon him. 2. That this was the first time he heard of any such Letters, nor did they concern him more than any of the house. 3. That he was not bound to purge the lord Ranelagh from all his fears, and that he had his own fears too, which God forbid should be evidence of Treason against any man whatsoever! 4. That it seemed the gentleman had better information from that kingdom than himself; yet he would not be confident to say, at Ayre there was never such a thing as a block-house or garrison. But to remove all scruples, (for indeed the road or landing-place is not there safe) he declared that it was his intention to have landed some miles above Ayre, and made only his magazine of that town.—To the earl of Argyle's Bounds, he hoped the gentleman knew they came not on foot out of Ireland, but had ships to waft and transport themselves, and that one of his prime houses (Rosneth) was within some few miles of the same Frith.

The lord Digby finding sir Walter Earle on ground, did handsomely bring him off, and told the lords, That all their Proofs for that Article were not yet ready, and that this was a superfetation only of the Charge; and that in such a business as the plotting of Treason, they must be content sometimes with dark probabilities.

Then Mr. Glyn desired the Lieutenant to resume his Defence, that they might give a repe-

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it, they left that Article to him, upon which Whitlock, after he had enforced the Evidence upon the 23rd Article, sate down: and sir Walter Earle, with much gravity and confidence, began to aggravate the matters in the 24th Article, and the dangerous consequence and high crime in it, and called forth the Witnesses to prove the particulars which he had at length opened. Some of the Witnesses were not in England; those of them who came in being sworn, spake little to the purpose, and did not prove the matter at all of that Article, upon which the knight was very blank and out of countenance. But the earl of Strafford, who lost no advantage of his Defence, rising up from his seat made a low obeysance (as he was used to do) to the Lords, and spake to this effect: 'My lords; I am a poor gentleman, a prisoner 'at the bar, against whom several persons 'learned in the laws, and of great ability for 'pleading, and strength of reason, and other 'noble persons of great parts and eloquence, 'have enforced the particular matters of my 'Charge; and I had well hoped they had been 'drawing towards an end. But now, my lords, 'a new and great pleader sets upon me, tired 'out before, and this noble knight hath laid a 'heavy burden indeed upon my shoulders: he 'hath opened more heinous crimes against me 'than all those gentlemen who have gone be-'fore. The learned gentleman who urged 'the matters of the last Article against me, 'when he came to this 24th Article, sate down 'and seemed to decline it, and yet he left 'nothing material which was not urged home 'by him. But this noble knight goes beyond 'all, and, indeed, beyond the Article itself, ob-'serving things not contained in it, and impos-'sible to be: and could he have proved this, 'it had been truly a miracle. But I humbly 'beg your lordships pardon, I am not willing 'to spend any of your time impertinently; I 'shall only say this, that where nothing is 'proved against me, I know your lordships 'great wisdom and justice will expect no de-'fence from me.' After the Earl was sate down, the lord Digby stood up, and in a very witty rhetorical speech took off sir Walter Earle, desired their lordships to pass by a mistake, that this Article was not intended for prosecution, as might appear by the gentleman's declining of it who managed the former. He moved that this 24th Article might be omitted, and their lordships not to receive any further trouble in the urging of it or defence to it, and that they would be pleased to look upon what that noble knight had said but as a superæ-tation. After the lord Digby had spoken, Whitlock presently rose up, and (after the lords had done smiling) he proceeded with the 25th Article. The queen was present at the trial; enquired who that knight was whom the lord Digby relieved? And being told his name was sir Walter Earle, she said, 'that water-dog did 'bark but not bite, but the rest did bite close.' The earl of Strafford speaking of the Committee who managed the Evidence against him, and particularly of the lawyers, said to a private friend, that Glynne and Maynard used him like advocates, but Palmer and Whitlock used him like gentlemen, and yet left out nothing material to be urged against him."

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tition of their Charge, and so close the process so far as concerned the Matter of Fact.

He replied, That in this case all slackness is speed enough; the matter touched him narrowly, even in his life and estate, yea, in that which he esteemed above them both, his honour and posterity; and therefore he confessed he had no desire to ride post in such a business. That he knew the Gentlemen of the Bar, if they were in his case, would think the time little enough, except their more able judgments could sooner dispatch the matter in hand; and therefore he humbly intreated, that that day might be granted to him for strengthening himself, and recollecting his thoughts and spirits, and to-morrow he would be ready with his last Replies for himself: which, after a little ceremony and contestation, was condescended unto by the house of commons.

April 9.

Upon Friday morning, about eight o'clock, the Lieutenant of the Tower and my lord's chamber-groom came to the Hall, and gave information to the house upon oath, That the lord Strafford was taken with an exceeding great pain, and fit of the stone, and could not upon any condition stir out of his bed.

Mr. *Glyn* replied, That it was a token of his wilfulness, not his weakness, that he had not sent a doctor to testify the same.

The Lord Steward made answer, That a doctor could not be had, perhaps, so soon in a morning; nor was it possible for any physician to give a certain judgment concerning a man's disability by the stone, because there is no outward symptoms that appear.

Mr. *Glyn* excepted, That if he did not appear upon Saturday morning, he should lose the privilege to speak in his own Defence afterwards, and they permitted to proceed.

The Lord Steward replied, That the lords had appointed four of their number to go to the Tower, and learn the just cause of his stay; and if by any means he were able, he should be obliged to come then; if not, humanity and common equity would excuse him.

In the afternoon it was reported that he was dead; of which there can be no better reason given than the humour and genius of the times, that dally with nothing oftener than untruths and calumnies: and certainly there are many men of shallow understandings and weak affections, who either will not, or cannot understand the gentleman's worth; but out of fearful and needless apprehensions are so desirous to hear of his ruin any way, that their busy tongues will dare to anticipate the stroke of justice.

Mr. *Glyn* proffers new Proofs concerning the two-and-twentieth Article.

April 10.*

Upon Saturday morning, he presented himself at the bar, where he expected nothing but repetitions of Charges and Defences; but mean while Mr. Glyn proffers some new Proofs concerning the 22d Article, which the noble lord refused, alleging the process was closed. Mr. Glyn answered, The process is not closed, as long as the business stands unrepealed; and

* This day an affair of the utmost consequence to the Earl of Strafford, since it cost him his life, came before the Commons. Preparatory to it, the doors of the house were ordered to be shut, the key brought up, and none to go out without leave: then Mr. Glynn reported from the committee in the Earl of Strafford's Cause, That they had some further evidence to corroborate the latter part of the 23rd Article against him: thereupon sir Henry Vane, the younger, and Mr. Pym, were enjoined by the house to declare their whole knowledge concerning the matters contained in that Article against the Earl, and how and by what means they came by it. When they had done this, a Paper was produced by Mr. Pym, and so much of it read by him as concerned the Earl of Strafford, but afterwards he was ordered to read it all. Notice being then given that a Message from the lords waited at the door, they were ordered to be called in; but all the members to keep their seats, and none to stir out without leave.—The further Examination of this business is left short in the Journals; it is only said there, That the Treasurer, sir Henry Vane, was enjoined by the house to answer, Whether he did take any Notes to the effect of those Notes already read, at what time, and upon what occasion? The Answer is omitted; and this is all which is said, therein, at this time.—In a marginal note of the printed Journals, we are told, 'That this Paper was a Copy of Notes, taken 'at a Giunto of the privy council, for the Scots 'affairs, about the 5th of May last.' Commons Journals, vol. 2, p. 118.

April 12. Heads of a Conference to be desired with the lords were argued in the house. "1st, A Narrative of the Evidence mentioned on Saturday last, to which two members of this house were ready to depose. 2ndly, That the house having taken it into consideration, did conceive it very material; but, in regard of the danger and distractions of the present times, and that much time may be spent in the debate touching the admitting of this Evidence, they resolve to come to a general reply, setting aside that evidence for this time, &c. 3rdly, That upon occasion of discovery of this Evidence, a Paper was read in the house whereby it did appear, that at the same time the dangerous words were spoken by the earl of Strafford, touching the bringing the Irish army into England, other words were then spoken by two others, then present, decyphered by these letters, *L. Arch. L. Cott.* (by which we conceive is meant the lord archbishop of Canterbury and lord Cottington) very full of pernicious counsels to the king, and slander to the commons assembled in the last parliament, as would appear by the Paper, if their lordships would please to have it read, which the committee is commanded to read, and leave it to their consideration: and to desire their lordships will take some course that

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that it did not become a prisoner at the bar to prescribe a method of proceeding to the house of commons in England.

It was answered by the Lord Lieutenant, That he thought it stood him in hand as nearly to maintain his life, as it did any to pursue him for it; yet he was willing they should bring in new Proofs, provided that he might have time to make new Replies, and withal use some new Witnesses in some Articles that concern his justification.

The lord Newark, upon these motions, desired the house might be adjourned: after two hours stay, and a hot conflict among the Lords, they returned, and the Lord Steward commanded the Order to be read, which consisted of two Articles:

1. "That as it was granted unto them to bring in Proofs concerning the 22d. Article, so it was to the lord Strafford to make his Replies, and use his Witness concerning the same.

2. "That if they went to no more Articles, no more should the lord Strafford; but if they did, that he might pitch upon any one Article as he pleased."

The House of Commons presently declined all other Articles, and conceived the Order expressly for them, restraining him from all other Articles, except that only.

He conceived the Order was for him, and said, That seeing they had picked out their Article, it was against all common equity to tie up his hands, and not admit of a common rule for them both. They replied, That when the Article was canvassed, they reserved Witnesses till another time. He answered, That he had done the same upon every Article. They replied, That the house had refused his Reservation. He answered, Nor had they passed an order for theirs.

Upon this new contestation the House rose again, and was adjourned. It is supposed that the House of Commons had the better ground, because they had particularly named their Wit-

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it may be duly examined by whom these words were spoken, that there might be some further proceedings to prevent the dangers that may ensue thereupon; and that these counsels may be looked into, and searched to the bottom."

The Conference being held, as was desired, Mr. Glynn reported to the house, 'That the 'Lord Steward did speak for the rest of the 'lords; and told them, that the lords had 'agreed this house may proceed as formerly was 'intended, before the offer of further Evidence 'was proposed: the lord Strafford to recollect 'his Evidence first, and, that being done, 'the members of the house of commons to 'state theirs. All this to be ended to-morrow 'morning; of which they would give the earl 'of Strafford notice.'

Mr. Whitlock informs us, That the next day, April 13, the Earl being brought to Westminster, and both houses being met, the Notes were openly read: the title of them was, "No Dan-"ger of a War with Scotland, if offensive, not "defensive." Then followed the Opinions interlocutory.

K. C. [King Charles.] 'How can we un-'dertake an offensive war, if we have no more 'money?'

L. L. Ir. [Lord Lieutenant of Ireland, Earl of Strafford.] 'Borrow of the city 100,000*l.*; 'go on vigorously to levy Ship Money; your 'majesty having tried the affection of your peo-'ple, you are absolved and loose from all rule 'of government, and to do what power will ad-'mit. Your majesty having tried all ways, and 'being refused, shall be acquitted before God 'and man: and you have an army in Ireland, 'that you may employ to reduce this kingdom 'to obedience: for I am confident the Scots 'cannot hold out five months."

L. Arch. [Laud.] 'You have tried all 'ways, and have always been denied, it is now 'lawful to take it by force.'

L. Cot. [Cottington.] 'Leagues abroad 'there may be made for the defence of the king-'dom: the lower house are weary of the king 'and church: all ways shall be just to raise 'money by, in this inevitable necessity, and are 'to be used, being lawful.'

L. Arch. 'For an offensive, not any defen-'sive war.'

L. L. Ir. 'The town is full of lords, put the 'Commission of Array on foot, and if any of 'them stir we will make them smart.'

Mr. Whitlock proceeds to tell us, "That the foregoing Paper, of so great consequence, was missing at the Committee; and, by the Earl's Answer, it was supposed he had seen it, and that it was conveyed to him (Mr. W.) by some of the Committee: that he, being in the Chair, and having the charge and custody of all the Papers, was suspected more than others to have acted this piece of treachery." He adds, "That great inquiry and search was made for the Paper, but it could not then be found. He told them when it was missing; and that amongst such a multitude of Papers as he had in his custody, it was not easy to see that he had them all again, when they were brought forth, or any of them called for: that he never shewed this Paper to any but the Committee, and knew not who had it, or what was become of it; nor did convey it, or know of any that had conveyed it away. But this would not serve; the house was acquainted with the missing of the Paper, and they ordered, 'That every one of the Com-'mittee should make a solemn protestation in 'the house, that they did not convey it away, 'nor knew what was become of it.' All of them made this protestation, and the lord Digby with more earnestness and deeper imprecations than any of the rest; yet afterwards, at the Battle of Naseby, the King's Cabinet being taken, among the papers in it was a copy of these Notes, under the lord Digby's hand; whereby Whitlock was cleared, and the conveyer of the Paper to the king, and from him to the Earl of Strafford, was fully discovered." See 2 Cobb. Parl. Hist. 744.

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nesses in their Reservation, the lord Strafford not so; they pressed but one Article, he many. But such was the pleasure of the Lords, that though the matter did not deserve to be much stood upon, yet after two hours vehement agitation of the business in the Upper House, they returned, and the Order was in favour to this effect:

1. That both of them should wave their new Proofs, and go immediately to that which follows. 2. If they would not do so, the Lords conceived themselves common Judges to both, and therefore would not deny Strafford the liberty of pitching upon what Article he pleased, as they had done. 3. That both of them should name their Witnesses at the bar instantly.

The Commons were much grieved at this, yet desired him to nominate his Witnesses, if he would make any benefit of the Order. He answered, That he would nominate after them, because they were first in Order. They replied, That he knew their Article, they not his. He said, He was to bring Proofs about the 2d, 5th, 13th, and the 15th Articles, and did desire them that they would now proceed to nomination.

But they told him, they could not embrace the Order without advice of the whole house. Then on a sudden a mighty noise followed of the whole house, 'Withdraw! Withdraw!' and was in so uncouth and tumultuous a confusion, that it produced both admiration and fear in the beholders, wherein we might easily feel the pulse of a distempered state. Both the Houses break up, not appointing so much as the next Dyet; each man's countenance spake anger and discontent, and nothing sounded in our ears all Sunday, but terrors and affrightments of a present division and breach between the two houses: That the house of commons would declare him a Traitor, and all such Lords too as were his adherents; that he should be no more heard in public, that (though parties, and not his peers) they would vote in his Sentence: That a Bill of Attainder should presently be drawn up against him, and that nothing should content them but present Execution.

April 12.

Big words flew up and down all Monday. That whole day was spent in a Conference betwixt the houses, without any meeting in the Hall; but the Lords (who had learned, as it seems, to foresee their own ruin by his misfortune, and now conceive that Monarchy and Nobility are of such identity, that one and the same is the diminution of both) kept fast to their Conclusion, and would not pass from their Order, notwithstanding all the many dangers represented: so that the House of Commons were constrained at last to give way, and embrace the first part of the Order, by waving Witnesses on both sides.

This hath been no small discouragement to his enemies; for a more real demonstration of his party amongst the Lords could not have been shewn.

Upon Monday, some of the lords went so high in their heat, as to tell the house of commons, That it was an unnatural motion, for the head to be governed by the tail; That they hated Rebellion as bad as Treason; That the same blood that ennobled their ancestors, did move also in their veins, and therefore they would never suffer themselves to be suppressed by a popular faction.

After a great deal of storm, all was (as well as might be) soddered up again, and Tuesday appointed to be the day for the Lieutenant to resume his Defences, and they their Charge, without any more Proof to be used on either side.

April 13.

Upon Tuesday, the Lord Steward at the entry told them, the Lords had ordered that both their testimonies should be waved, that they should proceed immediately to what followed, so that that day might put an end to what concerned the matter of fact.

The Lord Lieutenant replied, That in all humility and obedience he would submit himself to that, or any other their Decrees whatsoever, though it should reach as far home unto him as his own life; but withal humbly begged, That if hereafter he should be troubled (for they were to speak last) with new matter, or with supplemental Proof, he might have leave to speak something in his own Defence.

The Lord Steward answered, It was all the reason in the world.

The Lieutenant went on thus:

My Lords; This day I stand before you charged with High-Treason: the burden is heavy, yet far the more, in that it hath borrowed the patrociny of the house of commons; if they were not interested, I might express a no less easy, than I do a safe issue and good success to the business: But let neither my weakness plead my innocence, nor their power my guilt. If your lordships will conceive of my Defences, as they are in themselves, without reference to either, (and I shall endeavour so to present them) I hope to go away from hence as clearly justified, as I am now in the testimony of a good conscience by myself. My Lords, I have all along my Charge watched to see that poisoned arrow of Treason, that some men would fain have to be feathered in my heart, and that deadly Cup of Wine, that hath so intoxicated some petty mis-alledged errors, as to put them in the elevation of High-Treason; but in truth it hath not been my quickness to discern any such monster yet within my breast, though now, perhaps, by a sinistrous information, sticking to my clothes. They tell me of a twofold Treason, one against the Statute, another by the Common-Law; this direct, that consecutive; this individual, that accumulative; this in itself, that by way of construction.

For the first, I must, and do acknowledge, that if I had the least suspicion of my own guilt, I would spare your lordships the pains; cast the first stone at myself, and pass sen-

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tence of condemnation against myself: and whether it be so or not, I refer myself to your lordships Judgment and Declaration. You, and only you, (under the favour and protection of my gracious master) are my Judges: under favour, none of the Commons are my Peers, nor can they be my Judges. I shall ever celebrate the providence and wisdom of your noble ancestors, who have put the Keys of Life and Death (so far as concerns you and your posterity) into your own hands, not into the hands of your inferiors; none but your own selves know the rate of your noble blood, none but yourselves must hold the balance in dispensing the same.

I shall proceed in repeating my Defences, as they are reducible to these two main points of Treason: and for Treason against the Statute, (which is the only Treason in effect) nothing is alledged for that, but the 15th, 22d, and 27th, Articles. [Here he brought the Sum of all his Replies made to these three Articles before, and almost in the same words as before; only that testimony of sir Henry Vane's, because it seemed pressing, he stood upon it, and alledged five Reasons for the nullifying thereof.]

1. That it was but a single Testimony, and would not make faith in a matter of Debt, much less in a matter of Life and Death; yea, that it was expressly against the Statute to impeach, much less to condemn, him upon High-Treason, under the testimony of two famous Witnesses.

2. That he was dubious in it, and expressed it with an 'As I do remember,' and 'such or 'such like words.'

3. That all the Council of Eight, except himself, disclaim the Words; as if by a singular providence they had taken hold of his ears only.

4. That at the time the king had levied no Forces in Ireland, and therefore he could not be possibly so impudent as to say to the king, 'That he had an Army there, which he might 'employ for the reducing this kingdom.'

5. That he had proved by Witnesses beyond all exceptions (marquis Hamilton, the Lord Treasurer, the earl of Northumberland, lord Cottington, sir William Pennyman and sir Arthur Terringham), that there was never the least intention to land those forces in England.

[He went on:]

So much for the Articles that concern Individual Treason.

To make up the Constructive Treason, or Treason by way of Accumulation, many Articles are brought against me, as if in a heap of Felonies or Misdemeanors, for in their conceit they reach no higher, some prolifical seed, apt to produce what is treasonable, could lurk. Here I am charged to have designed the ruin and overthrow both of Religion and State. The first seemeth rather to have been used to make me odious than guilty, for there is not the least Proof alledged concerning my confederacy with the Popish Faction, nor could there be any indeed; never a servant in authority beneath the king my master was ever more hated and maligned by those men than myself, and that for an impartial and strict executing of the laws against them.

Here your Lordships may observe, that the greater number of the Witnesses used against me, either from Ireland or from Yorkshire, were men of that Religion: But for my own Resolution (I thank God,) I am ready every hour of the day to seal my dissatisfaction to the Church of Rome with my dearest blood.

But, my Lords, give me leave here to pour forth the grief of my soul before you: these Proceedings against me seem to be exceeding rigorous, and to have more of prejudice than equity, that upon a supposed charge of my hypocrisy or errors in Religion, I should be made so monstrously odious to three kingdoms; a great many thousand eyes have seen my accusations, whose ears shall never hear, that when it came to the upshot I was never accused of them. Is this fair dealing amongst Christians? But I have lost nothing by that: Popular applause was ever nothing in my conceit; the uprightness and integrity of a good conscience was, and ever shall be, my continual feast; and if I can be justified in your lordships judgments from this grand imputation, (as I hope I now am, seeing these gentlemen have thrown down the bucklers) I shall account myself justified by the whole kingdom, because by you, who are the epitome, the better part, yea, the very soul and life of the kingdom.

As for my design against the State, I dare plead as much innocency here, as in matter of my Religion; I have ever admired the wisdom of our ancestors, who have so fixed the pillars of this monarchy, that each of them keep a due proportion and measure with the other; and have so handsomely tied up the nerves and sinews of the state, that the straining of any one may bring danger and sorrow to the whole œconomy. The Prerogative of the Crown, and the Propriety of the Subject, have such mutual relations, this takes protection from that, that foundation and nourishment from this; And as on the lute, if any one string be too high or too lowly wound up, you have lost the harmony; so here the excess of Prerogative is oppression; of pretended Liberty in the subject, disorder and anarchy. The Prerogative must be used as God doth his omnipotency, upon extraordinary occasions; the laws (answerable to that 'Po-'tentia ligata in Creaturis') must have place at other times. And yet there must be a Prerogative, if there must be extraordinary occasions; the propriety of the subjects is ever to be maintained, if it go in equal pace with this; They are fellows and companions, that are and ever must be inseparable in a well-governed kingdom; and no way so fitting, so natural to nourish and entertain both, as the frequent use of parliaments; by those a commerce and acquaintance is kept betwixt the king and subject. These thoughts have gone along with me these 14 years of my public employments, and shall, God willing, to my grave: God, his

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majesty, and my own conscience, yea, and all those who have been most accessary to my inward thoughts and opinions, can bear me witness that I ever did inculcate this, That the happiness of a kingdom consists in a just poize of the king's Prerogative and the Subject's Liberty: and that things would never go well, till they went hand in hand together.

I thank God for it, by my master's favour, and the providence of my ancestors, I have an estate, which so interesteth me in the Commonwealth, that I have no great mind to be a slave but a subject; nor could I wish the cards to be shuffled over again, upon hopes to fall upon a better set; nor did I ever nourish such base mercenary thoughts, as to become a pander to the tyranny and ambition of the greatest man living. No; I have, and ever shall aim at a fair, but a bounded liberty; remembering always that I am a freeman, yet a subject; that I have a right, but under a monarch. But it hath been my misfortune now, when I am greyheaded, to be charged by the mistakers of the times, who are now so highly bent, that all appears to them to be in the extreme for monarchy, which is not for themselves. Hence it is, that designs, words, yea intentions, are brought out for real demonstrations of my misdemeanours; such a multiplying-glass is a prejudicate opinion.

The Articles contain Expressions and Actions; my Expressions either in Ireland or England, my Actions either before or after these late stirs.

[In this order he went through the whole Charge, from the first Article to the last, in an excellent method, and repeated all the sums and heads of what was spoken by him before; only added in the 28th Article, If that one Article had been proved against him, it contained more weighty matter than all the Charge besides; and it had not only been Treason in him but also villainy, to have betrayed the trust of his majesty's Army. Yet because the gentlemen had been sparing, by reason of the times, to insist upon that Article, though it might concern him much, he resolved to keep the same method, and not utter the least expression that might seem to disturb the happy agreement intended, though he wished the same might deceive his expectation: Only thus much he admired, how himself, being an incendiary against the Scots in the 23rd Article, is now become their confederate in the 28th Article; or how he could be charged for betraying Newcastle, and for fighting with Scots at Newborne too, seeing fighting with them was no possible means for betraying the town, but to hinder their passage thither.

That he never advised war farther than, in his poor judgment, concerned the very life of the king's authority, and the safety and honour of his kingdoms. Nor saw he what advantage could be made by a war in Scotland, where nothing could be gained but many hard blows. For his part, he honoured the nation, but he wished they might be ever under their own climate, and had no desire they should be too well acquainted with the better soil of England; But he thought that Article had been added in jest, or as a supernumerary; and he very little suspected to be reckoned a confederate with the Scots, and wished, as he hoped it was, that every Englishman were as free from that imputation as himself; closing his Defence with this speech.]

My lords, You see what may be alledged for this constructive, rather destructive Treason. For my part, I have not the judgment to conceive that such a treason is agreeable either with the fundamental grounds of reason or law: not of reason, for how can that be treason in the lump or mass, which is not so in any of the parts? Or how can that make a thing treasonable, which in itself is not so? Not of law, since neither statute, common-law, nor practice, hath from the beginning of this government ever mentioned such a thing; and where, my lords, hath this fire, without the least appearance of any smoke, lien hid so many hundred years, and now breaks forth into a violent flame to destroy me and my posterity from the earth? My lords, do we not live by laws, and must we be punished by laws before they be made? Far better were it to live by no laws at all, but to be governed by those characters of discretion and virtue that nature hath stamped in us, than to put this necessity of divination upon a man, and to accuse him of the breach of law, before it be a law at all. If a waterman upon the Thames split his boat by grating upon an anchor, and the same have a buoy appending to it, he is to charge his own inobservance; but if it hath none, the owner of the anchor is to pay the loss.

My lords, If this crime, which they call Arbitrary Treason, had been marked by any discerner of the law, the ignorance thereof should be no excuse for me; but if it be no law at all, how can it in rigour or strictness itself condemn me? Beware you do not awake these sleeping lions, by the searching out some neglected moth-eaten records; they may one day tear you and your posterity in pieces: it was your ancestors care to chain them up within the barricadoes of statutes; be not you ambitious to be more skilful and curious than your forefathers in the art of killing.

My lords, It is my present misfortune, for ever yours; and it is not the smallest part of my grief, that not the crime of Treason, but my other sins, (which are exceeding many) have presented me before this bar; and except your lordships wisdoms provide for it, it may be, the shedding of my blood may make way for the tracing of yours: you, your estates, your posterities, lie at the stake. If such learned gentlemen as these, whose tongues are well acquainted with such proceedings, shall be started out against you; if your friends, your counsel denied access unto you; if your professed enemies admitted to witness against you; if every word, intention or circumstance of yours,

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be urged and alledged as treasonable, not because of a statute, but because of a consequence, or construction of lawyers pieced up in a high rhetorical strain and a number of supposed probabilities; I leave it to your lordships consideration, to foresee what may be the issue of such dangerous and recent Precedents.

These Gentlemen tell me they speak in defence of the Commonwealth, against my Arbitrary Laws; give me leave to say it, I speak in defence of the Commonwealth, against their Arbitrary Treason: for if this latitude be admitted, what prejudice shall follow to king and country, if you and your posterity be by the same disenabled from the greatest affairs of the kingdom? For my poor self, were it not for your lordships interest, and the interest of a Saint in Heaven, who hath left me here two pledges on earth, [At this his breath stopp'd, and he shed tears abundantly in mentioning his Wife, which moved his very enemies to compassion.] * I should never take the pains to keep up this ruinous cottage of mine; it is loaden with such infirmities, that in truth I have no great pleasure to carry it about with me any longer: nor could I ever leave it in a better time than this, when I hope the better part of the world would perhaps think, that by this my misfortune I had given a testimony of my integrity to God, my king, and country. I thank God, I count not the afflictions of this present life comparable to that glory, which is to be revealed in the time to come.

My Lords! my Lords! my Lords! Something more I had to say, but my voice and spirits fail me: only I do in all humility and submission cast myself down before your lordships feet, and desire that I might be a Pharos to keep you from shipwreck; do not put such sooks in your own way, which no prudence, no circumspection, can eschew or satisfy, but by your utter ruin. And whether your Judgments in my case, I wish it were not the case of you all, be either for life or death, it shall be righteous in my eyes, and received with a *Te Deum laudamus*: (and then he lifted up his eyes, and said) *In te, Domine, confido, ne confundar in æternum!*†

This he spake with an inimitable life and grace. You have his very words as near as I can remember, only with so much loss and detriment as hath perished by transcribing the Copy from his own mouth. But you desire impartiality, and indeed you have it, and with some grains too of allowance; for I was so afraid of my own affection to the gentleman, that I rather bowed to the other extremity, and therefore have set down his Defences rather to his disadvantage by my rude pen, than in the native colour, to his eternal glory, and the confusion of his enemies.

The repetition of the Charge did not spend much time; they proceeded orderly Article by Article, in the very same words and matter as before; only there was some remarkable flashes that passed from Mr. *Glyn*, who was the man, in the time of their handling.

He told them, That he should represent the lord Strafford as cunning in his Replies, as he had been crafty in his actions; that he waved all that was material, and insisted only upon secondary Proofs; that it was more than evident throughout all his Charge, how he had endeavoured to bring in an arbitrary and tyrannical form of government over the lives, lands and liberties of the king's subjects; yea, had exercised a tyranny over their consciences too, by the oath administered in Ireland: And though his malicious designs had taken no effect, yet no thanks to him, but to the goodness of the king, and the vigilancy of the peers. Had they pleased, it had been too late to have punished him; for no rule of law had been left whereby to censure him, after the death and expiration of the laws. And if the intention of Guido Faux might be thought Treason, though the house was not blown up, then this intention of his may admit the same censure.

He closed; That throughout all his Defences he had pretended either Warrants from the king, or else the king's Prerogative: and what was this else but to draw up a cloud, and exhale the vapour for the eclipsing of the bright sun, by the jealousies or repinings of his subjects, if the strength of his piety and justice should not dispel all these mists, and send them down to their original? That the very standing and falling of these three kingdoms stood upon this Process; all of which do conceive their safety so far interested in his just punishment, that no settling of their peace or quiet could be expected without this: That they hoped the law should never protect him, who had gone about to subvert all law: nor the nobility (who had the same blood moving in their veins), by submitting themselves to his base tyranny, lose that privilege and liberty, which their ancestors had bought with their dearest lives. Though there was no Statute for this treason, was it the less monstrous? For there were none for

* Principal Baillie, writing in his Journal, of this hesitation, says, "Some took this for a true defect in his memory; others, and for the most part, for a notable part of his rhetoric; some that true grief and remembrance had stopt his mouth: for they say that his first lady the earl of Clare's sister being with child, and finding one of his whore's letters, brought it to him, and chiding him therefore, he struck her on the breast, whereof shortly she died."

† "Certainly never any man acted such a part, on such a theatre, with more wisdom, constancy and eloquence, with greater reason, judgment, and temper, and with a better grace in all his words and gestures, than this great and excellent person did; and he moved the hearts of all his auditors, some few excepted, to remorse and pity;" are the expressions of Whitlock, Mem. p. 48, who, as he himself tells us, had been in the chair of the committee of the house of commons against the Earl.

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many hundreds of years that durst ever venture upon such insolences, to occasion such a Statute. And were not the fundamental grounds and rules of government sufficient to rise up in judgment against him, without the making a particular statute? This, he said, he left to the dispute of the law; and concluded, that seeing they had found out the Jonah, who these many years had tossed and hazarded the Ship of the Commonwealth with continual storms and tempests, there could be no calms expected, but by casting him out into the seas; which, in all justice, they must, and do expect from their hands, who are intrusted by the body of the kingdom to do the same. The Aggravation of the Offence, he said, he had left to Mr. Pym, who here spake that Speech which is now in print.

It was a sport to see how Mr. Pym in his Speech was fearfully out, and constrained to pull out his Papers and read with a great deal of confusion and disorder, before he could recollect himself; which failing of his memory was no small advantage to the Lieutenant: because, by this means, the house perceived it was a premeditated flash, not grounded upon the Lieutenant's last Answer, but resolved on before, whatsoever he should say for his own justification. But the Lieutenant was not suffered to reply a word, either to Glyn or Pym, because the last word must be theirs. And so with Tuesday ended the matter of fact.

On Thursday the dispute in law is expected.

April 14.

Upon Wednesday we were big with expectation for the Matter of Law, having done before with Matter of Fact; but it seems the House of Commons had perceived a great defection of their party, and a great increase of the lord Strafford's friends in both the houses, occasioned by his insinuating, honest, and witty Defences, and therefore resolved of no more hearing in public: therefore it was thought upon by his accusers to draw up a Bill of Attainder* and present the same to the lords; whereby, First, the Matter of Fact should be declared to have been sufficiently proved; and then in the Matter of Law, that he had incurred the censure of Treason, for intending to subvert the fundamental laws of the kingdom: for though (said they) he cannot be charged by the letter of the Statute of 25 Edw. 3rd, yet he is within the compass of the Salvo, whereby it is provided, That the king and parliament hath power to determine what is treasonable, and what not; and that they were confident the lords would ratify and approve of this Bill of theirs, and give Judgment accordingly.

The motion was stoutly opposed by three great lawyers, (all members of the house) Selden, Holborne and Bridgeman, who made it manifest, that the *salvo* of 25 Edw. 3, was repealed, and that no man could now be convicted of treason, but by the letter of that statute: But being put to voice, it was carried for the Bill, and a Committee appointed for to draw it up.

This gave occasion of much talk abroad, and they who were otherwise the lord Strafford's enemies could not find equity enough in the Bill of Attainder. Some could not conceive what difference imaginable was betwixt the Bill and the Charge presented before; for in the Charge he was accused of Treason, and the Bill (though they had not the legislative power) seemed nothing but an affirmation of the same. Others (who would have the Bill understood of a definitive Sentence, because it was consecutive to the Proofs) were not satisfied, but that it was against all practice, that the Commons should give Sentence upon the death of a peer; and that it was against common equity too, that the complainers should be admitted to be Judges, and that the party accusant should give the Judgment. A third sort gave it out, That this was no Sentence against the lord Strafford, but only a passing of a new act of parliament, about a matter not hitherto declared treasonable: But yet these doubted, that by declaring the matter of fact to be approved, and applying the Censure to it, in reference to the lord Strafford, it would ever be thought a Sentence against him, to blemish his own fame, and the blood of his posterity. Moreover, that if they were about to make a new act, it were strange to punish a man for the breach of such a Statute as was not yet extant *in rerum natura*; which should in reason refer only to future obedience: And (what is more strange) though there were a new statute, yet by what authority can the parliament declare any individual or accumulative act to be treasonable, which was not so before? for it must be Treason by virtue of a statute, or else no treason at all. Now there is none can be brought, except the 25th of Ed. 3, whereof the letter of that Statute cannot, by their own confession, nor was not so much as once alledged against the lord Strafford: And for the *salvo* or *proviso* (which they mainly insisted on), the same stands repealed by two posterior acts of parliament.

You have the mutterings of all sorts of people.

The Lords fearing the Proceedings, as a beaten path trodden out to the ruin of their own lives and estates, told the house of commons in their conference upon Thursday, April 15, That they would go on the same way they did already; and, according to the Order of the house, give full audience to the lord Strafford's counsel in matter of law, and that they themselves, as competent Judges, would by themselves only give Sentence in the Cause; nor was there any other course suitable to the practice and Statutes of the kingdom, the safety of the nobility, or to equity or common justice.

It was replied by them of the Lower House, That they were resolved to go on with their bill; and if the same should be rejected by the lords, they feared a rupture and division might

* This Bill of Attainder was brought in by sir Arthur Haslerig. Lord Clarendon gives a very long and particular account of it in his first volume, p. 178 to p. 183, fol. edit.

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follow, to the utter ruin and desolation of the whole kingdom; that no content would be given to the subject, (and this was a strong argument indeed, yet better beseeming partiality and violence, than the pretended justice and piety of the times) unless the man who had so much intruded upon their right, and discontented the people, might be punished as a Traitor; and for the practice of the kingdom, that no man had ever found such a favourable hearing; and that the process against Essex, Norfolk, Somerset, were all of them closed up in one day.

April 16.

Upon Friday, the Lords gave Answer, That they could expect nothing from the House of Commons, but what should tend to the peace and preservation of the kingdom: nor was there a more forceable way than to preserve the laws and customs thereof, lest innovation, so much complained of by them, might unhappily be found among themselves: That the subjects should have all that justice could afford, but that an act of injustice would never give satisfaction to the world, nor safety to themselves; the eyes of all foreign states being fixed upon the business now in agitation, and the wisdom of our nation either to be much advanced or depressed by their judgments in this case: That the process against Norfolk and Essex (for Somerset was convict only of Felony, and had not so much animadversion to save himself by his book) were for direct and formal Treasons, comprised in one or two individual acts; but this against the lord Strafford only arbitrary and accumulative, to be pickt out of 28 Articles: And therefore that it was impossible to have a full examination of them all to give Sentence against him. And those noblemen were charged with some actual breach of statutes, formerly made; but here a new statute was to be made, or else he to be found guiltless. They concluded, that they had given order for his appearance on Saturday, and that in the great Hall at Westminster, where the House of Commons might if they pleased be present.

After some deliberation with the house, the Conferrers answered, That since the lords had so resolved, they would not deny to be there present, and to hear what his counsel could say for him; but to reply any more in public, they neither could nor would, because of the bill already past: only if the lords should take any scruple in the matter of law, they would be ready to give them satisfaction by a private conference. (So they willingly declined to do what indeed they could not possibly do, that is, to give public satisfaction in the matter of law.)

April 17.

Upon Saturday, they convened in the great Hall; but they that were of the Committee for the great Charge did not stand at the bar, as before, but sat promiscuously with the rest of their fellows: so that a mouth was not opened in the behalf of the House of Commons all that day. After they were sat, the Lord Steward told the Lieutenant, That the lords had resolved to give him a fair hearing in the Matter of Law, and therefore desired that the counsel might keep that distance, moderation and respect to the Judicatory that was sitting, and not at all to meddle with the Matter of Fact.

The Lieutenant replied, That in all humility he did acknowledge that favour from the lords; and that it was such an one too, as he could not but expect from such honourable peers and just persons in whose integrity and goodness (under that which he had placed above) he had reposed his chiefest confidence; for his Counsel, they knew much better than himself what concerned the point of discretion and reverence; and that he doubted not but that they would give all satisfaction and obedience.

Then his Counsel were called to the bar, Mr. Lane, the Prince's Attorney; Mr. Gardiner, Recorder of London; Mr. Loe, and Mr. Lightfoot.

Mr. *Lane* spake, and much to this sense and purpose:

My Lords, there is a heavy Charge lieth on me and my fellows, nothing less than to defend the life, the estate, the reputation, yea the posterity of this honourable person at the bar; if therefore we shall be more pressing, we hope your lordships will interpret this our forwardness to be for honour and conscience-sake, in a matter that concerneth both so nearly: But it shall be our endeavour to carry ourselves with our best respects to your lordships, and with all content and satisfaction to the honourable House of Commons. And because your lordships mentioned the Matter of Fact, one thing I dare be bold to say, That all the time of this noble lord's Defences, he did not so much as crave any one of our Opinions; yea, or acquainted us with any thing that tended that way. And for the Matter of Law, those Statutes cited by himself were none of our stock, but taken up at his own adventure: nor do I speak this to derogate from the pertinency of those Statutes (for they shall be the subject of my discourse), but that the nobleman be not disappointed of your right conceptions, and his own due praise.

My Lords, it is your pleasure we meddle not with Matter of Fact, and indeed we need not meddle at all with it, because we hope it is already done, and that sufficiently to our hands; yet the Matter of Law doth so naturally rise out of the Matter of Fact, that of necessity (under your lordships favour) we must somewhat grate on this, if we speak on that; nor do I conceive it possible for us to speak advantageously enough for the lord Strafford's just Defence, unless the whole Matter of Fact be determined, either as proved or not proved, or at least some states of questions agreed upon, where we may fix and settle our arguments. And therefore it is, my Lords, that I have chosen not at all to touch the Matter of Law (until your lordships shall be pleased to chalk me out a way), unless it be to clear your judgments in one statute only, viz. 25 Ed. 3. Be-

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cause when the same was alledged by the lord Strafford in his own Defence, that not being convicted of the letter thereof, he could not be convicted of Treason; I remember the *salvo* of that statute was much insisted upon by those from the House of Commons, as much conducing to their own ends. My Lords, I will first speak of the Statute itself, and then of its salvo, or provision. The statute is, 'That if any man 'shall intend the death of the king, his queen, 'their children; kill the Chancellor, or Judge 'upon the bench; imbase the king's coin, or 'counterfeit the broad-seal, &c. he shall be 'convicted and punished as a traitor.' That the lord Strafford comes within the letter of this Statute, is not so much as once alledged, nor indeed can it be with any reason: All that can be said is, That by relation, or by argument *á minori ad majus*, he may be drawn thither; yet that this cannot be, I humbly offer these considerations: 1. This is a Declarative Law, and such are not to be taken by way of consequence, equity, or construction, but by the letter only; otherwise they should imply a contradiction to themselves, and be no more declarative laws, but laws of construction, or constitutive. 2. This is a penal law, and such (if our grounds, hitherto unquestioned, hold good) can admit of no constructions or inferences; for penalties are to persuade the keeping of known laws, not of laws conjectural, ambiguous, and by consequence, which perhaps the most learned may not in their disputes question; much less the subject (who is not obliged to interpret the Statute) doubt of in the point of obedience; yea, rather without any doubt, he is to obey the letter of the statute, and conceive (and that truly) that he is not liable to the penalty. 3. We have a notable law, 13 Eliz. cap. 2, whereby it is declared, that the bringing in of Bulls from Rome to stir up the subject to mutiny and rebellion shall be punished as Treason. Now if by interpretation, or by consequence, this sense might have been thrust upon the preceding statutes, the making of this had been superfluous; yea, the persons then charged with that crime might have been impeached of treason, even before the making of this act.

Anno 21 Ed. 3. We have a Statute declaring, That for a servant to kill his master, is an act of Treason: And in the 23rd year of the same king, a process of Treason was framed against a man for killing his father, grounded upon the same argument, *a minori ad majus:* But it was found (and the Sentence is yet in the Records), that although in the 21st of Edward the 3rd, that argument might have been admitted; yet in the 27th it could not, by reason of the declarative law intervening in the 25th year: And this Case comes very home to the point in law.

My Lords, I will not demand what kind of Offence it may be, for a man to subvert the Fundamental Laws of a kingdom; the crime doubtless is unnatural and monstrous, and the punishment must keep the same proportion:

only I presume to offer these few things to your lordships considerations:

1st. That one or more acts of injustice, whether maliciously or ignorantly done, can in no sense of law be called the subversion of the Fundamental Laws; if so, as many judges (perhaps) so many traitors. It is very incident to man's nature to err; nor doth the lord Strafford plead his innocency in over-sights, but in treason.

2dly. I do remember the case of John de la Pool, duke of Suffolk: this man, in the 28th of Henry 6, was charged by the house of commons with Articles of Treason, and those too very like to these against my lord Strafford. 1. That he had given the king bad Advices. 2. That he had embased his Coin. 3. That he had cessed Men of War. 4. That he had given out summary Decrees. 5. That he had imposed Taxes. 6. That he had corrupted the Fountain of Justice. 7. That he had persuaded the king to unnecessary war, and to the giving over of Anjou in France, *ovum ovo.*— And for all these, though he was charged with High-Treason, for wronging the Right of the Subject, and subverting the fundamental laws of the kingdom; yet, after a long agitation, the matter was found by the lords of parliament, not to imply Treason, but only felony. Add to this another, who in the 23rd of Henry the 8th was charged for subverting the English laws, and yet no Treason charged upon him. Add to both the Charge of Richard Larks, pleaded at the Common-Pleas, who was charged with Treason for subverting the law, but convicted only of Felony: by which you may see, my lords, what to this time hath been subverting the laws.

3dly. It is very considerable, that the lord Strafford is not charged to have subverted, but only to have intended to subvert the Fundamental Laws: and this I conceive, if there were no more, might keep him free from that Statute of the 25 Edw. 3. For although, as touching the king, his queen and children, intention is treasonable: yet in all other things there mentioned, there must be action beside intention; for it is not said, If a man do intend to kill a chancellor, it shall be Treason; but only, if he do kill him; and if he doth actually counterfeit the Broad-Seal. And although a man should prepare a furnace, make ready his stamp, melt his bullion; yet if he gives not the king's impression upon the coin, all his intentions, yea, his preparations will not serve to make up a Treason.

And this (under favour) may serve to answer the Case of Guido Faux, lately objected; unless it be alleged, that the lord Strafford had as real an intention against the king's life as Faux had: For though the intention in that case be Treason by the statute, yet in all other things there is no treason without the action; so immense and vast a difference both is, and ought to be, betwixt a project against the royal blood, and all things else of a lower and under nature.

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You see therefore, my lords, that the body of the statute cannot stick against the lord Strafford, neither in letter, nor in consequence; this is not, that must not be; All that can be said is, That this fact may be Treason by the common-law. For my part, I profess my ignorance, who ever thought the common law might declare, but never make a Treason; that is, it might be presupposed that there is a statute whereupon to build a declaration: and therefore to say there is no statute for it, is to say it is no Treason at all. The statute ever makes the Treason; and to be declared to be Treason, either by common law, or by parliament, are but two different ways of proceedings, and must both resolve into one principle: yea, which comes home to the point, in the 21st of Edw. 3, to kill a man imployed in the king's war, was Treason; and the 23d, to kill the king's messenger, was treason by declaration of the common law, but always by reason of the statute: yet none of these are now treasons, but felonies only, by reason of the intervening statute, the 25th of Edw. 3. Such hath ever been thought the force of its letter and declaration; and so I will leave it, and speak a word or two of the *salvo*, which is this: that because all particulars could not be then defined, therefore what the parliament should declare to be treasonable in time to come, should be punished as Treason.

And according to this reservation, in the 8th of R. 2d, one who was charged before the King's-Bench was afterwards referred to the parliament; and there, though the fact was not contained in the body of the statute, yet because of the Proviso afore-mentioned it was adjudged Treason.

In the 11th of the same king, the duke of Ireland and Nevil archbishop of York were impeached of High-Treason by Gloucester, Arundel, and Warwick; and notwithstanding the Statute, were convicted thereof by the *salvo*. But in the 21st of the same Richard the 2d, the tide turned, and the king had such a hand with the parliament, that the Sentence was recalled, and those three noblemen themselves adjudged traitors. Again, in the 1st of Henry 4, his successor, that revocation of the 21st of R. 2d, was repealed, and the Sentence of the 11th of his reign established. Such were the tossings to and fro of treason; and all because of that uncertain Proviso.

Therefore it was, that in the same parliament the 1st of Henry 4th, a Petition was preferred by the nobility to have Treason limited with some Statute; because they knew not what to speak, or what to do, for fear thereof. And in the 10th chapter an Act was made upon this Petition, that the *salvo* should be holden repealed in all times to come, and nothing esteemed treason but what was literally contained in the Statute of the 25th of Edward 3: And therefore it is said in the Records, that there was great joy at the making of this act, in that the drawn sword hanging over every man's head, by this slender thread of a consequence, or illation, was moved by that act. Add to this, That in the 1st of queen Mary, the first chapter, the same is repeated, 'That no man shall be 'punished in life or estate as a traitor, but for 'the crime contained in the Statute 25 Ed. 3, 'without the least mention of a pretended '*salvo*.'

The earl of Northumberland's Case comes nigh to the point: he was charged with Treason, the 1st of Henry 4; and if the statute of the 5th of Henry 4, the first chapter, whereby this Proviso is repealed, had not intervened, no doubt he had been condemned of Treason: but he was only convict of Felony, and that because he could not be drawn within the letter of the statute of the 25th of Edw. 3. And I dare confidently say it, That since that Act was made, the 1st of Henry 4, the first chapter, whereby the Proviso is repealed, no man hath ever been declared a Traitor, either by king or parliament, except it were upon that, or some other statute, literally and declaratively taken. These two things I do offer to your lordships considerations; That the lord Strafford cannot be impeached of Treason by the statute of the 25th Edw. 3, and that the *salvo* contained in the same stands repealed almost 200 years ago: and this is all I conceive to be necessary for that statute which was alleged by the lord Strafford in his defence for Matter of Fact.

Then the Recorder spake some few words to this purpose; That what was spoken upon the Statute, was because it seemed inseparable from the Matter of Fact, that they could proceed no farther, till a state were afforded them; that to do otherwise, they conceived might be very prejudicial unto my lord Strafford. 1. In that they should suppose that to be done, which is not proved to be. 2. That the Matter of Law ariseth so naturally from the Matter of Fact, that it will be impossible to separate one from the other. 3. That it is the course of all judicatories, first to settle the Verdict, and upon that to fix the Arguments, otherwise he could conceive no possible way of proceeding; and therefore, in the lord Strafford's name, he most humbly intreated, that the Lords would either wholly determine the Matter of Fact (not whether it was Treason or no, for then all other proceedings in the law were unnecessary, but whether done or not done) or else to give them some states of the question whereunto they might confine themselves.

Upon this motion the house was adjourned for that day, nor hath it met since; for the House of Commons are returned to their old biass, and will hear of nothing but the Bill of Attainder; but the lords seem to be more resolute than before, because they find that they have no authority to declare a Treason in a fact already past, the Salvo of the 25th of Edw. the 3rd being repealed; withal, that if the Bill of Attainder should proceed, the king hath as great power to hinder that at the last blow, as any other statute: but I hope the lords will disburden him of that envy.

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All they which stand obliged to the lord Strafford, in blood, affection or deserving; and all who have been interested with him in the king's service, and many too, who both hate his person, and dislike his proceedings; will doubtless look upon it, and tender their own safety, all of them in likelihood being subject to the charge of Treason, if ever they chance to be called to do the king's service in any place of importance.

I cannot express how much the voice of the multitude is now altered from what it was lately, nothing now talked of what should be done, but only of what must be done: so that if the lord Strafford dies, his very enemies will confess, that it is done more for necessity, than for justice; and rather for the satisfaction of rancorous apprehensions, than for any guiltiness in the cause.

April 29.

Thursday last, viz. April 29, was designed for the agitation of the long intermitted business concerning the Lieutenant; and the way was this: The lords did meet at the great Hall at Westminster about nine of the clock, not in their robes, nor did the Lord Steward sit upon his sack, but with the rest promiscuously; nor did the committee for the house of commons stand at the bar, but sat with the rest of their fellows; and the earl of Strafford sat behind the place where he used to sit before; the reason of these changes was, because the dyet was appointed not for a meeting, but for a Conference; so curious are we (and that is all) about formalities. The king, queen, and prince were there, according to their custom: not a man spake a word in the house all the time, but only Mr. St. John, the king's Solicitor, one of the Committee; whose drift and purpose was to furnish the Lords with Reasons, why the House of Commons had proceeded with a Bill of Attainder: and withal, to reply to what the lord Strafford had spoken, either by himself or his counsel, in matter of law.

The Speech, containing a learned Argument on the Law of Treason, is here inserted from 8 Rushworth, 675.

MR. ST. JOHN'S ARGUMENT OF LAW; CONCERNING THE BILL OF ATTAINDER, April 29th, 1641.

My Lords; The knights, citizens, and burgesses of the Commons House of Parliament, have passed a Bill, for the attainting of Thomas earl of Strafford of High Treason. The Bill hath been transmitted from them to your lordships; it concerns not him alone, but your lordships and the commons too, though in different respects.—It concerns his lordship the highest that can be in the Penal part; so it doth, on the other side, as highly concern your lordships and the Commons, in that which ought to be the tenderest, the Judicatory within that, that judge not them who judge him, and in that which is most sacred amongst men, the Public Justice of the kingdom.

The King is to be accounted unto, for the loss of the meanest member, much more of one so near the Head. The Commons are concerned in their account for what is done, your lordships in that which is to be done. The business therefore of the present Conference, is to acquaint your lordships with those things, that satisfied the Commons in passing of this Bill; such of them as have come within my capacity, and that I can remember, I am commanded from the Commons at this time, to present unto your lordships.

My Lords, in judgment of greatest moment, there are but two ways for satisfying those, that are to give them; either the *lex lata*, the law already established, or else the use of the same power for making new laws, whereby the old at first received life.—In the first consideration of the settled laws, in the degrees of Punishment, the positive law, received by general consent, and for the common good, is sufficient, to satisfy the conscience of the Judge, in giving Judgment according to them.—In several countries, there is not the same measure of punishment, for one and the same offence; wilful murder in Ireland it is Treason, and so is the wilful burning of a house, or a stack of corn: in the Isle of Man it is Felony to steal a hen, but not to steal a horse; and yet the judge in Ireland, hath as just a ground to give Judgment of High-Treason in those cases there, as here to give Judgment only of Felony; and in the Isle of Man of Felony for the hen, as here of Petty-Larceny.

My Lords, in the other consideration of using the Supreme Power, the same law gives power to the parliament to make new laws, that enables the inferior court, to judge according to the old. The rule that guides the conscience of the inferior court is from without, the prescripts of the parliament, and of the common-law; in the other, the rule is from within, that *salus populi* be concerned, that there be no wilful oppression of any of the fellow-members, that no more blood be taken than what is necessary for the cure, the laws and customs of the realm as well enable the exercise of this, as of the ordinary and judicial power.

My Lords, what hath been said, is because that this proceeding of the Commons by way of Bill, implies the use of the mere legislative power, in respect new laws are for the most part past by bill.

This, my Lords, though just and legal, and therefore not wholly excluded; yet it was not the only ground that put the Commons upon the Bill, they did not intend to make a new Treason, and to condemn my lord of Strafford for it; they had in it other considerations likewise, which were to this effect.

1. The Commons knew, that in all former ages, if doubts of law arose of great and general concernments, the Parliament was usually consulted withal for resolution, which is the reason that many acts of parliament are only declarative of the old law, not introductive of a new, as the Great Charter of our Liberties; the Statute of 25 Ed. 3, of Treasons; the Sta-

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tute of the Prerogative, and of late the Petition of Right; if the law were doubtful in this case, they perceived the Parliament (where the old way is altered, and new laws made) the fittest judge to clear this doubt.

2. My Lords, they proceeded this way, to obviate those scruples and delays, which through disuse of proceedings of this nature, might have risen in the manner and way of proceeding, since the Statute of the 1 Hen. 4, c. 17, and more fully in the Roll, No. 144. The proceedings of parliament have usually been upon an Indictment first found, though in cases of Treason particularly mentioned in the Statute of 25 Edw. 3, which had not been done in this case; doubts likewise might rise, for Treasons, not particularly mentioned in the Statute of 25 Edw. 3, whether the Declaratory power of parliament be taken away, in what manner they were to be made, and by whom, they find not any Attainders of Treason in parliament, for near this 200 years, but by this way of Bill; and again, they know that whatsoever could be done any other way, it might be done by this.

3. In respect of the Proofs and Depositions, that have been made against him; for first, although they knew not, but that the whole Evidence which hath been given at the bar, in every part of it, is sufficiently comprehended within the charge, yet if therein they should be mistaken, if it should prove otherwise, use may justly be made of such Evidence in this way of Bill; wherein so as Evidence be given in, it is no way requisite that there should have been any Articles or Charge at all; and so in the case of double testimony upon the Statute of the 1st Edw. 6, whether one direct Witness, with others, to circumstances, had been single or double testimony? And although single testimony might be sufficient to satisfy private consciences, yet how far it would have been satisfactory in a judicial way, (where forms of law are more to be stood upon) was not so clear; whereas in their way of Bill, private satisfaction to each man's conscience is sufficient, although no Evidence had been given in at all.

My Lords, The proceeding by way of Bill, it was not to decline your lordships justice in the judicial way, in these exigends of the state and kingdom; it was to husband time, by silencing those doubts, they conceived it the speediest and surest way. My lords, these are in effect, the things the Commons took into their consideration, in respect of the manner and way of Proceeding against the Earl.

In the next place, I am to declare unto your lordships, the things they took into their considerations, in respect of the matter and merits of the Cause, and they are comprehended within these six heads.

1. That there is a Treason within the statute of 25 Edw. 3, by Levying of War upon the matter of the 15th Article.

2. If not by actual levying of war, yet by advising, and declaring his intention of war, and that by Savil's Warrant, and advice of bringing over the Irish Army upon the matter in the 23rd Article; then intending of a War, if not within the clause of levying of a War, in the statute of 25th Edw. 3, yet within the first Treason, of compassing the death of the king.

3. If either of these two single acts is within the statute of 25 Edw. 3, yet upon putting altogether, which hath been proved against him, that there is a Treason within the first clause, of compassing the death of the king. 'Et si 'non prosunt singula juncta juvant.'

4. That he hath sessed, and laid soldiers upon the subjects of Ireland, against their will, and at their charge, within the Irish statute of the 18th of Hen. 6, that both person and thing are within the statute; That the statute remains in force to this day, that the parliament here hath cognizance of it, and that even in the ordinary way of judicature, that if there be a Treason and a Traitor, that the want of jurisdiction in the judicial way, may justly be supplied by Bill.

5. That his endeavouring to subvert the fundamental laws and government of the realms of England and Ireland; and instead thereof, to introduce a tyrannical government against law, is Treason by the common-law; that Treasons at the common-law are not taken away by the statute of 25 Edw. 3, 1 Hen. 4, &c. nor any of them.

6. That as this Case stands, it is just and necessary to resort to the supreme power in parliament, in case all the rest should fail.

Of these six, five of them are Treason, within the compass of the laws already established, three within the statute of 25th Edw. 3, and one within the Irish statute, the other by the common law of England.—If but any one of these six considerations hold, the commons conceive, that upon the whole matter, they had good cause to pass the Bill.

My Lords, For the first, of Levying War, I shall make bold to read the case to your lordships before I speak to it, it is thus. The Earl did by warrant under his hand and seal, give authority to Robert Savil, a serjeant at arms, and his deputies, to sess such numbers of soldiers, horse and foot, of the army in Ireland, together with an officer, as the serjeant should think fit, upon his majesty's subjects of Ireland, against their will; this warrant was granted by the Earl to the end, to compel the subjects of Ireland to submit to the unlawful summons and orders made by the Earl upon paper petitions, exhibited to him in case of private interest between party and party; this warrant was executed by Savil and his deputies, by sessing of soldiers, both horse and foot, upon divers of the subjects of Ireland against their wills, in warlike manner, and at divers times the soldiers continued upon the parties, upon whom they were sessed, and wasted their goods, until such time as they had submitted themselves unto those summons and orders.

My Lords, This is a Levying War within the

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statute of 25th Edw. 3. The words of the statute are, 'If any man do levy war against our 'lord the king in his realm, this is declared 'Treason.'

I shall endeavour in this to make clear to your lordships, 1. What shall be a levying of war, in respect of the motive or cause of it. 2. What shall be said a levying of war, in respect of the action or thing done. 3. And in the third place, I shall apply them to the present case.

It will be granted in this levying of war, that forces may be raised, and likewise used in warlike manner, and yet no levying of war within the statute, that is, when the forces are raised and employed upon private ends, either of revenge or interest.

Before this statute in Edward the 1st's time, the title of a Castle was in difference between the earls of Hereford and Gloucester, for the maintaining of the possession on the one side, and gaining of it on the other; forces were raised on either side of many hundred men; they marched with banners displayed, one against another. In the parliament, in the 20th year of Edward 1, this was adjudged only Trespass, and either of the earls fined 1,000 marks apiece.

After the Statute in Hilary Term, in the 15th of Edw. 3, in the King's-Bench Rot. Nicholas Huntercome in warlike manner with 40 men, armed amongst other weapons, with guns, (so antient, as appears by that Record, they were) did much spoil in the manor of the Abbey of Dorchester in the county of Oxford, this was accounted no Treason, and so it hath been held by the Judges, That if one or more Township, upon pretence of saving their commons, do in a forcible and warlike manner throw in inclosures, this is only a Riot, no Treason.

The words of the Statute 25 Edw. 3, clear this point, that if any man ride armed openly or secretly with men at arms, against any other, to kill and rob, or to detain him until he hath made fine and ransom for his deliverance, this is declared not to be Treason, but Felony or Trespass, as the case shall require: all the printed Statutes which have it covertly or secret, are misprinted, for the words in the Parliament Roll, as appears in the 17th, are, *Discoverture ou secretement*, open or secretly.

So that, my lords, in this of Levying War, the act is not so much to be considered, but as in all other Treasons and Felonies, *quo animo*, with what intent and purpose? My Lords, If the end be considerable in levying war, it may be said, that it cannot be a war, unless against the king, for the words of the statute are, 'If 'any man levy war against the king.'

That these words extend further than to the person of the king, appears by the words of the Statute, which in the beginning declares it to be Treason, to compass and imagine the death of the king, and after other treasons, this is to be declared to be treason, to levy war against the king; If levying of war extend no further than to the person of the king, these words of the statute are to no purpose; for then the first treason of compassing the king's death, had fully included it before, because that he which levies war against the person of the king, doth necessarily compass his death.*

* "But does he so? Where is the truth, or the logic, of this necessity? In our Law writers, and Treason trials, I grant. They have passed this construction upon the statute: yet not till they add to it the words 'his person,' and make moral reflections on the deaths of Richard 2, and Edward 2. Let them consider on the other hand, the case of Henry 6; he was twice imprisoned for the express purpose of preserving his life, and was very carefully preserved alive for years; nor is it yet known how he came by his death. The Resolution of the Judges on the Earl of Essex's Trial in the year 1600, carries this necessity farther still. It is there declared to be the consequence of 'every rebel-'lion,' and not confined to war against the king's person; and this is as just a conclusion as the other.—Examine the words of this Law as in Edward 3rd's reign, as if it were the law of Poland, and make out the conclusion there; not under the prejudices and habits of thinking, to which our minds are accustomed.—I believe the Statute had in view a case of War and Rebellion, which might not be directed against the king's life: and this opinion will be found most agreeable to the state of that age, by those who will take the pains to examine its history attentively, and the condition of this and the neighbouring kingdoms. There is a great authority in our law on my side in this point. Chief Justice Brooke, who compiled most of his Abridgement in the reigns of Hen. 8, and his son, when Treasons were readily strained to any construction, doubts about the case of a design to deprive the king of his crown, whether it is within the statute of Treasons. Because, he says, one may deprive, &c. without designing the death; therefore, he adds, a statute was had for this Case under Hen. 8, and Ed. 6. See Bro. Abr. Treason pl. 24. What need have we of more? The *doubt* of a Judge under a Tudor prince, upon such a point and against the crown, may afford a satisfactory clearance of the doubt to subjects of a Brunswick prince. The argument upon the two cases of Levying War and depriving of the crown, is the same. And this learned Judge did certainly not encourage the separation of the king's authority from his person, in this branch of the Law of Treason.—It would be equally just to take the converse of the above argument, and to say, the levying war must be clear of design against the king's life, because if it were otherwise, there was no need to provide for it by the first clause of compassing, &c. Many of the arguments in the State Trials lead to this inference, unknown to their authors. It is the consequence of lord Bacon's statement of the Judges' Opinion, in his Treasons of the Earl of Essex, and in many other examples.—Again, the inconsistency of the doctrine will further appear, from the following view of it. If it be

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It is a war against the king, when intended for alteration of the laws or government in any part of them, or to destroy any of the great officers of the kingdom. This is a levying war against the king:

1. Because the king doth protect and maintain the Laws in every part of them, and the great officers, to whose care he hath, in his own stead, delegated the execution of them.

2. Because they are the king's laws, he is the fountain from whence, in their several channels, they are derived to the subject; all our Indictments run thus, trespasses laid to be done, 'contra pacem domini regis,' the king's peace, for exorbitant offences, though not intended against the king's person, against the king, his crown and dignity.

My lords, this construction is made good, by divers Authorities of great weight, ever since the Statute of 25th of Edw. 3, downwards.

In Rd. 2's time, sir Tho. Talbot conspired the death of the dukes of Gloucester and Lancaster, and some other of the peers; for the effecting of it, he had caused several people in the county of Chester, to be armed in warlike manner in assemblies in the parliament, held in the 17th R. 2, No. 20. sir Thomas Talbot being accused of High Treason for this: It is there declared, insomuch as one of them was Lord High Steward of England, and the other High Constable, that this was done in destruction of the estates of the realm, and of the laws of the kingdom, and therefore adjudged Treason, and the Judgment sent down into the King's Bench, as appears, Easter term, in the 17th R. 2, in the King's Bench rot. 16. These two lords had appeared in the 11 R. 2, in maintenance of the act of parliament made in the year before, one of them was of the Commissioners appointed by Parliament, and one of the Appealors of those who would have overthrown it.

The duke of Lancaster likewise was one of the lords, that was to have been indicted of Treason, for endeavouring the maintenance of it; and therefore conspiring of their deaths is said to be in destruction of their laws; This there is declared to be Treason, that concerned the person of the king and common-wealth.

In that great Insurrection of the villains, and meaner people, in Rd. 2's time, they took an oath, 'Quod regi et communibus fidelitatem 'servarent,' to be true to the king and commons, and that they would take nothing but what they paid for, punished all theft with death; here is no intendment against the person of the king; The intent was, to establish the laws of Villanage and Servitude, to burn all the Records, to kill the Judges: This in the Parliament of the 5th Rd. 2, No. 31, 32, the first part, is declared to be Treason against the king, and against the law.

In the 11th R. 2, in parliament, the raising of Forces against the Commissioners, appointed by act of Parliament the year before, adjudged Treason by all the judges.

The statute 1 Mary cap. 12, enacts, That if 12 or more shall endeavour by force, to alter any of the laws or statutes of the kingdom, he shall from such a time there limited, be adjudged only as a Felon. This act was to continue but to the next parliament, it is expired, it shews by the words only, that the offence was higher before the making it.

My lords, In queen Elizabeth's time, Grant, and divers apprentices of London, to the number of 200, rose, and assembled at Tower-hill, carried a cloak upon a pole instead of a banner, their intent was to deliver divers Apprentices out of prison, that had been committed upon a Sentence in the Star-Chamber for riots, to kill the lord mayor of London, and for setting prizes on Victuals. In Trinity term, 37 Eliz. divers of the Judges were consulted withal, and resolved, That this was a levying of war against the queen, being intended against the government and officers of the queen, and therefore Grant and others were executed as Traitors.

Afterwards, in that queen's time, divers of the county of Oxford consulted, to go together from house to house in that county, and thence to London and other parts, to excite them to take up arms, for the throwing in of all inclosures throughout England. Nothing was done, nor no assembly. Yet the statute of 13 Eliz. c. 1, during the queen's life, made it Treason, to intend, or advise to levy war against the queen.

In Easter term 39 Eliz. all the Judges of England met about the case, it was resolved by them, that this was a war intended against the queen; they agreed, That if it had been of one township or more, upon private interest, and claim of right of Common, it had not been Treason, but this was to throw in all Inclosures through the kingdom, whereunto these parties should pretend no claim. That it was against the law, in regard that the Statute of Merton gave power of Inclosures in many cases: upon this resolution Bradshaw and Burton were executed at Ayncstow-hill in Oxfordshire, the place where they intended the first rendezvous.

So that my lords, if the end of it be to overthrow any of the Statutes, any part of the law and settled government, or any of the great officers intrusted with the execution of them, this is a war against the king.

My lords, It will be further considerable, what shall be accounted a Levying of War, in

levying war against the king, to assume royal authority by force, it cannot be restrained to any particular branch of the prerogative. It must be treason so to assume any one of them. Of these there is none more clearly ascertained, than the administration of justice. This proceeds from the Crown as the Fountain of Justice, from whence all Courts are to derive their institution. Therefore, to erect such tribunal, and to maintain it with force, (any force sufficient for the purpose, according to Foster) is levying war against the king, by 'doing that 'which the king ought to do in government as 'king.' Laders on the Law of Treason, in Levying War, p. 77.

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respect of the actions and things done; there is a design to alter some part of the laws, and present government, for the effecting thereof, people be provided of arms, gathered together into troops, but afterwards march not with banners displayed, nor do *bellum percutere*, whether the army themselves, and gathering together upon this design, be a war, or such prosecution of the design with force, as makes it treason within the statute?

1. If this be not a war, in respect that it necessarily occasions hostile preparations on the other side.

2. From the words of the statute, shall levy war, and be thereof probably attainted of open deed, by people of their condition; although the bare conspiring be not an open deed, yet whether the arming and drawing of men together, be not an open declaration of war?

In sir Thomas Talbot's Case before cited, in the 17th R. 2, the acts of force are expressed in the Parliament Roll; That he caused divers of the people of the county of Chester, to be armed in a warlike manner in assemblies, here is no marching, no banners displayed.

In the 8th Hen. 8, William Bell and Thomas Lacy in Com. Kanc. conspired with Thomas Cheyney, called the 'Hermite of the queen of 'Faries,' to overthrow the laws and customs of the realm; and for the effecting of it, they with 200 more, met together, and concluded upon a course of raising greater forces in the county of Kent, and the adjacent shires; This adjudged Treason; these were open acts.

My Lords, For the Application of both these, to the Case in question:

1. In respect of the end of it: here was a War against the king, it was to subvert the laws; this being the design for the effecting of it, he assumed to his own person an arbitrary power over the lives, liberties, and estates of his majesty's subjects, and determined Causes upon Paper-Petitions, at his own will and pleasure; Obedience must be forced by the army, this is declared by the Warrant.

My lords, If it be said that the Warrant expresseth not any intent of subverting the laws; It expresseth fully one of the principal means, whereby this was to be done, that is, obedience to his arbitrary orders upon Paper-Petitions; This was done in reference to the main design.

In the Cases of the town of Cambridge and sir William Cogan, they have formerly been cited to your lordships upon other occasions, the things in themselves were not Treason, they were not a levying of war. In that of Cambridge, the town met together, and in a forcible manner broke up the University-Treasury, and took out of it the Records, and Evidences of the Liberties of the University over the town. In the other, they of Bridgewater marched to the Hospital, and compelled the master of the Hospital to deliver unto them certain Evidences, that concerned the town, and forced him to enter into a bond of 200*l*.

These, if done upon these private ends alone, had not been a Treason, as appears by the very words of the statute of 25 Edw. 3, beforementioned, of marching openly or secretly.

But my lords, these of Cambridge and Bridgewater, they were of the conspiracy with the Villains, as appears in the Parliament-Roll of 1 Rich. 2, n. 311, and 32, where the towns of Cambridge and Bridgewater are expressly excepted out of the general Pardon made to the Villains; this being done in reference to that design of the Villains, of altering the laws; this was that which made it Treason.

If the design went no further, than the enforcing obedience to these Paper Orders made by himself, it was sufficient it was to subvert one fundamental part of the law; nay, in effect the whole law; what use of law, if he might order and determine of men's estates at his own pleasure? This was against the law notoriously declared in Ireland.

In the close Roll in the Tower, in the 25th of Ed. 1, a Writ went to the Justices in Ireland, that kingdom at that time was governed by Justices, declaring, That upon Petitions they were not to determine any Titles between party and party, upon any pretence of profit whatsoever to the king.

In 38 Hen. 6, c. 2. Suits in equity not before the Deputy, but in Chancery; suits at common-law, not before him, but in cases of life in the King's-Bench; for title of lands or goods in the proper courts of the king's-Bench, or Common-Pleas.

This declared in the Instructions for Ireland, in the latter end of king James's time, and by the Proclamation in his majesty's time; my lord took notice of them; called the commissioners narrow-hearted commissioners.

The law said, He should not thus proceed in the subversion of it, he saith he will, and will enforce obedience by the army, this is as much, in respect of the end, as to endeavour the overthrow of the Statutes of Labourers, of Victuals, or of Merton for Inclosures; here is a Warrant against the king, in respect of the end *.

* "The same arbitrary confusion of right and wrong, encouraged the parliamentary leaders in Charles the 1st's time, to charge lord Strafford with having subverted the laws, and thereby committed High-Treason. It was the Article which they laboured the most, and perhaps they judged rightly; because, by being general and indistinct, it was capable of embracing any offence that malice and faction could find no other name for. They could not have attempted this with effect, if the Law of Treason had been properly defined; or if the minds of men, the learned as well as the vulgar, had not been obscured or perverted by the doctrines which had been long current, on the supposed authority of adjudged Cases. It is curious, but lamentable too, to find St. John, with whom the maintenance of this Article lay, urging them all and relying upon them, to prove lord Strafford guilty. Thus did the in-

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2. In respect of the Actions, whether there be either a Levying of War, or an open deed, or both.

My lords, There was an army in Ireland at that time, of 2,000 horse and foot; by this Warrant there is a full designation of this whole army, and an assignment of it over to Saville for this purpose. The Warrant gives him power from time to time, to take as many soldiers, horse and foot, with an officer throughout the whole army, as himself shall please; here is the terror and awe of the whole army to enforce obedience. My lords, If the Earl had armed 2,000 horse and foot, and formed them into companies to this end, your lordships would have conceived, that this had been a war. It is as much as in the case of sir Thomas Talbot, who armed them in assemblies.

This is the same with a breach of trust added to it.

That Army which was first raised, and afterwards committed to his trust, for the defence of the people, is now destined by him to their destruction. This assignation of the army by his warrant, under his hand and seal, is an open act. My lords, Here is not only an open act done, but a levying of war, soldiers, both horse and foot, with an officer in warlike manner assessed upon the subject, which killed their cattle, consumed and wasted their goods.

Your lordships observe a great difference, where six men go upon a design alone, and when sent from an army of 600, all engaged in the same service, so many were sent as were sufficient to execute the command, if upon a poor man fewer, more upon a rich; if the six had not been able, the whole army must make it good. The reason that the Sheriff directed alone, or but with one bailiff to do execution, is, because he hath the command of the law, the king's writ, and the *posse comitatus* in case of resistance. Here is the Warrant of a General of an Army; Here is the *posse exercitus*, the Power of the Army, under the awe of the whole Army six may force more, than sixty without it; and although never above six in one place, yet in several parts of the kingdom at the same time, might be above sixty; for sessing of Soldiers was frequent, it was the ordinary course for execution of his orders.

The Lord-Lieutenant of a county in England hath a design to alter the laws and government; nay, admit the design goes not so high, he only declares thus much, he will order the freeholders and estates of the inhabitants of the county, at his own will and pleasure, and doth accordingly proceed upon Paper-Petitions; foreseeing there will be disobedience, he grants out Warrants under his hand and seal, to the deputy-lieutenants and captains of the Trained-Bands, that upon refusal, they will take such number of the Trained-Bands through the county, with officers, as they shall think good, and lay them upon the lands and houses of the refusers, soldiers in a warlike manner are frequently sessed upon them accordingly; your lordships do conceive, that this is a levying of war within the statute.

The Case in question goes further in these two respects: That it is more against the declared law in Ireland, not only against the Common-law, but likewise against the Statute of 28 Hen. 6, against the Acts of the Commissioners; against Proclamations in pursuance of the law; against that himself took notice of narrow-hearted commissioners.—In this, that here was an Army, the soldiers by profession, acts of hostility from them of greater terror, than from freeholders of the same county.—My lords, I have now done with the first of Levying of War.

The Second is the Machination, the advising of a War. The case in this, rests upon a Warrant to Saville, and the advice in the 23d Article. The Warrant shews a resolution of employing the old Army of Ireland, to the oppression of his majesty's subjects, and the laws. In the 23d Article, having told his majesty, that he was loosed and absolved from rules of government, and might do every thing which power might admit; he proceeded further in speech to his majesty in these words; 'You 'have an Army in Ireland, you may employ 'to reduce this kingdom.'

My lords, Both being put together, there is

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justice of crown prosecutions meet with a retaliation here, in the injustice of a popular prosecution. So fared it, too, with Laud. Such men as he cannot complain, when they receive the same measure as they mete. Mr. St. John seems not more unjust than his predecessors, and to have as good reason as they, when he concludes, 'This is as much, in re-'spect of the end, as to endeavour the over-'throw of the Statutes of Labourers, of Vic-'tuals, or of Merton for Inclosures.'—Judge Jenkins, who was imprisoned by the Parliament for his enmity to them, employed his hours of confinement in collecting together the various acts of Law-Tyranny which they had practised. He chiefly drew his points of constructive treason from St. John's Argument, published by their authority, and retorted them upon his enemies, in order to prove them, by their own oracle, guilty of High-Treason.—Some of the Articles against Cardinal Wolsey contain this Charge of subverting the laws, enforced in the same loose manner, but though there are 44 of them altogether, they do not strain the point to the conclusion of High-Treason against him. These Articles were the acts of the Privy-Council, and probably drawn by sir Thomas More the Chancellor. Of the same kind are the Articles (of High-Treason as they are called) against Seymour lord Dudley, which exhibit a curious mixture. At the end of 22 Charges of Schemes of Ambition, as like Adultery as Treason, there is an *ergo* he aspired to the dignity royal. The Articles of Accusation against his brother the Protector, though more treasonable in their nature, are not called by that name." Luders on the Law of Treason in Levying War, 88.

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a Machination, a practice, an advice to Levy War, and by force to oppress and destroy his majesty's subjects.

It hath been said, the Statute of 25 Edw. 3, is a penal law, and cannot be taken by equity and construction, there must be an actual war; the Statute makes it Treason to counterfeit the king's Coin, the conspiring, the raising of Furnaces is no Treason, unless he doth *Nummum percutere*, actually coin.

My Lords, This is only said, not proved; the law is otherwise, 19 Hen. 6, fol. 49, there adjudged, That the conspiring and aiding to counterfeit Coin was Treason, and Justice Stamford, fol. 331, and 44, is of opinion, that this, or the conspiring to counterfeit the Great Seal, is Treason. The Statute is, If any shall counterfeit the Great Seal, conspiring to do it by the Book is Treason; if a man take the Broad Seal from one patent, and put it to another, here is no counterfeiting, it is tantamount, and therefore Treason, as is adjudged in 2 H. 4, fol. 25, and by the opinion of Stamford. If Machination or Plotting a war be not within that clause of the Statute of Levying of War, yet it is within the first, of compassing the death of the king, as that which necessarily tends to the destruction both of king and people, upon whose safety and protection he is to engage himself. That this is Treason, hath been adjudged, both after the Statutes of 1 Hen. 4, c. 10, and 1 queen Mary; so much insisted upon on the other side. In the 3d year of king Hen. 4, one Balshal coming from London, found one Bernard at plough, in the parish of Offey, in the county of Hertford, Bernard asked Balshal what news? he told him, that the news was, That king Richard the 2nd was alive in Scotland (which was false, for he was dead), and that by Midsummer next, he would come into England; Bernard asked him, What were best to be done? Balshal answered, Get men, and go to king Richard. In Michaelmas Term, in the 3d year of Hen. 4, in the King's-Bench rot. 4, this advice of War adjudged Treason.

In Queen Mary's time, sir Nicholas Throckmorton * conspired with sir Thomas Wyat, to levy war within this realm for alteration in Religion, he joined not with him in the execution. This conspiracy alone declared to be Treason by all the Judges; this was after the Statute of queen Mary, so much insisted upon. That Parliament ended in October, this Opinion was delivered the Easter term following, and is reported by justice Dyer, fol. 98. It is true, sir Thomas Wyat afterwards did levy war; sir Nicholas Throckmorton he only conspired. This adjudged Treason.

One Story † in queen Elizabeth's time practised with foreigners, to levy War within this kingdom, nothing done in pursuance of the practice. The intent, without any adhering to enemies of the queen, or other cause, adjudged Treason, and he executed thereupon. It is true, my lords, that year 13 Eliz. by act of parliament it is made Treason, to intend the levying of war; this Case was adjudged before the parliament: The case was adjudged in Hillary term; the parliament begun not till the April following. This, my lords, is a Case judged in point, that the practising to levy War, though nothing be done in execution of it, is Treason.

Object.—It may be objected, That in these Cases, the conspiring being against the whole kingdom, included the queen, and was a compassing her destruction, as well as of the kingdoms, here the advice was to the king.

Answ.—The Answer is first, That the Warrant was unknown to his majesty, that was a Machination of War against the people and laws, wherein his majesty's person was engaged for protection.

Secondly, That the Advice was to his majesty, aggravates the offence, it was an attempt which was the offence; it was an attempt not only upon the kingdom, but upon the Sacred Person and his Office too; himself was *hostis patriæ*, he would have made the father of it so to: Nothing more unnatural nor more dangerous, than to offer the king poison to drink; telling him that it is a cordial is a passing of his death: the poison was repelled, there was an antidote within; the malice of the giver beyond expression. The persuading of Foreigners to invade the kingdom, hold no proportion with this Machination of War; against the law or kingdom, is against the king, they cannot be severed.

My Lords, If no actual War within the Statute, if the counselling of war, if neither of these single acts be Treason within the statute, The Commons, in the next place, have taken it into consideration, what the addition of his other words, counsels, and actions do operate in the case, and have conceived, that with this addition, all being put together, that he is brought within the statute of 25 E. 3.

The words of the Statute are, 'If any man 'shall compass, or imagine the death of the 'king;' the words are not, 'If any man shall 'plot, or counsel the death of the king;' No, my lords, they go further than to such things as are intended immediately, directly, and determinatively against the life and person of the king, they are of a larger extent; to compass, is to do by circuit, to consult or practice another thing directly, which being done, may necessarily produce this effect.

However it be in the other Treasons within this Statute, yet in this, by the very words, there is room left for constructions, for necessary inferences and consequences.

What hath been the judgment and practice of former times, concerning these words, of compassing the king's death, will appear to your lordships, by some Cases of Attainders upon these words.

One Owen, in king James's time, in the 13th year of his reign, at Sandwich in Kent, spake these words, 'That king James being excom-'municated by the Pope, may be killed by any

* See vol. 1. p. 869. † Ibid. p. 861.

'more, which killing is no murder?' Being asked by those he spake to, how he durst maintain so bloody an assertion? Answered, 'That the 'matter was not so heinous as was supposed; 'for the king, who is the lesser, is concluded by 'the Pope, who is the greater; and, as a male-'factor, being condemned before a temporal 'judge, may be delivered over to be executed; 'so the king, standing convicted by the Pope's 'Sentence of Excommunication, may justly be 'slaughtered without fault; for, the killing of 'the king is the execution of the Pope's supreme 'Sentence, as the other is the execution of the 'law.' For this Judgment of High Treason was given against him, and execution done.

My Lords, there is no clear intent appearing, that Owen desired the thing should be done, only Arguments that it might be done, this is a compassing, there is a clear endeavour to corrupt the judgment, to take off the bonds of conscience, the greatest security of the king's life, 'God forbid,' saith one of better judgment than he, 'that I should stretch out my hand against 'the Lord's anointed:' No, saith he, the Lord doth not forbid it, you may, for these reasons, lawfully kill the king.

He that denies the Title to the Crown, and plots the means of setting it upon another's head, may do this without any direct, or immediate desiring the death of him that wears it; yet this is Treason, as was adjudged in the 10th of Hen. 7, in these of Burton, and in the duke of Norfolk's case, 13 Eliz.

This is a compassing of his Death; for there can no more be two kings in one kingdom, then two suns in the firmament: He that conceives a title, counts it worth venturing for, though it cost him his life: he that is in possession thinks it as well worth the keeping. John Sparhauk, in king Henry the 4th's time, meeting two men upon the way, amongst other talk, said, That the king was not rightful king, but the earl of March; and that the pope would grant indulgences to all, that could assist the Earl's Title, and that within half a year there would be no Liveries nor Cognizances of the king; that the king had not kept promise with the people, but had laid Taxes upon them.

In Easter-Term, in the 3rd year of Henry the 4th, in the King's Bench, rot. 12, this adjudged Treason, this denying the Title with motives, though not implyedly of action against it, adjudged Treason; this is a compassing the king's death.

How this was a compassing of the king's Death, is declared in the Reasons of the Judgment; that the words were spoken with an intent, to withdraw the affections of the people from the king, and to excite them against him, that in the end they might rise up against him *in mortem et destructionem* of the king.

My Lords, in this Judgment, and others, which I shall cite to your lordships, it appears, that it is a compassing the king's death by words, to endeavour to draw the people's hearts from the king, to set discord between the king and them, whereby the people should leave the king, should rise up against him, to the death and destruction of the king.

The Cases that I shall cite, prove not only that it is Treason, but what is sufficient Evidence to make this good.

Upon a Commission held the 18th Ed. 4, in Kent, before the marquis of Dorset, and others, an Indictment was preferred against John Awater, of High Treason, in the form beforementioned, for Words, which are entered in the Indictment *sub hac forma*: That he had been servant to the earl of Warwick; that though he were dead, the earl of Oxford was alive, and should have the government of part of that country; That Edward, whom you call king of England, was a false man, and had, by art and subtilty, slain the earl of Warwick, and the duke of Clarence his brother, without any cause, who before had been both of them attainted of High-Treason.

My Lords, This Indictment was returned into the King's Bench in Trinity-term, in the 18th Edw. the 4th; and, in Easter-term, the 22d of Edw. the 4th, he was outlawed, by the stay of the outlawry, so long as it seems the Judges had well advised before whether it were treason or not.

At the same session Thomas Heber was indicted of Treason for these words, 'That the 'last Parliament was the most simple and in-'sufficient Parliament that ever had been in 'England; That the king was gone to live in 'Kent, because that for the present he had not 'the love of the citizens of London, nor should 'he have it for the future: That if the bishop of 'Bath and Wells were dead, the archbishop of 'Canterbury being cardinal of England, would 'immediately lose his head.' This Indictment was returned into the King's Bench in Trinity-term, in the 18th of Edw. 4th: afterwards there came a privy-seal to the Judge to respite the Proceedings, which, as it should seem, was to the intent the Judges might advise of the Case, for afterwards he is outlawed of High-Treason upon this Indictment.

These words are thought sufficient evidence, to prove these several Indictments, that they were spoken to withdraw the people's Affections from the king to excite them against him, to cause risings against him by the people, *in mortem et destructionem* of the king.

Your lordships are pleased to consider, That in all these Cases, the Treason was for words only, words by private persons, and in a more private manner, but once spoken, and no more, only amongst the people, to excite them against the king.

My Lords, here are Words, Counsels, more than Words and Actions too, not only to disaffect the people to the king, but the king likewise towards the people; not once, but often; not in private, but in places most public; not by a private person, but by a counsellor of state, a lord lieutenant, a lord-president, a lord-deputy of Ireland.

1. To his majesty that the parliament had denied to supply him: a slander upon all the

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commons of England, in their affections to the king and kingdom, in refusing to yield timely supply for the necessities of the king and kingdom.

2. From thence, that the king was loose, and absolved from rules of government, and was to do every thing, that power would admit. My lords, more cannot be said, they cannot be aggravated; whatever I should say would be in diminution.

3. Thence you have an Army in Ireland, you may employ to reduce this kingdom.

To counsel a king, not to love his people, is very unnatural, it goes higher to hate them, to malice them in his heart, the highest expressions of malice to destroy them by war. These coals they were cast upon his majesty, they were blown, they could not kindle in that breast.

Thence, my lords, having done the utmost to the King, he goes to the People. At York, the country being met together for Justice, at the open Assizes upon the bench, he tells them, speaking of the Justices of the Peace, that they were all for law, nothing but law, but they should find that the king's little finger should be heavier than the loines of the law, as they shall find. My lords, Who speaks this to the people, a privy-counsellor? this must be either to traduce his majesty to the people, as spoken from him, or from himself, who was Lord-Lieutenant of the county, and President, intrusted with the forces and justice of those parts, that he would employ both this way. Add, my lords, to his Words there the exercising of an arbitrary and vast jurisdiction, before he had so much as instructions, or colour of warrant.

Thence we carry him into Ireland; there he represented, by his place, the Sacred Person of his majesty.

1. There at Dublin, the principal city of that kingdom, whither the subjects of that country came for justice in an Assembly of Peers, and others of greatest rank, upon occasion of a Speech of the Recorder of that city, touching their franchises and regal rights; he tells them, That Ireland was a conquered nation, and that the king might do with them what he pleased.

2. Not long after, in the Parliament 10 Car. in the chair of state, in full parliament again, That they were a conquered nation; and that they were to expect laws as from a conqueror, before the king might do with them what he would, now they were to expect it that he would put this power of a Conqueror in execution:—The circumstauces are very considerable; in full parliament; from himself *in Cathedra*, to the representative body of the whole kingdom.

The occasion adds much, when they desired the benefit of the laws, and that their causes and suits might be determined according to law, and not by himself, at his will and pleasure, upon Paper Petitions.

3. Upon like occasion, of pressing the laws and statutes, that he would make an act of Council-Board in that kingdom, as binding as an act of parliament.

4. He made his words good by his actions, assumed and exercised a boundless and lawless jurisdiction over the lives, persons and estates of his majesty's subjects, procured judgment of death against a peer of that realm; commanded another to be hanged, this was accordingly executed, both in times of high peace, without any process or colour of law.

5. By force, of a long time, he seized the Yarn and Flax of the subjects, to the starving and undoing of many thousands; besides the Tobacco business, and many monopolies and unlawful taxes; forced a new Oath not to dispute his majesty's royal commands; determined men's estates at his own will and pleasure, upon Paper-Petitions to himself; forced obedience to these, not only by fines and imprisonment, but likewise by the army; sessed soldiers upon the refusers in an hostile manner.

6. Was an Incendiary of the war between the two kingdoms of England and Scotland.

My lords, We shall leave it to your lordships judgments, whether these Words, Counsels, and Actions, would not have been a sufficient Evidence, to have proved an Indictment drawn up against him, as those before mentioned, and many others are? That they were spoken and done to the intent, to draw the king's heart from the people, and the affections of the people from the king; that they might leave the king, and afterwards rise up against him, to the destruction of the king: If so, here is a compassing of the king's death, within the words of the Statute of 25 Edw. 3, and that warranted by many former judgments.

My Lords, I have now done with the three Treasons within the Statute of 25 Edw. 3. I proceed unto the fourth, upon the Statute of 18 Hen. 6, c. 3, in Ireland, and I shall make bold to read the words to your lordships: 'That no lord, nor any other of what condition 'soever he be, shall bring, or lead Hoblers, 'Kernes, or Hooded men, nor any other peo- 'ple, nor horses, to lie on horseback, or on 'foot, upon the king's subjects, without their 'good wills and consent, but upon their own 'costs, and without hurt doing to the commons; 'and if any so do, he shall be adjudged as a 'Traitor.'

1. The Argument that hath been made concerning the Person, that it extends not to the king, and therefore not to him, weighs nothing with your lordships, 'Rex non habet in regno 'parem;' from the greatness of his Office, to argue himself into the same impossibility with his sacred majesty, of being incapable of High-Treason, it is an Offence, no Treason; The words in the Statute, 'No lord, nor any other, 'of what condition soever he be,' include every subject.

In Trinity Term, in 33 Hen. 8, in the King's-Bench, Leonard lord Gray*, having immediatcly before been Lord Deputy of Ireland, is

* See vol. 1, p. 439.

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attainted of High-Treason, and Judgment given against him, for letting divers Rebels out of the castle of Dublin, and discharging Irish Hostages and Pledges, that had been given for securing the peace; for not punishing one that said, that the king was an Heretic: I have read the whole Record, there is not one thing laid to his charge, but was done by him as Lord Lieutenant; He had the same plea with my Lord of Strafford; That these things were no adhering to the king's enemies, but were done for reasons of state, that he was not within those words of the Statute of 25 Edw. 3, himself being Lord Lieutenant there.

Object.—It hath been said, That the Soldiers sessed upon the subjects by him, were not such persons as are intended by that statute, Hoblers, Kernes, and Hooded men, those rascally people.

Answ.—My Lords, they were the names given to the soldiery of those times, Hoblers, Horsemen; the other the Foot. But the words of the Statute go further, Nor any other people, neither horse nor foot. His lordship sessed upon them both horse and foot.

Object.—The Statute extends only to those, that lead or bring; Savil led them; my Lord only gave the Warrant.

Answ.—To this I shall only say thus, 'plus 'peccat author, quam actor,' by the rule of the law 'agentes et consentientes pari plectuntur 'pœna;' if consent, much more a command to do it, makes the commander a Traitor; If there be any treason within this statute, my lord of Strafford is guilty.

It hath been therefore said, That this Statute, like Goliah's sword, hath been wrapt up in a cloth and laid behind the door, that it hath never been put in execution.

My Lords; if the Clerk of the Crown in Ireland, had certified your lordships upon search of the Judgments of Attainders in Ireland, he could not find that any man had been attainted upon this statute, your lordships had had some ground to believe it; Yet it is only my lord of Strafford's affirmation; besides, your lordships know, that an act of parliament binds until it be repealed.

It hath been therefore said; That this Statute is repealed by the statute of 8 Ed. 4, cap. 1, and 10 Hen. 7, c. 22, because by these two statutes, the English statutes are brought into Ireland.

The Argument (if I mistook it not) stood thus; That the Statute of 1 Hen. 4, c. 10, saith, That in no time to come, Treason shall be adjudged otherwise, then it was ordained by the statute of 25 Ed. 3, that the reason mentioned in 18 Hen. 6, in the Irish statute, is not contained in 25 Edw. 3, and therefore contrary to the statute of 1 Hen. 4, it must needs be void.

If this were law, then all the Statutes that made any new Treason after 1 Hen. 4, were void in the very fabrick, and at the time when they were made; hence likewise it would follow, that the parliament now, upon what occasion soever, hath no power to make any thing Treason, not declared to be so in the statute 25 Ed. 3. This, your lordships easily see, would make much for the lord of Strafford's advantage, but why the law should be so, your lordships have only as yet heard an affirmation of it; no reason.

But some touch was given, that the Statute of 10 Hen. 7, in words, make all the Irish statutes void, which are contrary to the English. The Answer to this is a denial that there are any such words in the Statute. The Statute declares, That the English Statutes shall be effectual, and confirmed in Ireland, and that all the statutes made before time to the contrary, shall be revoked.

This repeals only the Irish Statutes of 10 Hen. 4, and 29 Hen. 6, which say, that the English Statutes shall not be in force in Ireland, unless particularly received in parliament, it makes all the Irish Statutes void, which say, that the English Statutes shall not be in force there.—It is usual when a Statute says, that such a thing shall be done, or not done, to add further, that all Statutes to the contrary shall be void. No likelihood that this Statute intended to take away any statute of Treason, but when in the chapter next before this, Murder there is made Treason, as if done upon the king's person.

That this Statute of 18 Hen. 6, remains on foot, and not repealed either by the Statute of 8 Edw. 4, or this of 10 Hen. 7, appears expressly by two several acts of parliament, made at the same parliament of 10 Hen. 7.

By an act of parliament of Henry 6th's time in Ireland, it was made Treason for any man whatsoever, to procure a Privy-Seal, or any other command whatsoever, for apprehending any person in Ireland for Treason done without that kingdom, and to put any such command in execution, divers had been attainted of Treason for executing such commands: There is a Treason, so made, by act of parliament, in Henry 6th's time. In the 3rd chapter of this Parliament of 10 Hen. 7, an act is passed for no other end than to repeal this Statute of Hen. 6, of Treason.

If this Statute of Hen. 6, of Treason, had been formerly repealed by the Statute of 8 Ed. 4, or then by the 22nd chapter of this Parliament of 10 Hen. 7, by bringing in the English Statutes, the law-makers were much mistaken now to make a particular act of parliament to repeal it, it being likewise so unreasonable an act as it was.

In the 8th chapter of this Parliament of 10 Hen. 7, it is enacted, That the statutes of Kilkenny and all other statutes made in Ireland (two only excepted, whereof this of 18 Hen. 6, is none) for the common-weal, shall be enquired of, and executed: My lord of Strafford saith, that the bringing in of the English Statute hath repealed this Statute; the act of parliament made the same time, saith no; it saith, that all the Irish Statutes, excepting two, whereof this is none, shall still be in force.

Object.—Oh, but however it was in 10 Hen.

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7, yet it appears by Judgment in Parliament afterwards, that this Statute of 18 H. 6, is repealed, and that is by the parliament of 11 Eliz. c. 7, that by this parliament it is enacted, That if any man, without licence from the Lord Deputy, lay any soldiers upon the king's subjects, if he be a peer of the realm, he shall forfeit 100*l.* if under the degree of a peer, 100 marks.—This Statute, as is alledged, declares the penalty of laying soldiers on the subjects to be only 100*l.* and therefore it is not Treason.

Answ.—My lords, if the offence for which this penalty of 100*l.* is laid upon the offenders, be for laying Soldiers, or leading them to do any act offensive or invasive upon the king's people, the argument hath some force; but that the offence is not for laying soldiers upon the true subjects, that this is not the Offence intended in the Statute, will appear to your lordships *ex absurdo*, from the words of it. The words are, 'That 'if any man shall assemble the people of the 'county together, to conclude of peace or war, 'or shall carry those people to do any acts 'offensive or invasive, then he shall forfeit '100*l.*'

If concluding of war, and carrying the people to acts invasive, be against the king's subjects, this is High-Treason, which are the words of the Statute of 25 E. 3, for if any subject shall assemble the people, and conclude a war, and accordingly shall lead them to invade the subject, this is a levying of War within the words of the statute; and then the statutes of the 25 E. 3, 1 H. 4, 1 of Q. Mary, which the earl of Stratford, in his Answers, desires to be tryed by, are as well repealed, in this point, as the Statute of the 18th Hen. 6, he might then, without fear of Treason, have done what he pleased with the Irish army; for all the statutes of levying of War by this statute of 11 Eliz. were taken out of his way.

In Ireland a subject gathers Forces, concludes a war against the king's people, actually invades them, bloodshed, burning of houses, depredations, ensue; two of those, that is, murder and burning of houses, are Treason; and there the other Felony by the construction, the punishment of Treason and Felony is turned only into a fine of 100*l.*; from loss of life, lands, and all his goods, only to loss of part of his goods.

The third absurdity, a War is concluded, three several inroads are made upon the subject; in the first 100*l.* damage; in the second, 5,000*l.* damage; in the third, 10,000*l.* damage, is done to the subjects; the penalty for the last inroad is no more than for the first, only 100*l.* This statute, by this construction, tells any man, how to get his living without long labour.

Two parts of the 100*l.* is given to the king, a third part unto the Informer; Here is no damage to the subject, that is robbed and destroyed.

My Lords, The Statute will free itself and the makers from those absurdities. The meaning of the Statute is, That if any captain shall, of his own head, conclude of peace or war against the king's enemies, or rebels, or shall, upon his own head, invade them without warrant from the king, or lord deputy of Ireland, that then he shall forfeit 100*l.*

The Offence is not for laying of soldiers upon the king's people, but making war against the Irish Rebels without Warrant; the offence is not in the matter, but in the manner, for doing a thing lawful but without mission. 1. This will appear by the general scope of the Statute, all the parts being put together. 2. By particular Clauses in the Statute. 3. By the Condition of that Kingdom, at the time of the making of that Statute.

For the 1st, The Preamble recites, That in time of declination of justice, under pretext of defending the country and themselves, diverse great men arrogated to themselves regal authority, under the names of Captains; that they acquired to themselves that government, which belonged to the Crown; for preventing of this, it is enacted, That no man dwelling within the Shire-grounds, shall thenceforth assume, or take to himself the authority or name of a Captain, within these Shire-grounds, without letters-patents from the Crown, nor shall, under colour of his Captainship, make any demand of the people of any exaction, nor as a Captain, assemble the people of the Shire-grounds; nor as a Captain shall lead those people to do any acts offensive or invasive, without Warrant under the Great Seal of England, or of the Lord Deputy, upon penalty, that if he do any thing contrary to that act, that then the offender shall forfeit a hundred pounds.

My Lords, The Rebels had been out; the Courts of Justice scarce sate; for defence of the country divers usurped the place of Captains, concluded of war against the Rebels, and invaded them without Warrant: invading the Rebels without authority, is a crime.

This appears further by particular clauses in the statute, none shall exercise any Captainship within the Shire-grounds, nor assemble the men of the Shire-grounds, to conclude war, or lead them to any invasion.

That that had antiently been so continued to this time, that is the Irish, and the English pale, they within the Shire-grounds were within the English pale; and *ad fidem et legem Angliæ*. The Irish without the pale were enemies always, either in open act of hostility, or upon leagues and hostages given for securing the peace; and therefore as here in England we had our Marches upon the frontiers in Scotland and Wales, so were there marches between the Irish and English Pale, where the inhabitants held their lands by this tenure, to defend the country against the Irish, as appears in the close Roll of the Tower, in the 20th Edw. 3, membrana 15, on the backside, and in an Irish parliament, held the 42nd Edw. 3, it is declared, That the English pale was almost destroyed by the Irish enemies, and that there was no way to prevent the danger, but only, that the owners reside upon their lands for defence, and that

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absence should be a forfeiture. This act of parliament in a great council here was affirmed, as appears in the close Roll, the 22nd Edw. 3, membrana 20 dorso.

Afterwards, as appears in the Statute 28 Hen. 6, in Ireland, this hostility continued between the English marches and the Irish enemies, who by reason there was no difference between the English Marches and them in their apparel, did daily (not being known to the English) destroy the English within the pale: Therefore it is enacted, that every English-man shall have the hair of his upper lip for distinction sake. This hostility continued until the 10th Hen. 7, as appears by the Statute of 10 H. 7, and 17th, so successively downwards, till the making of this very Statute of 11 Eliz. as appears fully in the 9th chap.

Nay, immediately before, and at the time of the making of this Statute, there was not only enmity between those of the Shire-ground, that is, the English and Irish pale, but open war, and acts of hostility, as appears by history of no less authority than that Statute itself; for in the first Chapter of that Statute, is the Attainder of Shane Oneale, who had made open war, was slain in open war; it is there declared, That he had gotten by force, all the North of Ireland, for 120 miles in length, and about 100 in breadth; that he had mastered divers places within the English pale; when the flame of this war by his death, immediately before this Statute, was spent, yet the firebrands were not all quenched, for the Rebellion continued by John Fitz-Gerard, called the White Knight, and Thomas Gueverford, this appears by the Statute of the 13th queen Eliz. in Ireland, but two years after this of the 11th queen Eliz. where they are attainted of High Treason, for levying of war this 11th year, wherein this Statute was made.

So that my lords, immediately before, and at the time of the making of this Statute, there being war between those of the shire-grounds, mentioned in this Statute, and the Irish, the concluding of war, and acts offensive and invasive there mentioned, can be intended against no others, but the Irish enemies.

Again, The words of the Statute are, 'No 'Captain shall assemble the people of the 'shire-grounds,' to conclude of peace or war; is to presume, that those of the shire-grounds will conclude of war against themselves. Nor (with the Statute) 'Shall carry those of the shire-grounds to do any acts invasive; by the construction which is made on the other side, they must be carried to fight against themselves.

Lastly, The words are, That as Captain, none shall assume the name, or authority of a Captain; or as a Captain shall gather the people together; or as a Captain lead them; the offence is not in the matter, but in the manner; if the acts offensive were against the king's good subjects, those that were under command were punishable, as well as the commanders; but in respect the soldiers knew the service to be good in itself, being against the enemies, and that it was not for them to dispute the authority of their commanders, the penalty of 100*l.* is laid only upon him, that as Captain, shall assume this power without warrant, the people commanded are not within this statute.

My Lords, The logic whereupon this Argument is framed, stands thus, because the statute of the 11th queen Eliz. inflicts a penalty of 100*l.* and no more, upon any man, that as a Captain without warrant, and upon his own head, shall conclude of, or make war against the king's enemies: Therefore the Statute of the 18th Hen. 6 is repealed, which makes it Treason to lay soldiers upon, or to levy war against the king's good people.

But, my lords, Observation hath been made upon other words of this Statute, that is, that without Licence of the Deputy, these things cannot be done; this shews that the Deputy is within none of the statutes.

My Lords, This Argument stands upon the same reason with the former, because he hath the ordering of the Army of Ireland, for the defence of the people, and may give warrant to the officers of the army, upon eminent occasions of invasion, to resist or prosecute the enemy, because of the danger that else might ensue forthwith, by staying for a warrant from his majesty out of England.

My Lords, The statute of the 10th Hen. 7, c. 17, touched upon for this purpose, clears the business in both points; for there is declared, That none ought to make War upon the Irish rebels, and enemies, without Warrant from the Lieutenant, the forfeiture 100*l.* as here the Statute is the same with this, and might as well have been cited, for repealing the Statute of the 18th Hen. 6, as this of the 11th queen Eliz. But if this had been insisted upon, it would have expounded the other two clear against him.

Object.—My Lords, it hath been further said, although the Statute be in force, and there be a Treason within it, yet the parliament hath no jurisdiction, the treasons are committed in Ireland, therefore not triable here.

Answ.—My Lords, sir John Parrot,* his predecessor, 24 Edw. was tryed in the King's-bench for Treason done in Ireland, when he was deputy; and Oruche in the 34 queen Eliz. adjudged here for Treason done in Ireland.

Object.—But it will be said, these Trials were after the Statute of the 34th Hen. 8, which enacts, that Treasons beyond sea may be tried in England.

Answ.—My Lords, his predecessor my lord Grayt was tried, and adjudged here in the King's Bench: that was in Trinity Term, in the 33rd Hen. 8th, this was before the making of that Statute.

Object.—To this again will we say, That it was for Treason by the laws and statutes of England; that this is not for any thing that is

* See vol. 1, p. 1315. † Ibid. p. 439.

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Treason by the law of England, but an Irish statute.

So that the question is only, Whether your lordships here in parliament, have cognizance of an offence, made Treason by an Irish statute, in the ordinary way of judicature, without bill? for so is the present question.

For the clearing of this, I shall propound two things to your lordships consideration. Whether the rule for expounding the Irish Statute and Customs, be one and the same in England as in Ireland? That being admitted, Whether the parliament in England have cognizance or jurisdiction of things there done, in respect of the place, because the king's writ runs not there?

For the first, in respect of the place, the parliament here hath cognizance there. And secondly, If the rules for expounding the Irish statutes and customs, be the same here as there, this exception (as I humbly conceive) must fall away.

In England there is the Common Law, the Statutes, the Acts of Parliament, and Customs, peculiar to certain places, differing from the common law; If any question arise concerning either a custom or an act of parliament, the common law of England, the first, the primitive and the general law, that is the rule and expositor of them, and of their several extents; it is so here, it is so in Ireland, the common law of England, is the common law of Ireland likewise; the same here and there in all the parts of it.

It was introduced into Ireland by king John, and afterwards by king Henry 3, by act of parliament held in England, as appears by the Patent Rolls of the 30th Hen. 3, the first Membrana, the words are, 'Quia pro communi utilitate terræ Hiberniæ et unitate terrarum regis, rex vult, et de communi concilio regis provisum est, quod omnes leges et consuetudines quæ in regno Angliæ tenentur, in Hibernia teneantur, et eadem terra eisdem legibus subjaceat, et per easdem regatur, sicut dominus Johannes rex cum ultimò essèt in Hibernia statuit et fieri mandavit, quia, &c. Rex vult quòd omnia brevia de communi jure quæ currunt in Anglia, similiter currant in Hibernia, sub novo sigillo regis mandatum est archiepiscopis, &c. quod pro pace et tranquilitate ejusdem terræ, per easdem leges eos regi et deduci permittant, et eas in omnibus sequantur in cujus, &c. Teste rege apud Woodstock, decimo nono die Septembris.'

Here is an union of both kingdoms, and that by act of parliament, and the same laws to be used here as there, *in omnibus*.

My Lords, That nothing might be left here for an exception, that is, That in Treasons, Felonies, and other capital offences concerning life, the Irish laws are not the same as here, therefore it is enacted by a parliament held in England, in the 14th Edw. 2, (it is not in print neither, but in the Parliament Book) That the Laws concerning life and member shall be the same in Ireland, as in England.

And that no exception might yet remain; in a parliament held in England, the 5th Edw. 3, it is enacted, 'Quod una et eadem lex fiat tam Hibernicis quam Anglicis.' This act is enrolled in the Patent Rolls of the 5th Edw. 3, Parl. membr. 25. The Irish therefore receiving their Laws from hence, they send their Students at Law to the Inns of Court in England, where they receive their degree, and of them, and of the common lawyers of this kingdom, are the Judges made.

The Petitions have been many from Ireland, to send from hence some judges, more learned in the laws, than those they had there. It hath been frequent in cases of difficulty there, to send sometimes to the parliament, sometimes to the king, by advice from the Judges here, to send them resolutions of their doubts. Amongst many, I'll cite your lordships only one, because it is in a case of Treason upon an Irish statute, and therefore full to this point.

By a Statute there made the 5th Ed. 4, there is a provision made for such as upon suggestions are committed to prison for Treason, that the party committed, if he can procure 24 compurgators, shall be bailed and let out of prison.

Two citizens of Dublin were by a grand jury presented to have committed Treason, they desired benefit of this statute, that they might be let out of prison, upon tender of their compurgators: the words of the Statute of the 5th Ed. 4, in Ireland, being obscure, the Judges there being not satisfied what to do, sent the Case over to the queen, desired the opinion of the Judges here, which was done accordingly. The Judges here sent over their opinion, which I have out of the Book of Justice Anderson, one of the Judges consulted withal. The Judges delivered their opinion upon an Irish Statute, in case of Treason.

If it be objected, That in this Case, the Judges here did not judge upon the party; their opinions were only *ad informandam conscientiam*, of the Judges in Ireland, that the Judgment belonged to the Judges there. My lords, (with submission) this and the other Authorities, prove, that for which they were cited, that is, that no absurdity, no failure of justice would ensue, if this great judicatory should judge of Treason, so made by an Irish statute.

The Common Law rules of judging upon an Irish Statute; the Pleas of the Crown for things of life and death, are the same here and there, this is all that yet hath been offered.

For the second point, That England hath no power of judicature, for things done in Ireland. My lords, the constant practice of all ages proves the contrary. Writs of Error in Pleas of the Crown, as well as in civil causes, have in all king's reigns been brought here, even in the inferior courts of Westminster-hall upon Judgment given in the courts of Ireland, the practice is so frequent, and so well known, as that I shall cite none of them to your lordships, no precedent will, I believe, be produced to your lordships, that ever the case was remanded back again into Ireland, because the question arose upon an Irish Statute, or Custom.

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Object.—But it will be said, that Writs of Error, are only upon failure of justice in Ireland, and that suits cannot originally be commenced here for things done in Ireland, because the king's Writ runs not in Ireland.

Answ.—This might be a good Plea in the King's Bench, and inferior courts at Westminster-hall; the question is, Whether it be so in Parliament? the king's Writ runs not within the county palatine of Chester and Durham, nor within the Five Ports; neither did it in Wales, before the Union of Henry the 8th's time, after the laws of England were brought into Wales, in king Edward the 1st's time, suits were not originally commenced at Westminster-hall for things done in them; yet this never excluded the Parliament suits; for life, lands, and goods within these jurisdictions, are determinable in parliament, as well as in any other parts of the realm.

Ireland, as appears by the statute of the 30th Hen. 3, before mentioned, is united to the crown of England. By the Statute of the 28th Hen. 6, in Ireland, it is declared in these words, That Ireland is the proper dominion of England, and united to the crown of England, which crown of England is of itself, and by itself, wholly and entirely endowed with all power and authority sufficient to yield to the subjects of the same full and plenary remedy, in all debates and suits whatsoever.

By the Statute of the 23 Hen. 8th, ch. 1, when the kings of England first assumed the title of King of Ireland, it is there enacted, That Ireland still is to be held as a crown annexed and united to the Crown of England.

So that by the same reason, from this that the king's writs run not in Ireland, it might as well be held, that the Parliament cannot originally hold plea of things done within the county-palatine of Chester and Durham, nor within the five ports and Wales; Ireland is a part of the realm of England, as appears by those statutes, as well as any of them.

This is made good by constant practice in all the Parliament Rolls, from the first to the last; there are Receivers and Tryers of Petitions appointed for Ireland; for the Irish to come so far with their Petitions for justice, and the Parliament not to have cognizance, when from time to time they had in the beginning of the parliament, appointed Receivers and Tryers of them, is a thing not to be presumed.

An Appeal in Ireland, brought by William lord Vesey, against John Fitz-Thomas, for treasonable Words there spoken, before any judgment given in case there, was removed into the Parliament in England, and there the defendant acquitted, as appears in the Parliament Pleas of the 22d Edw. 1.

The Suits for lands, offices, and goods originally begun here are many, and if question grew upon matter in fact, a Jury usually ordered to try it, and the Verdict returned into the Parliament; as in the Case of one Ballyben in the Parliament of the 35th Edw. 1. If a doubt arose upon a matter tryable by Record, a writ went to the officers, in whose custody the Record remained, to certify the record, as was in the Case of Robert Bagott the same parliament of the 35th Ed. 1, where the Writ went to the Treasurer, and barons of the Exchequer.

Sometimes they gave Judgment here in Parliament, and commanded the Judges there in Ireland to do execution, as in the great Case of Partition, between the Copartners of the Earl Marshal in the Parliament of the 33d Ed. 1, where the Writ was awarded to the Treasurer of Ireland.

My lords, The Laws of Ireland were introduced by the Parliament of England, as appears by three acts of the parliament before cited. It is of higher jurisdiction *dare leges*, than to judge by them. The parliaments of England do bind in Ireland, if Ireland be particularly mentioned, as is resolved in the Book Case of the 1st Hen. 7. Cook's 7th Report Calvin's Case; and by the Judges in the Trinity-term, in the 33d queen Eliz. The statute of the 8th Ed. the 4th, ch. 1, in Ireland, recites, That it was doubted amongst Judges, whether all the English statutes, though not naming Ireland, were in force there? if named, no doubt.

From king Henry the 3d, his time downwards, to the 8th queen Eliz., by which Statute it is made Felony to carry sheep from Ireland beyond seas, in almost all these king's reigns, there be statutes made concerning Ireland. The exercising of the legislative power there, over their lives and estates, is higher than of the judicial in question: Until the 29th Edw. 3, erroneous judgments given in Ireland, were determinable no where but in England: no, not in the parliament of Ireland, as it appears in the close Rolls in the Tower, in the 29th Edw. 3, memb. 12, power to examine and reverse erroneous Judgments in the parliaments of Ireland is granted from hence. Writs of Error lie in the parliament here upon erroneous judgments, after that time, given in the parliaments of Ireland, as appears in the Parliament Rolls, of the 8th Hen. 6, no. 70, in the Case of the Prior of Leothan. It is true, the Case is not determined there, for it is the last thing that came into the parliament, and could not be determined for want of time, but no exception at all is taken to the jurisdiction.

The acts of parliament made in Ireland, have been confirmed in the parliaments of England, as appears by the close Rolls in the Tower, in the 42d Edw. 3, memb. 20, dorso: where the parliament in Ireland, for the preservation of the country from Irish, who had almost destroyed it, made an act, That all the land owners, that were English, should reside upon their lands, or else they were to be forfeited, this was here confirmed.

In the Parliament of the 4th Hen. 5, ch. 6, acts of parliament in Ireland are confirmed, and some privileges of the peers in the parliaments there are regulated.

Power to repeal Irish statutes, power to confirm them, cannot be by the parliament here, if it hath not cognizance of their parliaments;

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unless it be said, that the parliament may do it knows not what.

Guernsey and Jersey are under the king's subjection, but are not parcels of the crown of England, but of the duchy of Normandy, they are not governed by the laws of England, as Ireland is, and yet parliaments in England have usually held plea of and determined all Causes concerning Lands or Goods. In the Parliament, in the 33 Edw. 1, there be 'Placita de insula Jersey.' And so in the Parliament, 14 Edw. 2, and so for Normandy and Gascoigne, and always as long as any part of France was in subjection to the crown of England, there were at the beginning of the parliaments, Receivers and Tryers of Petitions, for those parts, appointed.—I believe your lordships will have no case shewed of any Plea, to the jurisdiction of the parliaments of England, in any things done in any parts wheresoever in subjection to the crown of England.

The last thing I shall offer to your lordships, is, the Case of 19 Eliz. in my lord Dyer, 306, and judge Crompton's Book, of the jurisdiction of Courts, fol. 23. The opinion of both these Books is, That an Irish peer is not tryable here, it is true, a Scotch or French nobleman is tryable here, as a common person; the law takes notice of their nobility, because those countries are not governed by the laws of England; but Ireland being governed by the same laws, the peers there are tryable according to the law of England only, *per pares*.—By the same reason, the earl of Strafford, not being a peer of Ireland, is not tryable by the peers of Ireland; so that if he be not tryable here, he is tryable no where.—My lords, In case there be a Treason and a Traitor within the statute, and that he be not tryable here for it, in the ordinary way of judicature, if that jurisdiction fail, this by way of Bill doth not: Attainders of Treason in parliament, are as legal, as usual by act of parliament, as by judgment.

I have now done with the Statutes 25 Edw. 3, and 18 Hen. 6. My lord of Strafford hath offended against both the kingdoms, and is guilty of High Treason by the laws of both.

My Lords, In the Fifth place, I am come to the Treasons at the Common-Law, the endeavouring to subvert the fundamental Laws and Government of the kingdom, and to introduce an Arbitrary and Tyrannical government. In this I shall not at all labour to prove, That the endeavouring by words, counsels and actions, to subvert the laws, is Treason at the common-law, if there be any common-law Treason at all left; nothing is treason, if this be not, to make a kingdom no kingdom; take the polity and government away, England's but a piece of earth, wherein so many men have their commorancy and abode, without ranks or distinction of men, without property in any thing further than possession; no law to punish the murthering, or robbing one another.

That of 33 Hen. 8, of introducing the Imperial Law, sticks not with your lordships; it was in case of an Appeal to Rome; these Appeals in cases of Marriages, and other causes counted ecclesiastical, had been frequent, had in most king's reigns been tolerated; some in times of Popery put a conscience upon them; the Statutes had limited the penalty to a *Præmunire* only, neither was that a total subversion, only an appeal from the ecclesiastical court here in a single cause, to the court of Rome; and if treason or not, that case proves not, a treason may be punished as a felony; a felony as a trespass, if his majesty so please; the greater includes the less in the case of *Præmunire*; in the Irish Reports, that which is there declared to be treason, was proceeded upon only as a *Præmunire*.

The thing most considerable in this is, Whether the Treasons at common-law, are taken away by the statute of 25 Ed. 3, which is to speak against both the direct words and scope of that Statute. In it there is this Clause, 'That because many other like Cases 'of Treason might fall out, which are not there 'declared; therefore it is enacted, That if any 'such case come before the Judges, they shall 'not proceed to judgment, till the Case be de-'clared in parliament, whether it ought to be 'adjudged Treason or not.' These words, and the whole scope of that statute, shews, that it was not the meaning to take away any Treasons that were so before, but only to regulate the jurisdiction and manner of trial. Those that were single and certain acts, as conspiring the king's death, levying war, counterfeiting the money, or great seal, killing a judge; these are left to the ordinary courts of justice: The others not depending upon single Acts, but upon constructions and necessary inferences, they thought it not fit to give the inferior courts so great a latitude here, as too dangerous to the subject, those they restrained to the parliament.—This Statute was the great security of the Subjects, made with such wisdom, as all the succeeding ages have approved it; it hath often passed through the furnace, but like gold, hath left little or nothing.

The Statute of 1 H. 4, c. 10, is in these words, 'Whereas in the parliament held the '21st year of R. 2, divers pains of Treason 'were ordained, insomuch that no man did 'know how to behave himself, to do, say, or 'speak: It is accorded that in no time to 'come, any Treason be adjudged otherwise, 'than it was ordained by the statute of 25th 'Edw. 3.' It hath been said, To what end is this Statute made, if it takes not away the common-law Treasons remaining after the statute of 25 Ed. 3.?

There be two main things which this statute doth; 1. It takes away for the future all the Treasons, made by any statute since 25 Ed. 3, to 1 H. 4, even to that time; for in respect, that by another act in that parliament, the statute of 21 R. 2, was repealed, it will not be denied, but that this statute repeals more treasons than these of 21 R. 2. It repeals all statute-treasons but those in 25 Edw. 3.—2. It not only takes away the Statute-Treasons, but

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likewise the declared Treasons in parliament, after 25 Edw. 3, as to the future, after declaration in parliament, the inferior courts might judge these Treasons; for the declaration of a treason in parliament after it was made, was sent to the inferior courts, that *toties quoties* the like case fell out, they might proceed therein, the subject for the future was secured against these; so that this Statute was of great use.

But by the very words of it, I shall refer all Treasons to the provision of 25 Ed. 3, it leaves that entire, and upon the old bottom. The Statute of 1 Mar. c. 1, saith, That no offences made Treason by any act of parliament, shall thenceforth be taken or adjudged to be treason, but only such as be declared and expressed to be treason by the statute of 25 Edw. 3, 'Concerning Treason, or the Declaration of Treason,' and no others: And further provides, 'That no pains of death, penalties, or forfeiture in any wise shall ensue, for committing 'any Treason, other than such as be in the 'statute of 25 Edw. 3, ordained and provided, 'any act of parliament, or any declaration, or 'matter to the contrary, in any wise notwithstanding.'

By the first of this Statute, only offences made treason by act of parliament, are taken away, the common-law-treasons are no ways touched, the words 'and no others,' refer still to offences made Treason by act of parliament; they restrain not to the treasons only, particularly mentioned in the statute in 25 Edw. 3, but leave that Statute entire to the Common-Law-Treason, as appears by the words immediately foregoing.

By the Second Part, for the pains and forfeitures of Treasons, if it intend only the punishment of Treason, or if it intend both Treason and Punishment, yet all is referred to the Provision and Ordinance of 25 Edw. 3, any act of parliament, or other declaration, or thing, notwithstanding.

It saith not, other than such Penalties or Treasons, as are expressed and declared in the Statute of 25 Edw. 3, that might perhaps have restrained it to those that are particularly mentioned, no, it refers all Treasons to the general ordination and provision of that statute, wherein the Common-Law-Treasons are expressly kept on foot.

If it be asked, What good this Statute doth, if it take not away the Common-Law-Treasons?—1. It takes away all the Treasons made by act of parliament, not only since 1 Hen. 4, which were many, but all before 1 Hen. 4, even until 25 E. 3, by express words. 2. By express words, it takes away all declared Treasons, if any such had been in parliament; those for the future are likewise taken away; so that whereas it might have been doubted, whether the statute of 1 H. 4, took away any Treasons, but those of the 22nd and 23rd years of R. 2. This clears it, both for Treasons made by parliament, or declared in parliament, even to the time of making the statute.

This is of great use, of great security to the Subject; so that, as to what shall be Treason, and what not, the Statute of 25 Ed. 3, remains entire, and so by consequence the Treasons at the common-law.

Only, my lords, it may be doubted, whether the manner of the parliamentary proceeding be not altered by the Statute of 1 H. 4, c. 10, and more fully in the Parliament-Roll, n. 14, that is, whether since that statute the parliamentary power of Declaration of Treason, whereby the inferior courts receive jurisdiction, be not taken away and restrained only to this, that so it might operate no further, than that particular contained in the Bill, that so Parliamentary Declarations for after-times should be kept within the parliament itself, and be extended no further: Since 1 H. 4, we have not found any such declarations made, but all Attainders of Treason have been by Bill?

If this be so, yet the Common-Law Treason still remaining, there is one and the same ground of reason and equity since 1 H. 4. for passing a Bill of Treason, as was before, for declaring of it without bill.—Herein the legislative power is not used against my lord of Strafford in the Bill, it is only the jurisdiction of the parliament.

But, my lords, because that either through my mistaking of the true grounds and reasons of the Commons, or my not pressing them with apt arguments, and precedents of former times, or that perchance your lordships, from some other reasons and authorities, more swaying with your lordships judgments, than those from them, may possibly be of a contrary or dubious opinion, concerning these Treasons, either upon the statutes of 25 E. 3, and 18 H. 6, or at the common-law.

My lords, If all these five should fail, they have therefore given me further in command to declare to your lordships some of their Reasons, why they conceive that in this case, the mere legislative power may be exercised.

Their Reasons are taken from these three grounds; 1. From the Nature and Quality of the Offence. 2. From the Frame and Constitution of the Parliament, wherein this law is made. 3. From Practices and Usages of former times.

The horridness of the Offence, in endeavouring the overthrowing the laws and present government, hath been fully opened to your lordships heretofore.

The Parliament is the Representation of the whole kingdom; wherein the King as head, your Lordships as the most noble, and the Commons the other members, are knit together into one body politic; this dissolves the arteries and ligaments that hold the body together, the Laws; he that takes away the laws, takes not away the allegiance of one subject alone, but of the whole kingdom.

It was made Treason by the statute of 13 Eliz. for her time, to affirm, that the Laws of the realm do not bind the descent of the crown; no law, no descent at all.

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No laws, no peerage; no ranks or degrees of men; the same condition to all.

It is treason to kill a Judge upon the bench; this kills not *Judicem, sed Judicium;* He that borrowed Apelles, and gave bond to return again Apelles the painter, sent him home, after he had cut off his right hand; his bond was broken; Apelles was sent, but not the painter. There are 12 men, but no law; there is never a Judge amongst them.

It is Felony to embezzle any one of the Judicial Records of the kingdom; this at once sweeps them all away, and from all.

It is Treason to counterfeit a 20*s.* piece; here is a counterfeiting of the law; we can call neither the counterfeit, nor true coin, our own.

It is Treason to counterfeit the Great-Seal for an acre of land; no property hereby is left to any land at all; nothing Treason now, either against king or kingdom; no law to punish it.

My Lords, If the question were asked at Westminster-hall, Whether this were a crime punishable in Star Chamber or in the King's Bench, by fine, or imprisonment? they would say it went higher: If whether Felony? they would say, that is for an offence only against the life, or goods of some one or few persons? It would, I believe, be answered by the Judges, as it was by the Chief Justice Thurning in 21 R. 2, that though he could not judge the case Treason there before him, yet if he were a peer in parliament he would so adjudge it.—My Lords, if it be too big for those Courts, we hope it is in the right way here.

2. The second consideration is from the Frame and Constitution of the Parliament; the Parliament is the great body politic, it comprehends all, from the king to the beggar; if so, my lords, as the natural, so this body, it hath power over itself, and every one of the members, for the preservation of the whole; It's both the physician and the patient; If the body be distempered, it hath power to open a vein, to let out the corrupt blood for curing itself; if one member be poisoned or gangrened, it hath power to cut it off for the preservation of the rest.

But, my lords, it hath often been inculcated, that Law makers should imitate the Supreme Law-giver, who commonly warns before he strikes. The law was promulged before the judgment of death for gathering the sticks. No law, no transgression.

My lords, To this rule of law is 'Frustra legis 'auxilium invocat, qui in legem committit,' from the *Lex talionis;* he that would not have had others to have a law, Why should he have any himself? Why should not that be done to him, that himself would have done to others?

It is true, we give law to Hares and Deers, because they be beasts of chase; It was never accounted either cruelty or foul play, to knock foxes and wolves on the head, as they can be found, because these be beasts of prey. The warrener sets traps for polecats and other vermin, for preservation of the warren. Further, my lords, most dangerous diseases, if not taken in time, they kill; Errors, in great things, as war and marriage, they allow no time for repentance; it would have been too late to make a law, when there had been no law.

My lords, for further Answer to this Objection, he hath offended against a law, a law within the endeavouring to subvert the laws and polity of the state wherein he lived, which had so long, and with such faithfulness protected his ancestry, himself, and his whole family: It was not *malum quia prohibitum*, it was *malum in se*, against the dictates of the dullest conscience, against the light of nature, they not having a law, were a law to themselves. Besides this, he knew a law without, that the Parliament, in cases of this nature, had *potestatem vitæ et necis.* Nay, he well knew, that he offended the promulged and ordinary rules of law. Crimes against law have been proved, have been confessed, so that the question is not *de culpa, sed de pœna,* What degree of punishment those faults deserve? We must differ from him in opinion, That 20 Felonies cannot make a Treason, if it be meant of equality in the use of the legislative power; for he that deserves death for one of these Felonies alone, deserves a death more painful, and more ignominious for all together.

Every Felony is punished with loss of life, lands, and goods; a Felony may be aggravated with those circumstances, as that the parliament with good reason may add to the circumstances of punishment, as was done in the case of John Hall,* in the parliament of the 1 H. 4, who, for a barbarous murder, committed upon the duke of Gloucester, stifling him between two feather beds at Calais, was adjudged to be hanged, drawn, and quartered.

Batteries by law are only punishable by fine, and single damages to the party wounded. In the Parliament held in 1 H. 4, cap. 6, one Savage committed a battery upon one Chedder, servant to sir John Brooke, a knight of the parliament for Somersetshire. It is there enacted, that he shall pay double damages, and stand convicted, if he render not himself by such a time. The manner of proceedings quickened, and the penalty doubled; the circumstances were considered, it concerned the commonwealth, it was a battery with breach of privilege of parliament.

This made a perpetual act: no warning to the first offender: and in the King's Bench, as appears by the Book Case of 9 H. 4, the first leaf, double damages were recovered.

My lords, in this of the Bill, the offence is high and general, against the king and the commonwealth, against all, and the best of all. If every Felony be loss of life, lands, and goods; What is misuser of the legislative power, by addition of ignominy, in the death and disposal of the lands to the crown, the public patrimony of the kingdom? But it was hoped, that your

* See vol. 1, p. 161.

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lordships had no more skill in the art of killing men, than your worthy ancestors. My lords, this Appeal from yourselves to your ancestors we do admit of, although we do not admit of that from your lordships to the peers of Ireland.

He hath appealed to them: your lordships will be pleased to hear, what Judgment they have already given in the case, that is, the several Attainders of Treason in parliament; after the Statute of 25 E. 3, for Treasons not mentioned, nor within that Statute, and those upon the first offenders without warning given.—By the Statute of 25 E. 3, it is Treason to levy war against the king; Gomines and Weston afterwards in parliament, in the 1st R. 2, n. 38, 39, adjudged Traitors for surrendering two several castles in France, only out of fear, without any compliance with the enemy; this not within the statute of 25 E. 3.

My Lords, in the 3rd of Rich. 2, John Imperiall that came into England upon Letters of Safe Conduct, as an agent for the state of Genoa, sitting in the evening before his door, in Bread-street, (as the words of the Records are) 'Paulo ante ignitegium;' John Kirkby, and another citizen, coming that way, casually Kirkby trod upon his toe, it being twilight, this grew to a quarrel, and the ambassador was slain; Kirkby was indicted of High Treason, the Indictment finds all this, and that it was only done *se defendendo*, and without malice.

The Judges, it being out of the Statute of 25 E. 3, could not proceed; the Parliament declared it Treason, and Judgment afterwards of High Treason: there is nothing can bring this within the statute of 25 E. 3, but it concerns the honour of the nation, that the public faith should be strictly kept: It might endanger the traffic of the kingdom; they made not a law first, they made the first man an example; this is in the Parliament Roll 3 R. 2, n. 18, and Hilary Term, 3 R. 2, rot. 31, in the King's-Bench, where Judgment is given against him.

In 11 R. 2, Tresilian, and some others, attainted of Treason for delivering opinions in the subversion of the law, and some others for plotting the like. My lords, the Case hath upon another occasion been opened to your lordships; only this is observable, that in the parliament of the 1st of Hen. 4, where all Treasons are again reduced to the Statute of 25 E. 3. these Attainders were by a particular act confirmed and made good, that the memory thereof might be transmitted to succeeding ages, they stand good unto this day; the offences there as here, were the endeavouring the subversion of the laws.

My Lords, after the 1 H. 4, sir John Mortimer being committed to the Tower, upon suspicion of Treason, brake prison, and made his escape; this no way within any statute, or any former judgment at common-law for this, that is, for breaking the prison only, and no other cause; in the parliament held the 2 Hen. 6, he was attainted of High-Treason by Bill.*

* See vol. 1. p. 267.

My lords, Poisoning is only murder, yet one Richard Cooke having put poison into a pot of pottage in the kitchen of the bishop of Rochester, whereof two persons died, he is attainted of Treason, and it was enacted, that he should be boiled to death by the statute of 22 H. 8, c. 9. By the Statute of the 25 H. 8, Elizabeth Barton the Holy Maid of Kent, for pretending Revelations from God, That God was highly displeased with the king, for being divorced from the lady Catharine, and that in case he persisted in the separation, and should marry another, that he would not continue king not above one month after, because this tended to the depriving of the lawful succession to the crown, she is attainted of Treason.

My lords, all these Attainders, for ought I know, are in force at this day. The statutes of 1 Hen. 4, and 1 queen Mary, although they were willing to make the Statute of 25 E. 3, the rule to the Inferior Courts, yet they left the Attainders in Parliament, precedent to themselves, untoucht, wherein the legislative power had been exercised. There is nothing in them whence it can be gathered, but that they intended to leave it as free for the future.

My lords, In all these Attainders, there were Crimes and Offences against the law; they thought it not unjust (circumstances considered) to heighten and add to the degrees of punishment, and that upon the first offender. My lords, we receive, as just, the other laws and statutes made by these our ancestors, they are the rules we go by in other cases, Why should we differ from them in this alone? These, my lords, are in part those things, which have satisfied the Commons in passing the Bill, it is now left to the judgment and justice of your lordships.

Upon the close of Mr. St. John's Speech the house adjourned, nor was there one word spoken but by master St. John, only the Lord Lieutenant used the last part of his rhetorick, and by a dumb eloquence, '*manibus ad sidera tensis*,' often holding up his hands towards Heaven, all along Mr. St. John's Speech, made his replies with a deep silence.

April 30.

On Friday, the Earl petitioned the Lords to be heard again, alledging, That his lawyers had not fully spoken at their last meeting, but this was denied him, because the House of Commons were to have the last Speech, nor were they content to speak again.

The KING's SPEECH to the COMMONS.

Upon this information, or what else is not known, the King (it seems, fearing the inconstancy of the Lords) came to the house on Saturday, May 1, at ten of the clock, and having called for the House of Commons, spake much to this effect;

'That he had sincerely, without affection or 'partiality, endeavoured to inform himself con- 'cerning the Lieutenant's Charge; and had, at 'length, seriously pondered with himself, both

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'concerning the Matter of Fact, and the Matter of Law: and now it stood him in hand to 'clear their judgments, than to exonerate his 'own conscience. For them, he had two 'things to declare:

'First, That there was never such a project, 'nor had the lord Strafford ever offered such 'Advice, for the transporting of the Irish Army 'into England; so that in nothing the Lieutenant had been more misunderstood than in 'that: which imputation did in no small measure reflect on himself (the King) as if he had 'intended to make war upon his own Subjects; 'which thought (he said) was far enough from 'his breast, nor could any man in probability 'think so unworthily of him, who had perceived 'how graciously he had dealt with his subjects 'elsewhere, that had deserved a great deal 'worse.

'Secondly, That the Lieutenant had never 'advised him to establish an Arbitrary Government; nor, if he had, should he have escaped 'condign punishment: nor would any of his 'good subjects ever think otherwise, unless 'they conceived him either to be a Fool or a 'Tyrant; that he either could not, or would 'not discern such wickedness. He was well 'content, he said, with that Authority and 'Power which God had put into his hands; nor 'should he ever think it his Prerogative, to intrude upon the propriety of the subject.

'For himself, and his own conscience, he 'said, he was now to declare, That, in his 'own judgment, there was nothing in the Process against the Lieutenant that deserved the 'censure of Treason. Oversights and Misdemeanors there were, in such a measure, that 'he confessed the lord Strafford was never worthy hereafter to bear any office in his kingdoms, no, not so much as of a Constable; 'but was to be answerable for all his errors, 'when they were to be charged upon him; and 'to this none of them should concur with 'greater alacrity than himself. That he hoped 'none of them would deny to give him the privilege of the first voice, which was, That he 'would never, in heart nor hand, concur with 'them to punish this man as a Traitor; and 'desired therefore, that they would think of 'some other way how the business might be 'composed: nor should it ever be less dear to 'him (though with the loss of his dearest blood) 'to protect the innocent, than to punish the 'guilty.'*

May 8.

Upon Saturday, the Bill against the lord Strafford passed the lords; there were 45 present, of which 19 voiced for him, and 26 against him. The greatest part of his friends absented themselves, upon pretence (whether true or supposititious) that they feared the multitude;

* "As soon as the earl of Bedford was dead, the lord Say (hoping to receive the reward of the Treasurership) succeeded him in his undertaking, and faithfully promised the king, 'that he should not be pressed in the matter 'of the earl of Strafford's life:' and under that promise got credit enough, to persuade his majesty to whatsoever he said was necessary to that business. And thereupon, when the Bill was depending with the lords, and when there was little suspicion that it would pass, though the house of commons every day by Messages endeavoured to quicken them, he persuaded the king 'to go to the house of peers, and according to custom to send for the house of 'commons, and then to declare himself, That 'he could not, with the safety of a good conscience, ever give his consent to the Bill that 'was there depending before them concerning 'the earl of Strafford, if it should be brought 'to him, because he was not satisfied in the 'point of Treason: but he was so fully satisfied 'that the Earl was unfit ever to serve him 'more, in any condition of employment, that 'he would join with them in any act, to make 'him utterly incapable of ever bearing office, 'or having any other employment in any of his 'majesty's dominions; which he hoped would 'satisfy them.'—This advice, upon the confidence of the giver, the King resolved to follow. But when his resolution was imparted to the Earl, he immediately sent his brother to him, beseeching his majesty 'by no means to take 'that way, for that he was most assured it 'would prove very pernicious to him; and 'therefore desired, he might depend upon the 'honour and conscience of the peers, without 'his majesty's interposition.' The king told his brother, 'that he had taken that Resolution by the advice of his best friends; but 'since he liked it not, he would decline it.' The next morning the lord Say came again to him, and finding his majesty altered in his intention, told him, 'If he took that course he 'advised him, he was sure it would prevail; 'but if he declined it, he could not promise his 'majesty what would be the issue, and should 'hold himself absolutely disengaged from any 'undertaking.' The king observing his positiveness, and conceiving his intentions to be very sincere, suffered himself to be guided by him; and went immediately to the house, and said as the other had advised. Whether that lord did in truth believe the discovery of his majesty's conscience in that manner, would produce the effect he foretold; or whether he advised it treacherously, to bring on those inconveniences which afterwards happened, I know not: but many who believed his will to be much worse than his understanding, had the uncharitableness to think, that he intended to betray his master, and to put the ruin of the Earl out of question.—The event proved very fatal; for the king no sooner returned from the house, than the House of Commons, in great passion and fury, declared this last act of his majesty's, to be 'the most unparalleled breach 'of privilege, that had ever happened; that if 'his majesty might take notice what bills were 'passing in either house, and declare his own 'opinion, it was to forejudge their counsels,

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otherwise his suffrages had more than counterpoised the voters for his death.

May 9.

Sunday all the day the king was resolute never to give way to the Bill * against the lord Strafford, telling them withal, That it seemed strange to him that the man could not die, unless he, and he only, by giving Sentence the king's legislative way, should condemn him.

'and they should not be able to supply the 'Commonwealth with wholesome laws, suitable 'to the diseases it laboured under; That this 'was the greatest obstruction of Justice, that 'could be imagined; That they and whosoever 'had taken the late protestation, were bound 'to maintain the privileges of parliament, which 'were now too grossly invaded and violated:' with many sharp discourses to that purpose." Lord Clarendon.

* Lord Clarendon, in his History of the Rebellion, (vol. 1. p. 257, Oxford 8vo ed. 1717) says, "That when the Privy Council pressed the King to pass the Bill of Attainder against the Earl of Strafford, saying, 'there was no 'other way to preserve himself and his posterity 'than by so doing, and therefore that he ought 'to be more tender of the safety of the kingdom 'than of any one person how innocent soever:' his majesty told them, 'That what had been 'proposed to him to do, was directly contrary 'to his conscience, and that being so, he was 'sure they would not persuade him to it, though 'themselves were never so well satisfied.' To that point they desired him 'to confer with his 'Bishops, who they doubted not would better 'inform his conscience.' The Archbishop of York [Williams] was at hand; who, to his argument of conscience, told him, That 'there was 'a Private and a Public conscience; that his 'public conscience as a king might not only 'dispense with, but oblige him to do that which 'was against his private conscience as a man; 'and that the question was not, Whether he 'should save the Earl of Strafford, but whether 'he should perish with him; that the conscience of a king to preserve his kingdom, the 'conscience of a husband to preserve his wife, 'the conscience of a father to preserve his children, (all which were now in danger) weighed 'down abundantly all the considerations the 'conscience of a master or a friend could suggest to him for the preservation of a friend or 'servant.' And by such unprelatical, ignominious arguments, in plain terms advised him 'even 'for conscience sake to pass that Act.' Though this bishop acted his part with more prodigious boldness and impiety, others of the same function (for whose learning and sincerity the king and the world had greater reverence) did not what might have been expected from their calling or their trust, but at least forbore to fortify and confirm a conscience, upon the courage and piety of which, the security of their persons, and their order, did absolutely under God depend."

The EARL's LETTER to the KING.

The same day, the King received the following Letter from the Earl:

'It hath been my greatest grief in all my 'troubles, to be taken as a person that should 'endeavour to present, and set things amiss 'between your majesty and your people, and 'to have given counsel tending to the disquiet 'of your majesty and your three kingdoms.

'Most true it is, that such an attempt (my 'private condition considered) had been a great 'madness, seeing, through your gracious favour, 'I was so provided, as I could not expect in 'any kind to mend my fortune, or to please my 'mind, more than by resting where your bounteous hand had placed me; nay, the business is 'most mightily mistaken; for unto your majesty it is well known, that my poor and humble advices concluded still in this, That your 'majesty should never be happy, till there were 'a right understanding procured betwixt you 'and them: No other means to effect and settle this happiness, but by the counsel and assent of the parliament; and no way to prevent the growing evils of this state, but by 'putting yourself entirely upon the loyalty and 'good affection of your subjects.

'Yet (such is my misfortune) the truth finds 'little credit, the contrary (it seems) generally 'believed, and myself reputed the cause of this 'great separation betwixt you and your people: 'Under a heavier censure than this, I am persuaded no gentleman can suffer; and now I 'understand, that the minds of men are the 'more incensed against me, notwithstanding 'your majesty hath declared, That in your 'princely opinion I am not guilty of Treason, 'nor are you satisfied in conscience to pass the 'Bill. This brings me into a great streight. 'Here is before me the ruin of my children and 'family, hitherto untouched in all the branches 'of it with any foul crime. Here are before 'me the many evils which may befal your sacred person, and the whole kingdom, should 'yourself and the parliament be less satisfied 'the one with the other than is necessary for 'the king and people. Here are before me the 'things most valued, most feared by mortal 'men, life and death: To say, Sir, there hath 'not been a conflict within me about these 'things, were to make myself less man than '(God knows) my infirmities will give me leave; 'and to call a destruction upon myself and my 'young children, where the intentions (at least) 'of my heart have been innocent of this great 'offence, (may be believed) would find no easy 'consent from flesh and blood.

'But, out of much sadness, I am come to a 'resolution of that which I take to be best becoming me, that is, To look upon that which 'is principally to be considered in itself, and 'that is, doubtless, the prosperity of your sacred 'Person and the Commonwealth, infinitely to 'be preferred before any man's private interest: 'And therefore, in few words, as I have put 'myself wholly upon the honour and justice of

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'my peers, and so clearly as I wish your majesty had been pleased to have spared that 'Declaration of yours on Saturday last, and to 'have left me intirely to their lordships; so 'now, (to set your majesty's conscience at 'liberty) I do most humbly beseech you, for 'the preventing of such mischiefs as may happen by your Refusal to pass the Bill, by this 'means to remove (praised be God I cannot 'say this accursed, but I confess) this unfortunate thing forth of the way towards that 'blessed agreement, which God, I trust, shall 'for ever establish betwixt you and your subjects. Sir, my consent herein shall acquit you 'more to God than all the world can do beside. To a willing man there is no injury 'done; and, as by God's grace, I forgive all the 'world, with a calmness and meekness of infinite contentment to my dislodging soul, so, 'sir, I can give the life of this world with all 'chearfulness imaginable, in the just acknowledgments of your exceeding favours, and only 'beg, that in your goodness you would vouchsafe to cast your gracious regard upon my poor 'son and his three sisters, less or more, and no 'otherwise, than their unfortunate father shall 'appear more or less guilty of this death. God 'preserve your majesty, Your majesty's most 'humble, and faithful subject and servant.

Tower, May 9, 1641. 'STRAFFORD.'*

Upon the receipt whereof, and after they had wrestled him breathless, at last *victus dedit manus*; being overcome with such incessant importunities, he yielded. And about nine of the clock at night the King promised to sign both the Bills the next morning; which was accordingly done, and a Commission drawn up for his Execution.

The EARL's PETITION to the PEERS.

The Earl of Strafford understanding that his majesty had passed the Bill, did humbly petition the house of peers: viz.

'Seeing it is the good will and pleasure of 'God, that your Petitioner is now shortly to 'pay that duty which we all owe to our frail 'nature; he shall in all Christian patience 'and charity, conform and submit himself to 'your justice, in a comfortable assurance of 'the great hope laid up for us, in the mercy 'and merits of our Saviour blessed for ever.— 'Only he humbly craves to return your lordships most humble thanks for your noble 'compassion towards those innocent children, 'whom now with his last blessing, he must 'commit to the protection of Almighty God, 'beseeching your lordships to finish his pious 'intentions towards them, and desiring that the 'reward thereof may be fulfilled in you, by 'Him that is able to give above all we are able 'to ask or think; Wherein I trust the honourable House of Commons will afford their 'Christian assistance.—And so beseeching 'your lordships charitably to forgive all his 'omissions and infirmities, he doth very heartily and truly recommend your lordships to 'the mercies of our heavenly Father, and that 'for his goodness he may perfect you in every 'good work, Amen. THO. WENTWORTH.'

The BILL of ATTAINDER.

'Whereas the knights, citizens, and burgesses of the House of Commons in this present parliament assembled, have in the name 'of themselves, and of all the commons of England, impeached Thomas earl of Strafford of 'High-Treason, for endeavouring to subvert 'the antient and fundamental laws and government of his majesty's realms of England and 'Ireland, and to introduce an arbitrary and tyrannical government against law in the said 'kingdoms, and for exercising a tyrannous and 'exorbitant power over, and against the laws 'of the said kingdoms, and the liberties, estates, and lives of his majesty's subjects; and 'likewise having by his own authority commanded the laying and assessing of soldiers 'upon his majesty's subjects in Ireland, against 'their consents, to compel them to obey his 'unlawful summons and orders made upon paper-petitions in causes between party and 'party, which accordingly was executed upon 'divers of his majesty's subjects in a warlike

* Hume, in a Note to the 6th volume of his History, says: "Mr. Carte, in his Life of the Duke of Ormond, has given us some Evidence to prove, that this Letter was entirely a forgery of the popular leaders, in order to induce the king to sacrifice Strafford. He tells us, that Strafford said so to his son, the night before his execution. But there are some reasons why I adhere to the common way of telling this story: 1. The account of the forgery comes through several hands, and from men of characters not fully known to the public: a circumstance which weakens every evidence. It is a hearsay of a hearsay. 2. It seems impossible, but young lord Strafford must inform the king, who would not have failed to trace the forgery, and expose his enemies to their merited infamy. 3. It is not to be conceived but Clarendon and Whitlock, not to mention others, must have heard of the matter. 4. Sir George Ratcliffe, in his Life of Strafford, tells the story the same way that Clarendon and Whitlock do. Would he also, who was Strafford's intimate friend, never have heard of the forgery? It is remarkable, that this Life is dedicated or addressed to young Strafford, would not he have put sir George right in so material and interesting a fact?"—That this Letter was a forgery is also stated, and inferred from arguments, in Carte's History, but there no authority is given for the assertion that lord Strafford told his son he had not written such a letter. When told by secretary Carleton, that the king had signed the commission for passing the Bill of Attainder, Strafford rose from his chair with marks of astonishment and horror, and raising his eyes to Heaven exclaimed, "Put not your trust in princes, nor in the sons of men, for in them there is no salvation."

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'manner, within the said realm of Ireland; and 'in so doing, did levy war against the king's 'majesty and his liege people in that kingdom; 'And also for that he, upon the unhappy dis-'solution of the last parliament, did slander 'the house of commons to his majesty, and did 'counsel and advise his majesty, 'That he was '' loose and absolved from the rule of govern-'' ment, and that he had an army in Ireland, '' by which he might reduce this kingdom;' 'for which he deserves to undergo the pains 'and forfeitures of High-Treason.

'And the said Earl hath been an incendiary 'of the wars between the two kingdoms of 'England and Scotland; all which offences 'have been sufficiently proved against the said 'Earl upon his impeachment.

'Be it therefore enacted by the king's most 'excellent majesty, and by the lords and com-'mons in this present parliament assembled, 'and by the authority of the same, that the 'said Earl of Strafford, for the heinous crimes 'and offences aforesaid, stand, and be adjudg-'ed and attainted of High-Treason, and shall 'suffer such pain of death, and incur the forfei-'tures of his goods and chattels, lands, tene-'ments and hereditaments of any estate of 'freehold, or inheritance in the said kingdoms 'of England and Ireland, which the said Earl, 'or any other to his use, or in trust for him, 'have or had the day of the first sitting of this 'parliament, or at any time since.

'Provided*, that no judge or judges, justice, 'or justices whatsoever, shall adjudge or inter-'pret any act or thing to be Treason, nor hear 'or determine any treason in any other man-'ner than he or they should, or ought to have 'done before the making of this act, and as if 'this act had never been had or made; Saving 'always unto all and singular persons, bodies 'politic and corporate, their heirs and succes-'sors, others than the said Earl and his heirs, 'and such as claim from, by, or under him all 'such right title and interest of, in, and to all 'and singular such of the said lands, tenements 'and hereditaments, as he, they, or any of 'them had before the first day of this present 'parliament, any thing herein contained to the 'contrary notwithstanding.

'Provided, That the passing of this present 'Act, or his majesty's assent thereunto, shall 'not be any determination of this present ses-'sions of parliament; But that this present 'sessions of parliament, and all bills and mat-'ters whatsoever depending in parliament, and 'not fully enacted or determined, and all sta-'tutes and acts of parliament, which have 'their continuance until the end of this pre-'sent session of parliament, shall remain, con-'tinue, and be in full force as if this act had 'not been.'

* "This Proviso," says Rushworth, "hath occasioned the common discourse and opinion that this judgment against the Earl was enacted never to be drawn into precedent." Mrs. Macaulay remarks, "This Clause, which relates to Judges in inferior courts, is consistent with all the Arguments urged by the Commons for the legality of their proceedings against Strafford. The statute of 1 Hen. 4, c. 17, being, as they asserted, to take away the parliamentary power of declaration of treasons, whereby the inferior courts receive jurisdiction, and restrain it to Bill, that it might operate no farther than to the particulars contained in the Bill. This clause of the Commons in the Bill of Attainder against Strafford, shews a very laudable attention to the preservation of Public Liberty, yet it has been represented by monarchical writers, that the Bill of Attainder was of so extraordinary a nature, that the legislators themselves were obliged to insert a Clause, that it should never be drawn into precedent."

The KING's LETTER on behalf of the Earl of STRAFFORD.

The day following, the King wrote this Letter to the Lords on the behalf of the Earl of Strafford, and sent it by the Prince*.

'My Lords; I did yesterday satisfy the justice of the kingdom, by passing the Bill of Attainder against the Earl of Strafford; but mercy being as inherent and inseparable to a king as justice, I desire at this time in some measure to shew that likewise, by suffering that unfortunate man to fulfil the natural course of his life in a close imprisonment; Yet so, if ever he make the least offer to escape, or offer directly, or indirectly, to meddle in any sort of public business, especially with me, either by message or letter, it shall cost him his life, without further process; That it may be done without the discontentment of my people, will be an unspeakable contentment to me; to which end, as in the first place, I by this Letter do earnestly desire your approbation, and to endear it more, have chosen him to carry it, that of all your house is most dear to me; So I desire that by a Conference, you will endeavour to give the House of Commons contentment, assuring you that the exercise of mercy is no more pleasing to me, than to see both houses of parliament consent for my sake, that I should moderate the severity of the law in so important a case.—I will not say, that your complying with me in this my intended mercy, shall make me more willing, but certainly it will make me more chearful, in granting your just grievances. But, if no less than his life can satisfy my people, I must say, *Fiat Justitia*. Thus again, recommending the con-

* Burnet says, "That he was told by Hollis himself, whose sister Strafford had married, that he drew up a Petition for Strafford, and a Speech for the King to make to both houses in his favour; that the Queen not only prevented the King's going to the parliament, and changed the Speech into a Message, but prevailed with him to add the postscript 'If he must die, '&c.'" Burnet's Hist. of his Own Time.

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'deration of my intention to you, I rest, your 'unalterable and affectionate friend,

'Whitehall, 11th May, 1641. CHARLES R.'

'P. S. If he must die, it were charity to re-'prieve him till Saturday.'

The EARL's EXECUTION.

On Wednesday, May 12th, the Earl having mounted the Scaffold*, he made his obeisances, and began to take his last farewell of his friends, who appeared much more concerned than himself: and observing his brother, sir George Wentworth, to weep excessively, 'Brother,' said he, with a chearful briskness, 'What do you see in me to deserve these tears? Doth any indecent fear betray in me a guilt, or my innocent boldness any atheism? Think now that you are accompanying me the third time to my marriage-bed: Never did I throw off my clothes with greater freedom and content than in this preparation to my grave: That stock (pointing to the block) must be my pillow; here shall I rest from all my labours: No thoughts of envy, no dreams of treason, jealousies or cares for the king, the state, or myself, shall interrupt this easy sleep; therefore, brother, with me, pity those who, besides their intention, have made me happy; rejoice in my happiness, rejoice in my innocence.'

Then kneeling down, he made this Protestation: 'I hope, Gentlemen, you do not think that either the fear of loss, or love of reputation, will suffer me to bely God and my own conscience at this time. I am now in the very door going out, and my next step must be from time to eternity, either of peace or pain: To clear myself before you all, I do here solemnly call God to witness, I am Not Guilty, so far as I can understand, of the great Crime laid to my charge, nor have ever had the least inclination or intention to damnify or prejudice the King, the State, the Laws, or the Religion of this Kingdom; but with my best endeavours to serve all, and to support all; So may God be merciful to my soul!'

Then rising up, he said, he desired to speak something to the People, but was afraid he should be heard by few, in regard of the noise: but having first fitted himself to the block, and rising, again he thus addressed himself to the spectators.

'My Lord Primate of Ireland, and my lords, 'and the rest of these noble gentlemen; It is a 'great comfort to me to have your lordships by 'me this day, because I have been known to 'you a long time, and I now desire to be heard 'a few words. I come here, by the good will and 'pleasure of Almighty God, to pay that last 'debt I owe to sin, which is Death; and by 'the blessing of that God, to rise again through 'the merits of Jesus Christ to righteousness, 'and life eternal.' [Here he was a little interrupted.

'My lords, I am come hither to submit to 'that Judgment which hath passed against me; 'I do it with a very quiet and contented mind; 'I thank God I do freely forgive all the world; 'a forgiveness that is not spoken from the teeth 'outward, (as they say) but from the very 'heart: I speak it in the presence of Almighty 'God, before whom I stand, that there is not a 'displeasing thought arising in me towards any 'man living. I thank God I can say it, and 'truly, too, my conscience bearing me witness, 'that in all my employments, since I had the 'honour to serve his majesty, I never had any 'thing in the purpose of my heart, but what 'tended to the joint and individual prosperity 'of king and people, although it hath been my 'ill fortune to be misconstrued.

'I am not the first that hath suffered in this 'kind; it is the common portion of us all, while 'we are in this life, to err; righteous judgment 'we must wait for in another place, for here 'we are very subject to be misjudged one of 'another. There is one thing that I desire to 'free myself of, and I am very confident '(speaking it now with much chearfulness) that 'I shall obtain your Christian charity in the 'belief of it. I was so far from being against 'Parliaments, that I did always think the Par-'liaments of England were the most happy con-'stitutions that any kingdom or nation lived 'under, and the best means, under God, to 'make the king and people happy.

'For my death I here acquit all the world, 'and beseech the God of heaven heartily to 'forgive them that contrived it, though in the 'intentions and purposes of my heart I am Not 'Guilty of what I die for: And, my Lord Pri-'mate, it is a great comfort for me, that his 'majesty conceives me not meriting so severe 'and heavy a punishment, as is the utmost exe-'cution of this Sentence. I do infinitely re-'joice in this mercy of his, and I beseech God 'to return it into his own bosom, that he may 'find mercy when he stands most in need of it.

'I wish this kingdom all the prosperity and

* "On Wednesday, May 12th," says Kennett, "the Earl was brought to the Scaffold upon Tower-hill; as he passed near the lodgings of the Archbishop of Canterbury (whom he had desired by a message to be at the window and to bless him as he went to execution) he looked up, and bowing said, 'My lord, 'your prayers and your blessing.' The Archbishop lift up his hands for the sign of bestowing both, but was so overcome with grief that he fell back in a swoon; the Earl bowed again, and said, 'Farewel, my lord, God protect 'your innocency.' Many of the spectators observed, that he walked more like a general, at the head of an army, than like a condemned man. The Lieutenant desired him to take coach, for fear the people should rush in upon him and tear him in pieces: 'No,' said he, 'Master Lieutenant, I dare look death in the 'face, and I hope the people too. Have you 'a care that I do not escape, and I care not 'how I die, whether by the hand of the executioner, or the madness and fury of the people, 'if that may give them better conteat; it is all 'one to me.'"

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'happiness in the world; I did it living, and 'now dying, it is my wish. I do most humbly 'recommend this to every one who hears me, 'and desire they would lay their hands upon 'their hearts, and consider seriously, whether 'the beginning of the happiness and reforma- 'tion of a kingdom should be written in letters 'of blood; consider this when you are at your 'homes, and let me be never so unhappy, as 'that the least drop of my blood should rise 'up in judgment against any one of you: but 'I fear you are in a wrong way.

'My Lords, I have but one word more, and 'with that I shall end. I profess that I die a 'true and obedient son to the Church of Eng- 'land, wherein I was born, and in which I was 'bred. Peace and prosperity be ever to it.

'It hath been objected, if it were an objec- 'tion worth the answering, That I have been 'inclining to Popery; but I say truly from my 'heart, that from the time that I was 21 years 'of age, to this present, going now upon 49, I 'never had in my heart to doubt of this Reli- 'gion of the Church of England, nor ever had 'any man the boldness to suggest any such 'thing to me, to the best of my remembrance. 'And so being reconciled by the merits of 'Jesus Christ my Saviour, into whose bosom I 'hope I shall shortly be gathered, to those 'eternal happinesses which shall never have 'end; I desire heartily the forgiveness of every 'man for any rash or unadvised words, or any 'thing done amiss. And so, my Lords and 'Gentlemen, farewell; farewell all things of 'this world.

'I desire that you would be silent, and join 'with me in prayer, and I trust in God we shall 'all meet and live eternally in Heaven, there to 'receive the accomplishment of all happiness; 'where every tear shall be wiped away from 'our eyes, and every sad thought from our 'hearts: And so God bless this kingdom, and 'Jesus have mercy on my soul!'

Then turning himself about, he saluted all the noblemen, and took a solemn leave of all considerable persons upon the scaffold, giving them his hand.

After that, he said, 'Gentlemen, I would 'say my Prayers, and intreat you all to pray 'with me, and for me;' then his Chaplain laid the Book of Common-Prayer upon the chair before him as he kneeled down, on which he prayed almost a quarter of an hour, and then as long, or longer, without the Book, and concluded, with the Lord's-Prayer.

Standing up, he spies his brother, sir George Wentworth, and calls him to him, saying, 'Brother, we must part; remember me to my 'sister, and to my wife, and carry my blessing 'to my son, and charge him that he fear God, 'and continue an obedient son to the Church 'of England, and warn him that he bear no pri- 'vate grudge, or revenge, toward any man 'concerning me; and bid him beware that he 'meddle not with church-livings, for that will 'prove a moth and canker to him in his estate; 'and wish him to content himself to be a ser- 'vant to his country, not aiming at higher pre- 'ferments.

'*Aliter.*] To his son, Mr. Wentworth, he 'commends himself, and gives him charge to 'serve his God, to submit to his king with all 'faith and allegiance in things temporal, to the 'church in things spiritual; chargeth him again 'and again, as he will answer it to him in hea- 'ven, never to meddle with the patrimony of 'the church; for if he did, it would be a canker 'to eat up the rest of his estate.'

'Carry my blessings also to my daughters, 'Anne and Arabella, charge them to serve and 'fear God, and he will bless them; not forget- 'ting my little infant, who yet knows neither 'good nor evil, and cannot speak for itself; God 'speak for it and bless it.' 'Now,' said he, 'I 'have nigh done; one stroke will make my 'wife husbandless, my dear children fatherless, 'and my poor servants masterless, and will se- 'parate me from my dear brother, and all my 'friends; but let God be to you and them all 'in all.'

After this, going to take off his doublet, and to make himself ready, he said, 'I thank God 'I am not afraid of death, nor daunted with 'any discouragement rising from any fears, but 'do as cheerfully put off my doublet at this 'time, as ever I did when I went to bed.' Then he put off his doublet, wound up his hair with his hands, and put on a white cap.

Then he called, 'Where is the man that is to 'do this last office?' (meaning the Executioner) 'call him to me;' When he came and asked him forgiveness, he told him, he forgave him and all the world. Then kneeling down by the block, he went to prayer again himself, the Primate of Ireland kneeling on the one side, and the Minister on the other: to the which Minister, after prayer, he turned himself, and spake some few words softly, having his hands lifted up, and closed with the Minister's hands.

Then bowing himself to lay his head upon the block, he told the Executioner, 'That he 'would first lay down his head to try the fitness 'of the block, and take it up again before he 'would lay it down for good and all;' and so he did: and before he laid it down again, he told the Executioner, that he would give him warning when to strike by stretching forth his hands, and presently laying down his neck upon the block, and stretching forth his hands, the Executioner struck off his head at one blow; and taking it up in his hand, shewed it to all the people, and said, 'God save the king.'*

* "And so fell this noble Earl, who if his Master could have saved him, might have been able to save his Master: This was indeed the blow that by degrees reached up to the king's own head. Take his character thus given by the lord Clarendon. 'Thus fell the greatest 'subject in power, and little inferior to any in 'fortune, that was at that time in any of the 'three kingdoms; who could well remember 'the time when he led those people who then 'pursued him to his grave. He was a man of

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His body was afterwards embalmed, and appointed to be carried into Yorkshire, there to be buried amongst his ancestors.

An ACT for REVERSING the Earl of STRAFFORD'S ATTAINDER.*

'Whereas Thomas late Earl of Strafford was 'impeached of High Treason, upon pretence of 'endeavouring to subvert the fundamental laws, 'and called to a public and solemn Arraign-'ment and Trial before the peers in parliament, 'where he made a particular Defence to every 'Article objected against him; insomuch that 'the turbulent party then seeing no hopes to 'effect their unjust designs, by any ordinary 'way and method of proceedings, did at last re-'solve to attempt the Destruction and Attain-'der of the said Earl, by an Act of Parliament, 'to be therefore purposely made, to condemn 'him upon Accumulative Treason, none of the 'pretended Crimes being Treason apart, and so 'could not be in the whole, if they had been 'proved, as they were not: and also judged 'him guilty of Constructive Treason, (that is, 'of levying war against the king) though it was 'only the commanding an Order of the Council 'Board in Ireland, to be executed by a Serjeant 'at Arms and three or four soldiers, which was 'the constant practice of the deputies there for 'a long time. To the which end, they having 'first presented a Bill for this intent to the 'House of Commons, and finding there more 'opposition than they expected, they caused a 'multitude of tumultuous persons to come down 'to Westminster, armed with swords and staves, 'and to fill both the Palace Yards, and all the 'approaches to both houses of parliament, with 'fury and clamour, and to require 'Justice, 'speedy Justice,' against the Earl of Strafford; 'and having by those and other undue practices 'obtained that Bill to pass the House of Com-'mons, they caused the Names of those reso-'lute gentlemen, who in a case of innocent 'blood had freely discharged their consciences, 'being 59, to be posted up in several places 'about the cities of London and Westminster, 'and stiled them "Straffordians," and Enemies 'to their Country; hoping thereby to deliver 'them up to the fury of the people, whom they 'had endeavoured to incense against them. 'And then procured the said Bill to be sent up 'to the house of peers, where it having some

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'great parts, and extraordinary endowments of 'nature, not unadorned with some addition of 'art and learning.'" Kennett.

The following are the amiable and sound reflections of Mr. Fox on this transaction: "The prosecution of lord Strafford, or rather the manner in which it was carried on, is less justifiable" (than the regulations proposed by the Parliament in regard to the Militia). "He was doubtless a great delinquent, and well deserved the severest punishment; but nothing short of a clearly proved case of self-defence can justify, or even excuse, a departure from the sacred rules of criminal justice. For it can rarely indeed happen, that the mischief to be apprehended from suffering any criminal, however guilty, to escape, can be equal to that resulting from the violation of those rules to which the innocent owe the security of all that is dear to them. If such cases have existed, they must have been in instances where trial has been wholly out of the question, as in that of Cæsar, and other tyrants; but when a man is once in a situation to be tried, and his person in the power of his accusers and his judges, he can no longer be formidable in that degree which alone can justify (if any thing can) the violation of the substantial rules of criminal proceedings." Introductory Chapter to the History of the early part of the reign of James the 2d. 4to ed. p. 10.

One of the most candid representations which have been exhibited of the Character of lord Strafford, proceeds from the pen of Mrs. Hutchinson, who thus expresses herself in her Memoirs of the Life of Colonel Hutchinson: "There were two above all the rest, who led the van of the King's Evil Counsellers, and these were Laud, archbishop of Canterbury, a fellow of mean extraction and arrogant pride, and the earl of Strafford, who as much outstripped all the rest in favour, as he did in abilities, being a man of deep policy, stern resolution, and ambitious zeal to keep up the glory of his own greatness. In the beginning of this king's reign, this man had been a strong assertor of the Liberties of the People, among whom he had gained himself an honourable reputation, and was dreadful to the Court Party, who thereupon strewed snares in his way, and when they found a breach at his ambition, his soul was that way entered and captivated. He was advanced first to be Lord President of the Council in the North, to be a Baron, after, an Earl, then Deputy of Ireland, the nearest to a favourite of any man since the death of the duke of Buckingham, who was raised by his first master, and kept up by the second, upon no account of personal worth, or any deserving abilities in him, but only upon violent and private inclinations of the princes. But the earl of Strafford wanted not any accomplishment, that could be desired in the most serviceable minister of state. Besides, he having made himself odious to the people, by his revolt from their interest, to that of the oppressive court, he was now obliged to keep up his own interest with his new party, by all the malicious practices that pride and revenge could inspire him with." P. 60, 69, Mem. of Col. Hutchinson, by his Widow.

How different this from the arrogant, undigested, and scarcely human scurrility of Mrs. Macaulay, who, after telling us in the text of her diatribe against Strafford, that 'the badness of his heart had corrupted his judgment,' suggests in a note, that it was rather the badness of his judgment which had corrupted his heart!

* See Luders's "Observations on the Law of High Treason." 99, 100.

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'time rested under greater deliberation; at last, 'in a time when a great part of the peers were 'absent by reason of the tumults, and many of 'those who were present protested against it, 'the said Bill passed the house of peers: and 'at length his majesty, the late king Charles I, 'of glorious memory, granted a Commission for 'giving his royal assent thereunto; which nevertheless was done by his said majesty with 'exceeding great sorrow then, and ever remembered by him with unexpressible grief of 'heart; and out of his majesty's great piety, he 'did publicly express it, when his own sacred 'life was taken away, by the most detestable 'traitors that ever were.

'For all which Causes, be it declared and 'enacted by the king's most excellent majesty, 'by and with the advice and consent of the 'lords spiritual and temporal, and commons in 'this present parliament assembled, That the 'Act, intituled, 'An Act for the Attainder of 'Thomas Earl of Strafford, of High Treason,' 'and all and every Clause and Article, and 'thing therein contained, being obtained as 'aforesaid, is now hereby repealed, revoked, 'and reversed.

'And to the end that right be done to the 'memory of the deceased Earl of Strafford afore'said, be it further enacted, That all records 'and proceedings of parliament, relating to the 'said Attainder, be wholly cancelled and taken 'off the file, or otherwise defaced and obliter'ated; to the intent the same may not be visible in after-ages, or brought into example, to 'the prejudice of any person whatsoever.

'Provided, That this Act shall not extend to 'the future questioning of any person or per'sons, however concerned in this business; or 'who had any hand in the tumults, or disorderly 'procuring the act aforesaid; any thing herein 'contained to the contrary thereof notwith'standing.'

A Copy of the PAPER posted up at the corner of the wall of Sir William Brunkard's house, in the Old Palace-yard, in Westminster, Monday May 3, 1641.

"The NAMES of the STRAFFORDIANS posted.

"1. Lord Digby; 2. Lord Compton; 3. Lord Buckhurst; 4. Sir Robert Hatton; 5. Sir Thomas Fanshaw; 6. Sir Edward Alford; 7. Sir Nicolas Slaning; 8. Sir Thomas Danby; 9. Sir George Wentworth; 10. Sir Peter Wentworth; 11. Sir Frederick Cornwallis; 12. Sir William Carnaby; 13. Sir Richard Winn; 14. Sir Jarvis Clifton; 15. Sir William Withrington; 16. Sir William Pennyman; 17. Sir Patrick Curwent; 18. Sir Richard Lee; 19. Sir Henry Slingsby; 20. Sir William Portman; 21. Mr. Jarvis Hollis; 22. Mr. Sydney Godolphin; 23. Mr. Cooke; 24. Mr. Coventry; 25. Mr. Benjamin Weston; 26. Mr. William Weston; 27. Mr. Selden; 28. Mr. Alford: 29. Mr. Lloyd; 30. Mr. Herbert; 31. Captain Digby; 32. Serjeant Hyde; 33. Mr. Taylor; 34. Mr. Griffith; 35. Mr. Scawen; 36. Mr. Bridgeman; 37. Mr. Fettiplass; 38. Dr. Turner; 39. Captain Charles Price; 40. Dr. Parry, Civilian; 41. Mr. Arundel; 42. Mr. Newport; 43. Mr. Holborne; 44. Mr. Noel; 45. Mr. Kirton; 46. Mr. Pollard; 47. Mr. Price; 48. Mr. Trevanian; 49. Mr. Jane; 50. Mr. Edgecombe; 51. Mr. Chicheley; 52. Mr. Mallery; 53. Mr. Porter; 54. Mr. White, Secret. E. D.; 55. Mr. Warwick."

The following Speeches,* said to be made by the Earl of Strafford, are taken from the Sommers' Collection of Tracts.

The SPEECH of THOMAS WENTWORTH, late Earl of STRAFFORD, and Deputy of Ireland, in the Tower, to the Lords before he went to Execution, Sommers' Tracts, 2 Coll. vol. 2, p. 4.

"Right honourable, and the rest, you are now come to convey me to my death, I am willing to die, which is a thing no more than all our predecessors have done, and a debt that our posterity must in their due time discharge, which since it can be no way avoided, it ought the less to be feared; for that which is common to all, ought not to be intolerable to any: it is the law of nature, the tribute of the flesh, a remedy from all worldly cares and troubles; and to the truly penitent, a perfect path to blessedness. And there is but one death, though several ways unto it: mine is not natural, but enforced by the law and justice: it hath been said that the laws vex only the meaner sort of people, but the mighty are able to withstand them: it is not so with me, for to the law I submit myself, and confess that I receive nothing but justice: for he that politicly intendeth good to a common weal, may be called a just man, but he that practiseth either for his own profit, or any other sinister ends, may be well termed a delinquent person; neither is delay in punishment any privilege for pardon. And moreover, I ingenuously confess with Cicero, That the death of the bad is the safety of the good that be alive.

"Let no man trust either in the favour of his prince, the friendship and consanguinity of his peers, much less in his own wisdom and knowledge, of which I ingenuously confess I have been too confident; kings, as they are men before God, so they are Gods before men, and

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* "There are two Speeches," says Mrs. Macaulay, "in Sommers's Collection of Tracts, pretended to have been composed by Strafford, one spoken to some Lords who attended him in the Tower immediately before his Execution, the other intended to be spoken at his Death. They are full of contrition for his past conduct, and the style so different from the account generally given of his behaviour, from his professions, from his advice to his family, and from his character, and the strong prejudices he had imbibed in the latter part of his life, that there is great reason to suspect their authenticity."

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I may say with a great man once in this kingdom, 'Had I strived to obey my God as faithfully, as I sought to honour my king diligently, I had stood and not fallen.' Most happy and fortunate is that prince, who is as much for his justice feared, as for his goodness beloved: for the greater that princes are in power above other, the more they ought in virtue to excel other; and such is the royal sovereign whom I late served.

"For my peers, the correspondence that I had with them during my prosperity, was to me very delightful and pleasing, and here they have commiserated my ruin, I have plentifully found, who (for the most generous of them) I may boldly say, though they have detested the fact, yet they have pitied the person delinquent; the first in their loyalty, the last in their charity: ingenuously confessing, that never any subject, or peer of my rank, had ever that help of counsel, that benefit of time, or a more free and legal trial than I have had: in the like whereof, none of my predecessors hath had so much favour from his prince, so much sufferance from the people; in which I comprehend the understanding commons, not the many-headed monster, multitude; but I have offended, am sentenced, and must now suffer.

"And for my too much confidence in my supposed wisdom and knowledge, therein have been the most deceived: for he is wise to himself, that knows by others faults to correct his own offences: to be truly wise is to be secretaries to ourselves; for it is mere folly to reveal our intimate thoughts to strangers: wisdom is the most precious gem with which the mind can be adorned, and learning the most famous thing for which a man ought to be esteemed, and true wisdom teacheth us to do well, as to speak well: in the first I have failed, for 'the wisdom of man is foolishness with God.'

"For knowledge, it is a thing indifferent both to good and evil, but the best knowledge is for a man to know himself; he that doth so shall esteem of himself but little, for he considereth from whence he came, and whereto he must go, he regardeth not the vain pleasures of this life, he exalteth God, and strives to live in his fear; but he that knoweth not himself, is wilful in his own ways, unprofitable in his life, unfortunate in his death, and so am I. But the reason why I sought to attain unto it, was this: I have read that he that knoweth not that which he ought to know, is a brute beast amongst men; he that knoweth more than he ought to know, is a man amongst beasts: but he that knoweth all that may be known, is a God amongst men. To this I much aspired, in this I much failed; 'Vanity of vanities; all is but 'vanity.'

"I have heard the people clamour and cry out, saying, that through my occasion the times are bad, I wish that when I am dead they may prove better: most true it is, that there is at this time a great storm impending (God in his mercy avert it.) And since it is my particular lot, like Jonah, to be cast into the sea, I shall think my life well spent, to appease God's wrath, and satisfy the people's malice.

"O what is eloquence more than air? fashioned with an articulate and distinct sound, when it is a special virtue to speak little and well, and silence is oft the best oratory; for fools in their dumbness may be accounted wise: it hath power to make a good matter seem bad, and a bad cause appear good: but mine was to me unprofitable, and like the cypress trees, which are great and tall, but altogether without fruit.

"What is honour? but the first step to disquietness, and power is still waited on by envy, neither hath it any privilege against infamy. It is held to be the chief part of honour, for a man to join to his office and calling, courtesy and affability, commiseration and pity: for thereby he draweth to him with a kind of compulsion, the hearts of the multitude. But that was the least part of my study, which now makes me call to mind, that the greater the persons are in authority, the sooner they are catcht in any delinquency, and their smallest crimes are thought to be capital, the smallest spot seems great in the finest linnen, and the least flaw is soonest found in the richest diamond. But high and noble spirits finding themselves wounded, grieve not so much at their own pain and perplexity, as at the derision and scoffs of their enemy: but for mine own part, though I might have many in my life, I hope to find none in my death.

"Amongst other things which pollute and contaminate the minds of great spirits, there is none more heinous than ambition, which is seldom unaccompanied with avarice: such to possess their ends, care not to violate the laws of religion, and reason, and to break the bonds of modesty and equity, with the nearest tyes of consanguinity, and amity; of which as I have been guilty, so I crave at God's hands forgiveness. It is a maxim in philosophy, that ambitious men can be never good counsellors to princes; the desire of having more is common to great lords, and a desire of rule a great cause of their ruin.

"My lords, I am now the hopeless precedent, may I be to you all an happy example: for ambition devoureth gold, and drinketh blood, and climbeth so high by other mens heads, that at the length in the fall it breaketh its own neck: therefore it is better to live in humble content, than in high care and trouble: for more precious is want with honesty, than wealth with infamy: for what are we but mere vapours, which in a serene element ascend high, and upon an instant, like smoke, vanish into nothing: or like ships without pilots, tost up and down upon the seas by contrary winds and tempests. But the good husbandman thinks better of those ears of corn, which bow down, and grow crooked, than those which are straight and upright, because he is assured to find more store of grain in the one than in the other. This all men know, yet of this, how few make use: the defect whereof must be now my pain: may my suffering prove to others profit.

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"For what hath now the favour of my prince, the familiarity with my peers, the volubility of a tongue, the strength of my memory, my learning, or knowledge, my honours, or offices, my power, and potency, my riches, and treasure, (all these the special gifts, both of nature, and fortune) what have all these profitted me? Blessings I acknowledge, though by God bestowed upon man, yet not all of them together upon many: yet by the divine providence, the most of them met in me: of which had I made happy use I might still have flourished, who now am forced immaturely to fall.

"I now could wish (but that *utinam* is too late) that God with his outward goodness towards me had so commixed his inward grace, that I had chused the medium path, neither inclining to the right hand, nor deviating to the left; but like Icarus with my waxen wings, fearing by too low a flight to moisten them with the waves: I soared too high, and too near the sun, by which they being melted, I aiming at the highest, am precipitated to the lowest: and am made a wretched prey to the waters: but I who before built my house upon the sand, have now settled my hopes upon the rock my Saviour: by whose only merits my sole trust is, that whatsoever becomes of my body, yet in this bosom my soul may be sanctuaried.

"Nimrod would have built a tower to reach up to Heaven, and called it Babel; but God turned it to the confusion of languages, and dissipation of the people. Pharaoh kept the children of Israel in bondage, and after having freed them, in his great pride would have made them his prey; but God gave them a dry and miraculous passage, and Pharaoh and his host a watry sepulchre. Belshazzar feasted his princes and prostitutes, who drunk healths in the vessels taken from the Temple, but the hand of God writ upon the wall, Mene. Tekel. Phoras, and that night before morning was both his kingdom and life taken from him: thus God lets men go on a great while in their own devices, but in the end it proves their own ruin and destruction, never suffering them to effect their desired purposes: therefore let none presume upon his power, glory in his greatness, or be too confident in his riches: these things were written for our instruction, of which the living may make use, the dying cannot; but wit and unfruitful wisdom are the next neighbours to folly.

"There can be no greater vanity in the world, than to esteem the world, which regardeth no man; and to make slight account of God, who greatly respecteth all men; and there can be no greater folly in man, than by much travail to increase his goods, and pamper his body, and in the interim with vain delights and pleasures, to lose his soul. It is a great folly in any man to attempt a bad beginning, in hope of good ending; and to make that proper to one, which was before common to all, is mere indiscretion, and the beginning of discord, which I positively wish may end in this my punishment.

"O how small a proportion of earth will contain my body, when my high mind could not be confined within the spacious compass of two kingdoms? But my hour draweth on, and I conclude with the Psalmist, not aiming at any one man in particular, but speaking for all in general: 'How long will ye Judges be corrupted? how long will you cease to give true judgment? &c. Blessed is the man that doth not walk in the council of the wicked, nor stand in the way of sinners, nor sit in the seat of the scornful, therefore they shall not stand in the Judgment, nor sinners in the assembly of the righteous, &c.'"

The SPEECH of Thomas Earl of Strafford, intended to be spoken on the Scaffold the day he was beheaded; (May 12, 1641) but being interrupted, he delivered it to his brother, Sir George Wentworth, from whose original Copy, under the Earl's own hand, this is word for word transcribed. [Sommers' Tracts, 1 Coll. vol. 4. p. 449.]

"People of my native country (I wish my own or your charity, had made me fit to call you friends);

"It should appear by your concourse and gazing aspects, that I am now the only prodigious meteor, towards which you direct your wondering eyes. Meteors are the infallible antecedents of tragical events, and do commonly level their malevolent operation upon some remarkable person. At this present time, I am become my own prodigy, and the crossed influence will appear in my (too sudden) execution: And this fear is only left me, The consequence will produce a greater effusion than mine. I would to God, my blood would cure your sad hearts of all their grievances (though every drop thereof were a soul on which a life depended) I should render it with as much alacrity as some (nay, the most) of you have come to triumph in my fatal extirpation.

"In regard I have been of you (my native country, whose wisdom and justice, in respect of the generality of it, is no way questionable) voted to this untimely end, I have not one syllable to say in justification of myself, or those actions for which I suffer; only, in excuse of both, give me leave to say, my too much zeal to do my master service, made me abuse his regal authority; and howsoever I have been one most infortunate, yet, at all times, a favourite in the prosecution, of my places and offices; and yet (as I shall answer before the dreadful tribunal, whereunto your just anger hath before nature doomed me) my intents were fairer than my actions: But God knows, the over-greatness of my spirits severity, my government, the witchcraft of authority, and flattery of multitudes to sharpen it, are but ill interpreters of my intentions; which that you may believe, I have no argument, but improtestation, which hath but this circumstance to confirm it, That it proceeds from a dying man.

"If I should take upon me to make a relation of all the particulars of my arraignment and attainder, it would but too much prorogue your

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longing expectation of my shameful death: Besides, it would be needless, in respect I should but say over again what I said before the parliament, (and perhaps be as little believed) though the terms on which I then answered, be far different from my attestation now, (that being before my condemnation, and this after it.) Besides there were multitudes to catch it, as fast as I uttered it, (and doubtless you shall have it upon every stall-book post) for I have been, and whilst I breathe am, the pestilence which rages through your minds, your estates, and trades: and you will be ready to read the bills of your own losses, though the disease that brought the destruction be removed.

"Having nothing in this world but a little breath, which within a few minutes is to be expired, I should not use it to this purpose, but that custom upon these directions prescribes my warrant for it: And further, that I might be an example to great persons, that they may know, the favour of a great king is not equivalent to the breath of nations; and that it is a thousand times better and more noble for a lion to play with a glove, than tear it: nor is it proper for a dove to soar with eagle's wings; and the rather, because the necessity of the times requires that I should die, only for example.

"He that gave conscience to you all, (that are willing to accept it) my royal master, did in his own conscience once declare me guiltless of these facts, for which this death is come upon me: But Heaven that hath made your general clamours the organ of my destiny, thought me not worthy to enjoy this life I have abused; and from your voices, as from the lips of oracles, I have received my woful doom, wherein my charity (at this hour) cannot, nor will accuse you of the least injustice: but still I trench upon your patience, and linger in the thing you came to look for, my death.

"A little, little more, and I have done. For testimony of my faith and religion, be pleased to understand, that I have professed and do (now) die in the true Protestant religion, not in any points deviating in my belief from the fundamental grounds of the true Protestant religion, professed, practised, maintained, and authorized by the church of England. I would say more of this, but that I desire my private ejaculations may be my last meditations, only, because I know there is not any one of you, at odds with my soul or person (though with my facts and vices) I cannot doubt, but your humanity and charitable inclinations will afford me your devout prayers, for my Saviour's sweet mercy. Good people pray for me; pray for me, even for my eternal Saviour's sake, into whose bosom I render my woful and afflicted soul: Sweet Jesus, my Redeemer, (the Redeemer even of me, a woful and dejected sinner) receive into thy arms my spirit."

The Account given by May, (of whose work Warburton very justly thus writes to Hurd: "It is an extraordinary performance, little known, written with great temper, good sense, and spirit, has the qualities of a regular composition, which neither Ludlow nor Whitlock have: It is written with much judgment, penetration, manliness, and spirit, and with a candour that will greatly increase your esteem, when you know he wrote by order of his masters the Parliament:" Letters, June 30, 1753, August 16th, 1753:) of the Proceedings against Lord Strafford, and of some circumstances connected with those Proceedings, are highly interesting. See May's "History of the Parliament," b. 1, p. 87 to 99.—For the Proceedings on the alleged Plot, for the Escape of the Earl of Strafford, the Seduction of the Army, and bringing in the French, see the Historians, and 6 Rushw. also 2 Cobb. Parl. Hist. The following Evidence is the chief of what relates to Strafford's Escape:

The House of Commons having been alarmed with the apprehensions of some Plots or Designs on foot, and having appointed a Committee to inquire into the same, they on the 5th of May made their Report to the house, That this Plot consisteth of three Heads: the first was, the Design upon the Tower. The second, To engage the Army. The third, To bring in foreign forces. For the Tower, it appeared to be thus: captain Billingsly being examined upon oath, confessed, That he was acquainted with sir John Suckling: That the said sir John lately offered him employment in one of the king's ships then at Portsmouth; afterwards, employment for Portugal: that this Deponent having notice to meet at the privy lodgings at White-hall, did there receive orders to get 100 men to serve in the Tower under him; and if he did fail, he should answer it with his life. And afterwards meeting with sir John Suckling, and acquainting him therewith, he told him he would furnish him with the said number. Sir William Belfore, Lieutenant of the Tower, being examined, said, That he had command to receive capt. Billingsly, with 100 men, into the Tower, who should be under his command: That the Earl of Strafford at that time, expostulating with him about his Escape, told him, He would attempt nothing in that kind without his privity; and that he should have the king's Warrant for his indemnity; and that the Warrant should be to command him to remove the Earl of Strafford, from the Tower to some other Castle; and he would then take his opportunity to escape: That the Lieutenant of the Tower not giving any complying Answer thereunto, the said Earl sent again to intreat him to come to him, and would have persuaded him to let him make an escape; saying, 'Without your concurrence it cannot 'be done; and if you will consent thereunto, I 'will make you present payment of 22,000*l.*; 'besides, you shall have a good marriage for 'your son.' To which the Lieutenant of the Tower replied, 'He was so far from concurring 'therein, that he was not to be farther moved in 'such a thing.' Thus much the Lieutenant of the Tower delivered upon his Oath.

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As for the Designs from beyond the Seas, the Committee did make Report to the house, That it was cleared unto them, That the governor of Calais had examined some Englishmen, whether the earl of Strafford's head was cut off; and this was in point of time, the 1st of May, according to the English stile; and sir Philip Cartwright, governor of Guernsey, wrote Letters also, which came in great haste, That he understood the French had a design upon that island, or some part of England. It also appeared to the Committee, by divers of the Letters, which were opened coming from beyond sea, that they expected the earl of Strafford there. It also appeared by the examination of Mrs. Nutt, That the Earl of Strafford's escape was projected.*

* "Mr. Taylor, burgess for Windsor, was brought upon his knees in the House of Commons, for speaking the following Words, in disparagement of the whole house, about the Earl of Strafford's death, viz. 'They had committed 'murder with the sword of justice; and that 'he would not for a world have so much blood 'lie on his conscience, as did on theirs for that 'sentence:' which Words being proved against him by the mayor of Windsor (to whom he spoke it) and some others, he was expelled the house, and voted incapable of ever being a Parliament-man; committed to the Tower during pleasure; to be carried down to Windsor, there to make recantation for those Words, and to return back to do the same at the bar; and it was ordered that a writ should presently issue out for a new election in his room." 2 Cobb. Parl. Hist. 315.

END OF VOL. III.

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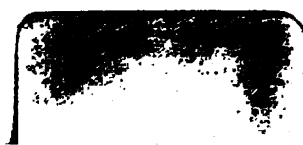

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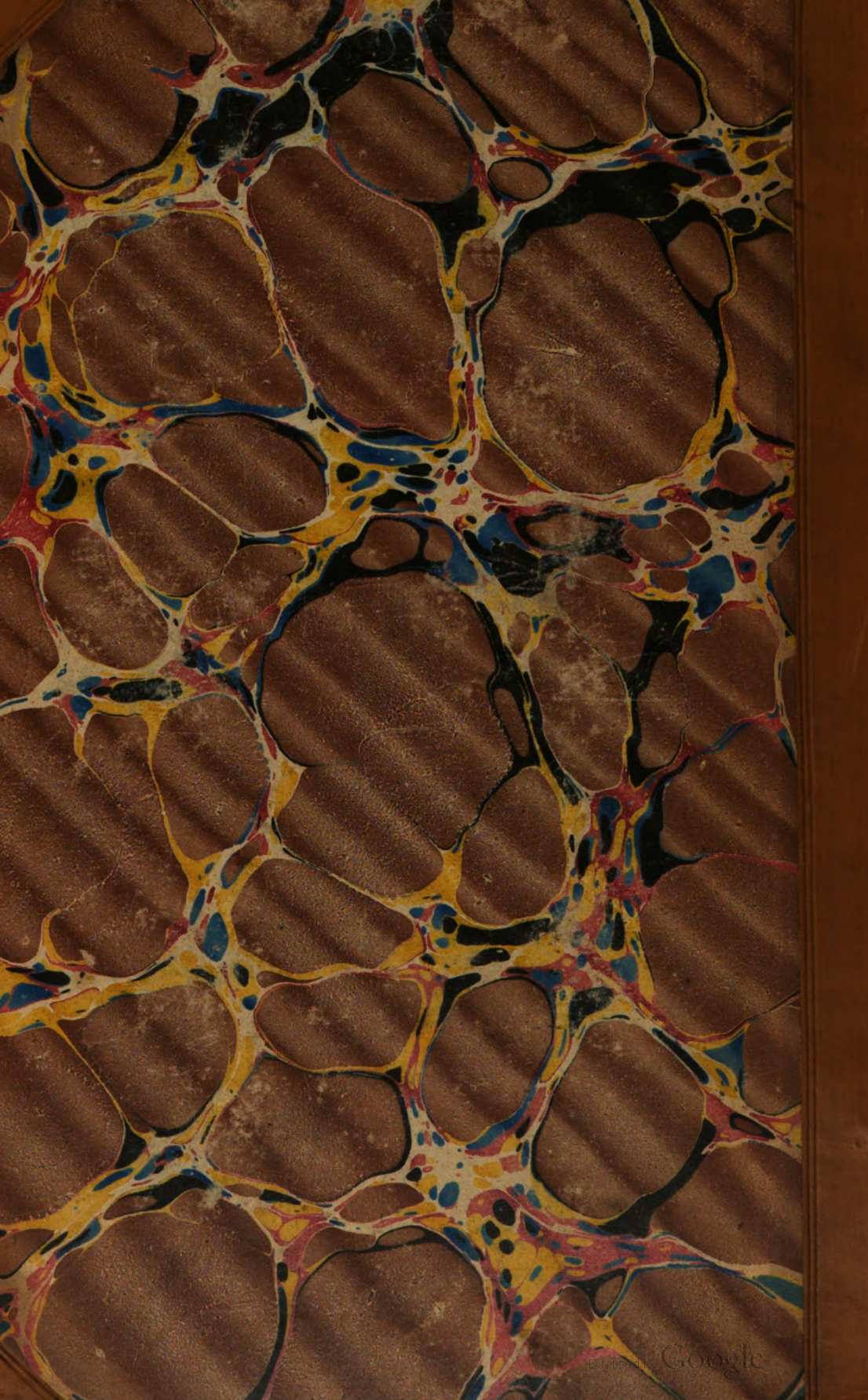
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